Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 2 July 2020[1]

Case C-265/19

Recorded Artists Actors Performers Ltd
v
Phonographic Performance (Ireland) Ltd,
Minister for Jobs, Enterprise and Innovation,
Ireland,
Attorney General

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling — Division of powers between the Union and its Member States — WIPO Performances and Phonograms Treaty 1996 (WPPT) — Obligation of 'national treatment' of performers — Exceptions to that obligation resulting from international reservations — Exclusive competence of the Union or the Member States' competence to determine, on the basis of those reservations, which third-country performers are entitled to equitable remuneration — Directive 2006/115/EC — Article 8)

1. The present reference for a preliminary ruling from the High Court (Ireland) concerns the interpretation of Article 8 of Directive 2006/115/EC,[2] read in conjunction with Articles 4 and 15 of the World Intellectual Property Organisation ('WIPO') Performances and Phonograms Treaty ('the WPPT'), adopted on 20 December 1996 in Geneva and approved on behalf of the European Community by Council Decision 2000/278/EC.[3]

2. In essence, by its questions, the referring court would like to know which performers (and producers) can benefit from the right to 'equitable remuneration' under Article 8(2) of Directive 2006/115. The questions, therefore, pertain to the scope of that provision although the first, second and third questions are framed primarily by reference to the international obligations of the Union and where applicable those of the Member States.

3. The referring court asks in essence whether the national treatment requirement laid down in Article 4 of the WPPT applies to Article 8(2) of Directive 2006/115, and — in the second, third and fourth questions — what discretion Member States enjoy as regards the beneficiaries of the right to a single equitable remuneration set out in the directive, including when reservations are permitted by the WPPT and the Rome Convention applies.

1 Original language: English.

2 Directive of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ 2006 L 376, p. 28).

3 Decision of 16 March 2000 (OJ 2000 L 89, p. 6, 'the WPPT').

I. Legal framework

A. The Rome Convention

4. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was concluded in Rome on 26 October 1961 ('the Rome Convention').

5. Article 4 of the Rome Convention provides:

'Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(a) the performance takes place in another Contracting State;

(b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.'

6. According to Article 5 of that convention:

'1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

(a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);

(b) the first fixation of the sound was made in another Contracting State (criterion of fixation);

(c) the phonogram was first published in another Contracting State (criterion of publication).

2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.'

B. The WPPT

7. Both the Union and all the Member States are parties to the WPPT (as is, in particular, the United States of America).

8. Article 1(1) of the WPPT provides:

'Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the [Rome Convention].'

9. Under Article 2(a), (b), (d), (e) and (g) of the WPPT, the following definitions apply:

'(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

...

(d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.

(e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

...

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.'

10. Article 4 of the WPPT, entitled 'National treatment', provides:

'(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.'

11. According to Article 15 of the WPPT:

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

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

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

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

12. The agreed statements concerning Article 15 provide:

'It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.'

13. Article 23(1) of the WPPT states as follows:

'Provisions on enforcement of rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.'

C. Directive 2006/115

14. Recitals 5, 12, 13 and 16 of that directive state:

'(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the right-holders concerned.

…

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

…

(16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'

15. According to Article 7(1) of Directive 2006/115:

'Fixation right

1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.'

16. Article 8(1) and (2) of that directive, which is identical to Article 8(1) and (2) of Directive 92/100/EEC,[4] provides:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

17. Article 11 of Directive 2006/115, entitled 'Application in time', states:

'1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which were, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or which met the criteria for protection under this Directive on that date.'

D. National law

18. Section 38 of the Copyright and Related Rights Act 2000 (No 28 of 2000) ('the CRR Act') provides for a licence as of right in certain circumstances. In particular, it provides:

'(1) … where a person proposes to —

(a) play a sound recording in public, or

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

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

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

(ii) complies with the requirements of this section.

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

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

(b) informs each of those bodies of the date on and from which he or she intends to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,

4 Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

(c) makes payments to the licensing body …

…'

19. Section 184 of the CRR Act prescribes the circumstances in which inter alia a sound recording shall qualify for copyright protection. It provides:

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

(a) in the State; or

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

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

20. Section 288 of the CRR Act states:

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

21. Section 287 of that act provides:

'In this Part, and in Part IV —

"qualifying country" means

(a) Ireland,

(b) another Member State of the [European Economic Area (EEA)], or

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

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

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

22. According to Section 289(1) of the CRR Act:

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

II. Facts giving rise to the dispute in the main proceedings and the questions referred for a preliminary ruling

23. The dispute in the main proceedings concerns the collection and distribution of licence fees payable in respect of the playing of recorded music in public, or the broadcasting of recorded music. Under national legislation, the owner of a bar, nightclub or any other public place who wishes to play recorded music is required to pay a licence fee in respect of that use. Similarly, if a person wishes to include a sound recording in a broadcast or a cable programme service, then they too must pay a licence fee in respect of that inclusion. This obligation is set out in detail under domestic law in the CRR Act. The legislation envisages that the user will pay a single licence fee to a licensing body representing the producer of the sound recording, but that the sum so collected will then be shared as between the producer and the performers.

24. The plaintiff in the main proceedings, Recorded Artists Actors Performers Ltd ('RAAP'), is an Irish collecting society which manages the rights of certain performers. The first defendant, Phonographic Performance (Ireland) Ltd ('PPI'), is an Irish collecting society which represents the rights that phonogram producers hold over sound recordings or phonograms in Ireland.

25. RAAP and PPI concluded a contract which stipulates how licence fees are collected and distributed for the playing of sound recordings in public (bars and other publically accessible places) in Ireland by users in Ireland. [5]

26. The dispute between RAAP and PPI arises because the CRR Act employs different qualifying criteria for producers and performers, respectively, which have the effect of excluding certain performers from certain countries from the right of equitable remuneration (in particular, the United States of America). This has allowed PPI to argue, it seems, that there is no obligation in law to pay those particular performers; and, as a result, PPI would be entitled to retain the fees which correspond to those performers which have been collected under the contract.

27. RAAP considers that licence fees which are payable under the CRR Act — which transposed Directive 92/100, the latter being codified and replaced by Directive 2006/115 — must, in accordance with Article 8(2) of that directive and international agreements to which that directive refers, be shared between the producer and the performer. The nationality and residence of the performer are irrelevant.

28. On the other hand, PPI submits that performers who are neither EEA nationals nor residents, and whose performances do not originate in a sound recording carried out in the EEA, are not eligible to receive a share of remuneration when those performances are played in Ireland. Otherwise, if one were to pay those performers, that would infringe the international reciprocity approach adopted by Ireland and contained in the CRR Act. In particular, if one were to follow RAAP's position, United States performers would be paid in Ireland, even though Irish performers do not receive equitable remuneration in the United States.

5 It follows from the file that there are two sets of proceedings which pertain to the dispute. The other proceedings concern the statutory functions of the organisations which represent producers and performers, respectively. In particular which organisation is charged with calculating the licence fees payable to individual performers. RAAP contends that this is their role, as the collective management organisation representing performers. If so, PPI is required to make a lump sum payment to RAAP, and RAAP will then distribute that sum—less deductions for administrative costs—to individual performers. There is another issue as to whether RAAP is entitled to collect on behalf of *all* of the performers within a particular class, or only those performers who have actually assigned that right to it. These other proceedings are not the subject of the order for reference.

29. RAAP brought an action against PPI before the referring court, which observes that a combined reading of sections 38, 184, 208, 287 and 288 of the CRR Act has the effect of excluding — unless a decree is adopted under section 289 of that act (*quod non* so far) — 'non-EEA' performers from benefiting from their share of the fees collected under the above act, with the result that, often, producers (including those established outside the EEA) benefit from the totality of those fees.

30. In the case of a sound recording involving US producers and US performers, the producer would receive the totality of licence fees payable by users in Ireland. The reason for that is the fact that the payment eligibility criteria, contained in the CRR Act, are more flexible for producers than they are for performers.

31. Therefore, such a legislation appears to be incompatible with Article 8(2) of Directive 2006/115, in so far as the latter requires equitable remuneration to be shared between producers and performers.

32. It follows that the resolution of the main proceedings depends, in particular, on whether Ireland can — without infringing Directive 2006/115 (and, previously, Directive 92/100) — legislate to the effect that, on its territory, 'performers' referred to in that directive do not include 'non-EEA' performers, such as the United States performers.

33. Given the high stakes of this action, Ireland, its Attorney General and the Minister for Jobs, Enterprise and Innovation decided to participate in the main proceedings as second, third and fourth defendants. A full judgment can be found at the Appendix to the order for reference and allows for a better understanding of the issues underlying the order.

34. The referring court observes that the fact that the domestic legislation treats EEA-domiciled persons and residents in the same manner as Irish nationals means that the legislation does not offend against the general principle of non-discrimination under EU law. However, that legislation must be compatible not only with that general principle but also with Article 8(2) of Directive 2006/115. According to that provision, every Member State must 'ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers'.

35. The referring court notes that the extent to which it is necessary to rely upon provisions of the WPPT (to which Ireland and the Union are party) and the Rome Convention (to which Ireland is party) to interpret Article 8 of Directive 2006/115 remains uncertain.

36. In particular, it is necessary to establish whether the 'national treatment', contained in each of those treaties, should play a role in the interpretation of Article 8(2) of Directive 2006/115.

37. Given that, on the one hand, the 'national treatment' concept was — unlike certain other concepts contained in the Rome Convention and the WPPT — not expressly taken over in Directive 2006/115, but that, on the other hand — due to the conclusion of the WPPT by the Union — that concept is part of Union law, it is not clear which is, in the end, the scope of that concept for the interpretation of Union law in the area of copyright and neighbouring rights.

38. The referring court also seeks guidance from the Court on whether this asymmetric treatment of producers and performers represents a legitimate response to a reservation under Article 15(3) of the WPPT (in particular, the one entered by the United States of America).

39. It is against that background that the High Court (Ireland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

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

40. Written observations were submitted to the Court by RAAP, PPI, Ireland as well as by the European Commission. All those parties presented oral argument at the hearing on 4 February 2020.

III. Analysis

A. First question

1. Summary of the arguments of the parties

41. RAAP submits that the obligation on the national court to interpret Directive 2006/115 in the light of the purpose and objective of the Rome Convention and/or the WPPT comprises an obligation to interpret that directive as establishing a set of rules compatible with the obligations contained in those instruments. Article 8 of the directive must therefore be interpreted so as to extend the rights provided for in Article 8(2) thereof to those who are entitled to national treatment in respect of those rights by virtue of Article 4 of the WPPT.

42. Moreover, it is necessary to take into account the Rome Convention, in spite of the fact that the Union is not a contracting party. Furthermore, that convention occupied an important place in the genesis of Directive 2006/115.

43. The interaction between Articles 4 and 5 of the Rome Convention on the one hand and Articles 3 and 4 of the WPPT on the other is such that WPPT Contracting Parties must extend the benefit of national treatment to performers in respect of performances that are incorporated in a phonogram which qualifies for national treatment under the Rome Convention. That benefit must be extended to any performer of such a performance, even where that performer is not a national of a Contracting Party State.

44. PPI contends, essentially, that Directive 2006/115 should be interpreted, in so far as possible, in a manner that is consistent with the WPPT, and not in a manner that conflicts with EU or Member State obligations under the WPPT or the Rome Convention. Where concepts derived from the Rome Convention or the WPPT are used in the text of the directive, regard should be had to the Convention or the WPPT (as the case may be) in the interpretation of those phrases appearing in the text of the directive. Therefore, Article 8(2) cannot be treated, through a process of interpretation of that provision, as incorporating the requirement for national treatment under Article 4 of the WPPT, as the directive does not seek to enact any measure to give effect to that requirement of the WPPT.

45. Ireland accepts, as a matter of construction of the Rome Convention and the WPPT, that Article 3(2) of the WPPT subsumes into the WPPT the concept of national treatment provided for in Articles 4 and 5 of Rome Convention: the concept of national treatment including that Contracting States should grant national treatment whenever a performance is incorporated in a phonogram that is first published (or published within 30 days) in another contracting State. These rules are derived from the 'criterion of publication' and the concept of 'simultaneous publication' provided for in the Rome Convention.

46. However, importantly for a State with a dualist approach to international law, Ireland is concerned to ensure that only properly enacted Irish law or EU law gives rise to rights and obligations in the Irish and EU legal systems.

47. Ireland submits, in essence, that Article 8(2) of Directive 2006/115 should not be interpreted in the light of the 'national treatment' notion, provided in the WPPT and the Rome Convention. That directive does not concern the situation of performers whose performances are incorporated in a phonogram first published in a third State.

48. The Commission argues, in essence, that it follows from the wording, scheme and purpose of Article 8(2) of Directive 2006/115 as well as from the obligation to interpret that directive in accordance with international agreements concluded by the Union that the performers concerned include, in principle, those from all the WPPT Contracting Parties, whether they reside in or outside the EEA.

2. Assessment

49. By its first question, the referring court wishes to know how Directive 2006/115 should be interpreted where certain concepts which are expressly mentioned in the international agreements in the area of copyright and related rights, such as the obligation to apply national treatment in Article 4 of the WPPT, *do not appear in the directive*.

50. On the one hand, the importance of the national treatment obligation is clear already from the fact that it has always been at the heart of any multilateral agreement on the protection of intellectual property rights and is one of the main benefits which Contracting Parties gain from membership.[6] On the other hand, it should be borne in mind that the right to remuneration (under Article 8 of Directive 2006/115 or under Article 15 of the WPPT) is, in economic terms, among the most important rights of performers and phonogram producers.

51. RAAP and the Commission argue that the performers concerned by the right to equitable remuneration, recognised under Union law, include, in principle, performers from third countries whose music is broadcasted in the Union. They contend that this follows from the general terms used by the Union legislature ('the performers') and from the aims of Directive 2006/115 (high level of protection), but in particular it is said to follow from the obligation to interpret secondary Union law in conformity with the international agreements concluded by the Union such as the WPPT, whose Article 4(1) read in conjunction with Article 15(1) obliges the contracting parties (the European Union and its Member States) to apply the 'national treatment' in relation to the equitable remuneration owed to performers.

52. I have come to the conclusion that that line of argument is correct.

53. When one analyses the text of Directive 2006/115, it is clear that third-country nationals are not excluded from the scope of application of that directive and, what is more, that is fully consistent with the Union's obligations in the context of the WPPT and with the Charter of Fundamental Rights of the European Union. 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.

54. PPI and the Ireland's thesis amounts to saying that, given that every single rule may not be found in the *acquis*, the Member States have full freedom.

55. Suffice it to say that the Court has already rejected such an argument in the neighbouring rights judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, notably paragraph 70) and in the Opinion 3/15 of the Court (*Marrakesh Treaty on access to published works*) (EU:C:2017:114).

56. First, it is necessary to establish whether Article 8(2) of Directive 2006/115 must be read in the light of the requirement of national treatment of performers from third countries contained in Article 4(1) of the WPPT. For that purpose, it is necessary to determine whether that requirement should be considered to remain an obligation which falls on the Member States in their quality as Contracting Parties to that mixed agreement or whether it is rather an obligation which must be assumed by the Union in its quality as a Contracting Party to the same agreement.

57. The Court has already considered Article 8 of Directive 2006/115 in the light of the Union's international obligations in *SCF Consorzio Fonografici*,[7] *PPL Ireland*,[8] and *Verwertungsgesellschaft Rundfunk*.[9]

6 Reinbothe, J., and Von Lewinski, S., *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP*, Oxford University Press, Oxford, 2015, p. 296, which also provides a good overview of the historical background of and commentary on the WPPT.

7 Judgment of 15 March 2012 (C-135/10, EU:C:2012:140). See, in this context, Malenovsky, J., La contribution de la Cour de justice à l'harmonisation du droit d'auteur dans l'Union européenne, ERA Forum (2012), 13, p. 411.

8 Judgment of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141).

9 Judgment of 16 February 2017 (C-641/15, EU:C:2017:131).

58. That case-law addresses the relationship between the directive and the various international agreements as well as interprets certain of the concepts in the text of Article 8 of the directive in the light of the Union's international obligations in the agreements.

59. In particular, in *SCF Consorzio Fonografici* (C-135/10, EU:C:2012:140, paragraphs 37 to 56), the Court addressed the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement'), the WPPT and the Rome Convention.

60. The Court recalled that, under Article 216(2) TFEU, 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. This is the case with the WPPT to which the Union is indeed a Contracting Party and that treaty forms an integral part of the Union legal order. Consequently, that treaty binds the institutions of the European Union and the Member States. As regards the Rome Convention, its provisions do not form part of the legal order of the European Union (the Union is not a Contracting Party to that convention and it cannot be regarded as having taken the place of its Member States as regards its application, if only because not all of those States are parties to that convention: that is, Malta).

61. As regards the WPPT, the Court also held in *SCF* (C-135/10, EU:C:2012:140, paragraph 47), that Article 23(1) of the WPPT requires the Contracting Parties to undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of that treaty. It follows that the application of the provisions of the WPPT, in their implementation or effects, is subject to the adoption of subsequent measures. Therefore, such provisions have no direct effect in the EU law and are not such as to create rights for individuals which they may rely on before the courts by virtue of that law.

62. Nevertheless, the Court also held in that judgment that in the light of recital 10 of Directive 92/100 that as the directive is intended to harmonise certain aspects of the law on copyright and related rights in the field of intellectual property in compliance with the relevant international agreements such as, inter alia, the TRIPS Agreement, the WPPT and the Rome Convention, *it establishes a set of rules compatible with those contained in those agreements*.

63. Indeed, the approach I am advocating in this Opinion appears to be the only one consistent with Article 216(2) TFEU and with settled case-law that EU secondary legislation must, so far as possible, be interpreted in a manner that is consistent with the Union's international law obligations, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union.[10]

64. The full extent of the duty to give a consistent interpretation in circumstances where the European Union has *acceded* to the international agreement in question is demonstrated by *Hermès*[11] where the Court decided that not only must EU measures designed to implement the Union's international obligations be interpreted in light of those obligations, but that national rules giving effect to that EU measure must separately conform to the requirements of international agreements to which the European Union is party.

65. Moreover, the WPPT and Directive 2006/115 each relate to the right to receive equitable remuneration in the field concerned.

10 See, inter alia, judgments of 14 July 1998, *Bettati* (C-341/95, EU:C:1998:353, paragraph 20), and of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 35).

11 Judgment of 16 June 1998 (C-53/96, EU:C:1998:292, paragraph 28).

66. I would point out that Directive 92/100 was the predecessor to Directive 2006/115. The aim and objective of the former directive was to put in place the first building block of an internal market for copyright and related rights. The intention of the EU legislature was, as confirmed by the amended proposal for that directive,[12] to follow broadly the provisions of the Rome Convention in order to achieve uniform minimum protection in the European Union. However, it took care to do so in compliance with the international conventions to which Member States were party. The (then) European Community was not party to any intellectual property law conventions.

67. Recital 10 of Directive 92/100 (which corresponds to recital 7 of Directive 2006/115) states: '… the legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which many Member States' copyright and related rights laws are based.'

68. Several elements went beyond the Rome Convention. As regards performers, there was the introduction of an exclusive right for performers (to authorise or prohibit) the fixation of their performances (Article 7); and an exclusive right to the broadcasting by wireless means and the communication to the public of their performances except where made from a fixation.

69. Article 8 of Directive 92/100 was inserted by the European Parliament, and accepted by the Commission in its amended proposal, as a complement to the introduction of the exclusive right for performers to authorise or prohibit the reproduction of fixations in phonograms of their performances contained elsewhere in the directive (Article 7). The intention was to allow performers to share alongside producers in any further use by third parties of phonograms, sometimes described as secondary use.

70. Following the adoption of the WPPT, Directive 2001/29/EC[13] became the vehicle for implementation of the new obligations deriving from the WPPT and the WCT (see recital 15 of that directive).

71. As rightly pointed out by the Commission, the fact remains that no new specific action was taken by the EU legislature to introduce Article 15(1) and (2) of the WPPT.

72. I believe this was, in any event, unnecessary because Article 8(2) of Directive 92/100, which predated the Union's adoption of the WPPT, corresponds specifically to and implements Article 15 of the WPPT.

73. Accordingly, the EU legislature clearly considered that, through Article 8 of Directive 92/100, it satisfied its obligation under Article 23(1) of the WPPT to introduce a right of equitable remuneration as provided for in Article 15(1) and (2) of the WPPT.

74. It follows from the foregoing considerations that Article 8(2) of Directive 92/100 (and Article 8(2) of Directive 2006/115) must be interpreted in conformity with the WPPT.

75. It is important to point out that, on the occasion of the ratification of the WPPT, the Union made no reservation and so remains bound by the obligations to provide national treatment and to apply Directive 2006/115 without restriction.

12 Proposal of 30 April 1992 (COM(92) 159 final, p. 12).

13 Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

76. It follows from the case-law that the concepts contained in Directive 2006/115 must be interpreted, as far as is possible, in the light of those of the WPPT,[14] and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are employed and the purpose of those provisions. The interpretation of the directive must consider Article 4 of the WPPT. This means that Member States must implement the directive in a manner compliant with the national treatment requirement of the WPPT.

77. The Commission contends correctly that Directive 2006/115 applies to acts that occur in the territory of the Union and, as with most of the instruments adopted in the copyright *acquis*, defines its scope *ratione materiae* and not *ratione personae*.[15]

78. I will return to the scope of Article 8(2) of Directive 2006/115 further in the answer to the second, third, and fourth questions.

79. Protection is conferred on right-holders whose works or other subject matter such as performances, phonograms or broadcasts meet the eligibility for protection *ratione materiae* under Directive 2006/115. This exploitation by a third party, within the meaning of Article 8(2), triggers the protections afforded by the directive.

80. The provisions in question merely require that the user has triggered the right to remuneration by playing the sound recording in the Union. In that sense, a performance takes place in the Union/EEA irrespective of the nationality or place of residence of the performer or the record producer or where the first fixation occurs.

81. I agree with the Commission that the text of Directive 2006/115 is unambiguous; and the application of Article 8(2) without restriction to beneficiaries from other Contracting Parties is consistent not only with the national treatment obligation, but also with *the aim and objective of the directive*, which is a uniform and high level of protection[16] and the smooth functioning of the internal market.

82. Therefore, Ireland, like every Member State, does not have (and has never had) a discretion to apply its own criteria for determining which performers qualify as 'relevant performers' under Article 8 of Directive 2006/115 because this is governed solely by the directive as a matter of Union law in the light of the Union's obligations under the WPPT.

83. Accordingly, the Commission is correct to argue that Directive 2006/115 is consistent with the Union's obligation flowing from international instruments to provide national treatment in terms of its material scope and application to all acts within the Union. This does not require a specific reference to the concept of national treatment in order for the directive to be compatible with Article 4 of the WPPT. The obligation to interpret Article 8(2) of the directive in the light of Article 4 of the WPPT is therefore, unaffected by the fact that national treatment is not expressly referenced in the directive. Advocate General Tizzano in *SENA*, C-245/00, EU:C:2002:543, concluded that the rules on national treatment under the Rome Convention are an integral part of EU law; I note that that Opinion predates the EU's formal ratification of the WPPT.[17] Indeed, Article 8(2) of Directive 2006/115 corresponds to Article 15 of the WPPT.

14 See, to that effect, *SCF* paragraph 52 et seq. For a critique of this case-law, see Simon, D., *Effets des accords internationaux dans l'ordre juridique de l'Union*, Europe, Number 5, May 2012.

15 For a different approach, see Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32).

16 The purpose of harmonisation under Articles 114, 56 and 62 TFEU.

17 See also to that effect *Sterling on World Copyright Law*, 4th ed., Sweet & Maxwell Thomson Reuters, §28B.07.

84. Importantly, in order to comply with its obligations under the WPPT (see the declaration of the European Community referred to in Article 26 of the WPPT), the Union must (be able to) ensure that its Member States comply with the national treatment requirement. This is one of the ways that compliance with national treatment is guaranteed.

85. In this respect, I agree with the argument made in the order for reference (paragraph 37) that reference may be made to Article 23(1) of the WPPT, which provides that the Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of that treaty. Hence, the European Union, as a Contracting Party, is subject to this obligation and one of the ways in which the European Union meets this obligation is through Article 8(2) of Directive 2006/115.

86. It follows from the foregoing that the argument made by PPI, such that in the absence of a specific provision in that directive national treatment is left to Member States, cannot stand.

87. Consequently, the answer to the first question is that Article 8(2) of Directive 2006/115 is to be interpreted in the light of the requirements of the WPPT to which the Union is party and it is consistent with the Union's obligation to provide national treatment as required by Article 4 of the WPPT without the need for a specific provision to this effect.

B. Second question

1. Summary of the arguments of the parties

88. RAAP contends that a Member State does not have discretion to prescribe criteria for determining which performers qualify as 'relevant performers' under Article 8(2) of Directive 2006/115 to the extent that those criteria are in conflict with the obligations of the Member State under the Rome Convention and/or the WPPT.

89. PPI submits, in essence, that because Article 8(2) of the directive does not adopt any measure for the purpose of giving effect to the requirement of national treatment contained in Article 4 of the WPPT, in circumstances where the performance in issue did not take place in the EEA and it was not given by a national, domiciled in or resident of the EEA, Member States retain complete discretion to determine the criteria by which the beneficiaries of the Article 8(2) right are identified, subject of course to compliance by Member States with their own international treaty obligations. Accordingly, it is not contrary to a Member 'State's obligation under Article 8(2) of the directive to restrict the right to share in the payment of equitable remuneration to situations where the recording used for wireless broadcast or communication to the public in the Member State was (i) of a performance which took place in an EEA country or (ii) was given by a performer who is a national, domiciled in or resident of an EEA country.

90. Ireland points out that Directive 2006/115 permits Member States, such as Ireland, in their implementation thereof, normal legislative discretion as to form and methods once the objectives of the directive are transposed into national law.

91. In any case, Ireland contends, in essence, that there is no obligation that requires it to provide for equitable remuneration whenever a right to remuneration arises for a record producer under the rule of first publication and 30-day rule, as provided for in Rome Convention and absorbed into the WPPT by reason of Article 4 of the WPPT. Neither instrument has direct effect nor is there any text in that directive to which such concepts could attach themselves, hence there is nothing for them to be based on.

92. The Commission contends, in essence, that the second question should be answered to the effect that a Member State does not have discretion to prescribe criteria for determining which performers qualify as 'relevant performers' under Article 8 of the directive.

2. Assessment

93. By its second question, the referring court is asking the Court whether Member States have discretion to apply their own criteria to the notion of 'relevant performers' by relying on the international agreements in the area of copyright and related rights to which they are party, such as the Rome Convention and the WPPT, including in circumstances where the performance takes place in the EEA.

94. In my view the answer to this question ensues from the reply to the first question.

95. I believe that since this question makes no express reference to any international obligation, it should be answered solely by reference to Directive 2006/115 in the light of the Union's own international obligations. I will treat of the question of any discretion under the international conventions in the context of the third question and, as we shall see, Member States do not enjoy any such discretion.

96. Protection is accorded to both performers and producers pursuant to Article 8(2) of that directive where two conditions are met namely: (i) the performance is fixed in a phonogram which is 'published for commercial purposes'; and (ii) that phonogram is exploited by a user by either of the triggering acts of communication to the public or broadcasting by wireless means.

97. In the absence of a definition and of any reference to the law of the Member States, the notion of a phonogram which is 'published for commercial purposes' in Article 8(2) should be understood as an autonomous notion of Union law. Its content can be determined by the aim and objective of that provision: as Article 8(2) serves to give effect to Article 15 of the WPPT, recourse should be had first to the relevant definition of 'publication' in Article 2(e) of the WPPT; wherein 'publication' of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

98. The WPPT established that performances that have been fixed on a phonogram must enjoy national treatment in all cases in which the phonogram is eligible for protection. While contracting entities to the Rome Convention and the WPPT enjoy some discretion in relation to aspects of their national treatment obligations, this is a clear obligation without any possibility of derogation. RAAP submits that the criteria for enjoyment of the right must not undermine the guarantee of remuneration for both sets of rights holders and the effective and substantial right for both rights holders that Article 8(2) of Directive 2006/115 seeks to provide.

99. As the Commission rightly pointed out, the definition of 'publication' in Article 2(e) of the WPPT makes no reference to the place of publication, nor to *first* publication (emphasis added). Rather, it refers only to the act of offering to the public with consent. That act of offering a phonogram, which includes a fixed performance, must be an act that takes place in the Union. It must also be for 'commercial purposes' which, in the absence of a definition must be taken to mean that such a phonogram is on general release and available on the market for use, with consent.

100. However, there is nothing in the text of Article 8(2), read in the light of Article 15 of the WPPT, from which it can be inferred that the particular performance fixed in the phonogram must *first have been performed or that performance must first have been fixed* (emphasis added) in the Union in order to benefit from the right of equitable remuneration.

101. In particular, a Member State cannot restrict the right to share in equitable remuneration to circumstances where the performance takes place in the EEA irrespective of whether the performers are domiciled in or residents of an EEA country. Indeed, Directive 2006/115 contains no express reference to the law of the Member States in this respect.

102. As explained in point 97 of the present Opinion, the notion of a phonogram that is 'published for commercial purposes' pursuant to Article 8(2) should be understood as an autonomous notion of Union law. The provisions in question merely require that the user has triggered the right to remuneration by playing the sound recording in the Union. In that sense, a performance takes place in the Union/EEA irrespective of the nationality or place of residence of the performer or the record producer or where the first fixation occurs.

103. Article 8(2) applies to secondary use of a phonogram which is either direct or indirect and which occurs in the territory of the Union/EEA. When read in the light of Article 2(a), which refers to 'performer' in a general way, and Article 15 of the WPPT, Article 8(2) is triggered by any user who carries out an act of communication to the public that makes the sound or representations of sounds fixed in a phonogram audible to the public, namely by playing the phonogram or broadcasting it by wireless means, that is, by traditional analogue means.

104. Therefore, 'the relevant performer' for the purposes of Article 8(2) is the performer, that is to say a person whose performance is made audible when a phonogram in which that performance is fixed is played in the territory of the Union.

105. As the Commission pointed out, in this respect, Article 8(2) differs from Articles 4 and 5 of the Rome Convention, which allow contracting parties to apply a criterion of nationality or fixation or publication both for producers and for performances fixed in phonograms. However, this is not the case for Article 8(2).

106. The Court has also interpreted the notions of 'communication to the public' and 'phonogram' (*SCF*, *PPL Ireland* and *Rundfunk*[18]), and of 'places accessible to the public against payment of an entrance fee' (*Rundfunk*) by reference to the WPPT and also to the Rome Convention. However, the Court has held that Article 8(2) of Directive 92/100 requires an individual interpretation of the identity of the 'user' and the question of the use of the phonogram at issue (*SCF*).

107. Moreover, I consider (as does the Commission) that this reading of Directive 2006/115 is the only one consistent with a high level of protection (recital 5), uniform protection and the smooth functioning of the internal market (recital 17).[19]

108. As the Court has already held in *SCF* and *PPL Ireland*, Article 8(2) of Directive 2006/115, provides a right for performers and producers of phonograms which is compensatory in nature and which is exercisable in the event of the use of a work or other protected subject matter. It is a right, which is essentially financial in nature, which is not liable to be exercised before a phonogram is published for commercial purposes, or a reproduction of such a phonogram has been used for communication to the public by a user.

18 Respectively, judgments of 15 March 2012, *SCF Consorzio Fonografici* (C-135/10, EU:C:2012:140 (SCF)); of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141 ('PPL Ireland')); and of 16 February 2017, *Verwertungsgesellschaft Rundfunk* (C-641/15, EU:C:2017:131). See, in general, Ben Dahmen, K., Interactions du droit international et du droit de l'Union européenne: Un pluralisme juridique rénové en matière de propriété industrielle, L'Harmattan, 2013.

19 See, by analogy, judgment of 20 January 2009, *Sony Music Entertainment* (C-240/07, EU:C:2009:19, paragraphs 20-25, 27 and 35). This is already apparent from the Court's case-law. See judgment of 31 May 2016, *Reha Training Gesellschaft* (C-117/15, EU:C:2016:379, paragraph 28).

109. At the same time Directive 2006/115 makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of any of the concepts referred to in Article 8(2). Accordingly, in view of the need for a uniform application of EU law and the principle of equality, those concepts must normally be given an autonomous and uniform interpretation throughout the European Union. [20]

110. It follows from the foregoing that a Member State does not have discretion to prescribe criteria for determining which performers qualify as 'relevant performers' under Article 8 of Directive 2006/115. In particular, a Member State cannot restrict the right to share in equitable remuneration to circumstances where the performance takes place in the EEA irrespective of whether the performers are domiciled in or residents of an EEA country.

C. Third question

1. Summary of the arguments of the parties

111. RAAP submits that the discretion enjoyed by a Member State to make a reciprocal response to a reservation entered by another Contracting Party under Article 15(3) of the WPPT is limited to the extent that the response must reflect the terms of the reservation made. A Contracting Party is not required to set aside the provisions in the Rome Convention as to the 30-day rule in order to avoid asymmetric criteria of qualification as between record producers and performers. What is required is that the provisions of the WPPT for qualification of performances for national treatment on the basis of incorporation in a protected phonogram (incorporating the criteria of the Rome Convention) be complied with. It is open to a Contracting Party to the WPPT to provide rights to the nationals of another Contracting Party, which has made a reservation under Article 15(3) and which rights are more generous than the ones provided by the reserving party in its national law; such provision must, however, comply with the requirements of the WPPT and, where relevant, the Rome Convention and with relevant provisions of EU law.

112. PPI considers that, in principle, a Member State has discretion under the WPPT in responding to a reservation under Article 15(3): it is not obliged to mirror precisely the effect of a reservation and to avoid any situation whereby nationals of the reserving state are placed in a more advantageous position than its own nationals vis-à-vis the reserving State. The Rome Convention itself envisaged the possibility that nationals of non-Contracting States might obtain an unreciprocated advantage through the 30-day rule in Article 5(2) but did not require Contracting States to avoid that possibility. Ireland is obliged, under the Rome Convention, to honour its obligations towards US producers under the 30-day rule.

113. The advantageous position of US (and other reserving Contracting Parties') producers derives from the application of the first publication/30 day rule under the Rome Convention only: Ireland could have entered a reservation in accordance with Article 16(1)(a)(iii) of the Rome Convention so as to exclude the possibility of payments to producers who are nationals of non-Contracting States further to Article 5(2); but Ireland chose not to do so and was not obliged to do so. It cannot now be obliged to enter such a reservation to ensure equal treatment of producers and performers who are nationals of reserving states.

20 See, to that effect, judgments of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraphs 27 and 28), and of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraphs 14 and 15).

114. A reservation entered by a Contracting Party to the WPPT which excludes the application of Article 15(1) has the result that, as regards that Contracting Party, the *status quo ante* in respect of the payment of equitable remuneration to producers and performers remains in place: in particular, the reservation means there can be no obligation on Ireland to provide for payments to the performers who are nationals of the reserving party.

115. Ireland considers that a reservation, regardless of its extent, entitles the other Contracting Parties not to provide for national treatment at all. It contends that RAAP's 'mirror precisely' response is not supported by the language, purpose or context of WPPT. A Contracting Party is entitled to treat, in the circumstances of a reservation for the purpose of this question, performers differently from phonogram producers where a phonogram is first published in a Contracting State. As a matter of first principles, and regardless of obligations under the Treaty — unless there is some applicable international law prohibition — it is open to the responding party to provide for a more generous regime than that provided by the reserving party. This might arise by reason of other considerations not directly related to the subject matter or for reasons of domestic policy/politics.

116. The Commission submits, in essence, that Member States enjoy no discretion in an area that is the exclusive competence of the Union and are precluded from responding to the reservations entered by other Contracting Parties or applying criteria other than those set out in Article 8(2) of Directive 2006/115.

2. Assessment

117. By its third question, the referring court wishes to know if Member States can respond to reservations made by other Contracting Parties to the WPPT or apply the particular rules in the Rome Convention on eligibility for protection.

118. As regards the relationship between the concept of 'equitable remuneration' in Article 15 of the WPPT, Article 12(d) of the Rome Convention (which Article 15 of the WPPT is modelled upon) and Article 8(2) of Directive 92/100 (now Directive 2006/115), it seems to me that only the WPPT is relevant. The Rome Convention is not part of the Union legal order and the specific requirements therein, in relation to what is a protected phonogram in Article 5, do not bind the Union; nor are the Rome Convention rules on national treatment, which allow for a choice as between fixation, publication, and nationality for eligibility for national treatment, binding on the Union.

119. As the Commission pointed out, none of these rules contained in the Rome Convention is reflected in the text of Article 8(2) of Directive 2006/115, which, even when it was adopted as Directive 92/100, does not allow for any reservations or restrictions on its application.

120. Therefore, only Article 4(2) of the WPPT should be analysed here.

121. Article 4(2) of the WPPT, to which the Union is party, provides an exception from the national treatment requirement in the case of reservations under Article 15(3) of the WPPT.

122. The Commission argues that Directive 2006/115 falls within 'a field which is now the exclusive competence of the Union' and refers generally to 'common EU rules under the various intellectual property rights provided in Union law'.

123. According to the Commission, whilst it is true that at the time of signature and ratification of the WPPT and its sister treaty the WIPO Copyright Treaty (WCT) by the Union, this area was considered a shared competence and therefore Member States ratified those treaties alongside the Union, this is no longer the case. The Union has taken the place of the Member States in relation to the WPPT. In that regard, the Commission is proposing that the Court transpose (in the case of the WPPT) the

reasoning followed by the Court in *TV2 Danmark*,[21] which concerned the Berne Convention for the Protection of Literary and Artistic Works.[22]

124. In particular, paragraph 31 of that judgment states: 'by adopting [Directive 2001/29] on the harmonisation of certain aspects of copyright and related rights in the information society, the European Union legislature is deemed to have exercised the competence previously devolved on the Member States in the field of intellectual property. Within the scope of that directive, the European Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the relevant stipulations of the Berne Convention'.

125. The Commission argues that, as the field covered by Directive 2006/115 is now one of exclusive competence, Member States cannot respond to reservations entered by other Contracting Parties under Article 15(3) of the WPPT; nor can they apply Article 4(2) themselves. Therefore, it is incumbent on the European Union to determine what should, in a uniform manner for the whole EU territory, be the consequence, for US artists whose music is broadcasted in the European Union, of the reservation entered by that Contracting Party on the basis of Article 15(3) of the WPPT.

126. I agree with that line of argument. First of all, in my view, it is necessary to reject the argumentation of PPI and Ireland based on the fact that the WPPT has no direct effect and seeking to show that the national treatment of third-country nationals contained in that treaty has nothing to do with Directive 2006/115.

127. Suffice it to recall the Court's case-law that although the WPPT and the Rome Convention have no direct effect this in no way detracts from the obligation to interpret Directive 2006/115 in the light of those agreements.[23]

128. Further, the simple fact that EU secondary law, seeking to ensure equitable remuneration to artists whose creative work is communicated to public in the European Union, does not expressly mention the EU's international obligation to treat equally EU artists and those from third countries is not sufficient to exclude the requirement to interpret EU secondary law in conformity with that obligation.

129. Moreover, I consider that Article 8(2) of Directive 2006/115 must in fact be seen as the implementation by the Union of Article 15 of the WPPT, in particular in view of paragraph 2 of that article.[24]

130. However, it should be recalled that the obligation to provide an interpretation of EU secondary law that is in conformity with a mixed agreement does not extend to obligations contained in that agreement which fall within the spheres where the European Union has not yet exercised its powers and legislated in sufficient importance.[25]

21 Judgment of 26 April 2012, *DR and TV2 Danmark* (C-510/10, EU:C:2012:244, paragraph 31). For a critique of this case-law, see Treppoz, E., 'Le juge européen et les normes internationales en matière de droit d'auteur', *Chronique Droit européen de la propriété intellectuelle*, RTD Eur., 2012, p. 964. See also Bergé, J.-S., 'Les mots de l'interaction: compétence, applicabilité et invocabilité', JDI, 2012, chron. 5.

22 Paris Act of 24 July 1971, as amended on 28 September 1979 ('the Berne Convention'). See in this respect in relation to 'national treatment', Ricketson, S., and Ginsburg, J.C., *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Vol. 1, Oxford, 2006, p. 295.

23 See *SCF*, (C-135/10, EU:C:2012:140, paragraphs 47 to 50, 52 and 53 and the case-law cited). See, however, Moura Vicente, D., *La propriété intellectuelle en droit international privé*, ADI Poche, 2009, p. 120 and note 274, explaining that certain articles of TRIPS are liable to have direct effect, as was previously decided in Germany.

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

25 Judgment of 11 September 2007, *Merck Genéricos — Produtos Farmacêuticos* (C-431/05, EU:C:2007:496, paragraphs 34, 35 and 46).

131. Hence, it must be first determined whether there exist Union rules in 'the sphere in question'.[26]

132. As pointed out by Advocate General Sharpston in *Lesoochranárske zoskupenie* (C-240/09, EU:C:2010:436, point 66), it is not necessarily clear what degree of exercise of Union powers is 'of sufficient importance' to lead to the conclusion that the Union has legislated within a particular 'sphere'.

133. How should a particular 'sphere' be defined? Could it be a broad concept of 'legislation concerning intellectual property law'? It is true that in the *Etang de Berre* judgment[27] the Court considered the existence of 'legislation affecting the environment' to be sufficient to establish the Court's jurisdiction. In any event, it follows from the case-law discussed in the present Opinion that 'the relevant sphere' must be determined on a case-by-case basis.

134. In the present case, the Commission argued in its written observations that the sphere in question should be described as being an excessively broad concept, that of the intellectual property area. The Commission raised this argument previously in the *Dior*[28] and *Merck Genericos*[29] cases.

135. Just as that expansive argument was rejected by the Court in both judgments — and despite the wording of paragraph 31 of the judgment of 26 April 2012, *DR and TV2 Danmark* (C-510/10, EU:C:2012:244) that I believe should be applied by analogy in the present case — I consider the Court should rule that the sphere in question cannot be described as being, very generally, that of the intellectual property *acquis*.

136. Indeed, if that area of law were qualified, in its totality, as the sphere in question, it would be all too easy to state that the European Union had legislated abundantly in the field of intellectual property and to conclude that all aspects of that law, contained in a mixed agreement, fall under EU competence rather than that of the Member States, notwithstanding the fact that a considerable number of IP matters have so far been only superficially harmonised.

137. Whilst it is necessary that the sphere in question is demarcated in a sufficiently precise manner, the question arises whether, in view in particular of the third question referred — given that it concerns the options open to a Contracting Party when another Contracting Party enters a reservation and is located in the field of external relations — it is appropriate to rely also on case-law concerning Article 3(2) TFEU.

138. The latter provision concerns international commitments entered into by the Union and requires, for the purposes of establishing exclusive competence of the Union, that the relevant area is 'an area already largely covered by the EU rules'[30] (see further point 147 of the present Opinion).

139. So what is that area, since it cannot comprise the whole area of intellectual property?

26 Compare judgments of 11 September 2007, *Merck Genéricos —Produtos Farmacêuticos* (C-431/05, EU:C:2007:496, paragraph 35), and of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraphs 31 and 32).

27 Judgment of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598, paragraph 28). For a critique of the case-law see, for example, Tanghe, Y., *The EU's external competence in IP matters: the contribution of the Daiichi Sankyo case to cloudy constitutional concepts, blurred borders, and corresponding court jurisdiction*, Columbia Journal of European Law, Vol. 22.1, 2015, p. 139 et seq.

28 Judgment of 14 December 2000, *Dior and Others* (C-300/98 and C-392/98, EU:C:2000:688).

29 Judgment of 11 September 2007, *Merck Genéricos — Produtos Farmacêuticos*, (C-431/05, EU:C:2007:496). See, for example, Holdgaard, R., *Case C-431/05, Merck Genéricos*, CMLR 45, 2008, p. 1233.

30 Judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 65 et seq.), Opinion 3/15 of the Court (*Marrakesh Treaty on access to published works*), EU:C:2017:114, paragraph 107.

140. I agree with what the Commission subsequently argued at the hearing; the relevant area for which the Union can claim exclusive competence is rights in sound recordings: that is, the rights of the performer, and the rights of the record producer in the object of protection which is the phonogram (or the record) that is played in establishments, bars, restaurants, etc., that is to say, it is used by users in the Union as an act of exploitation for the purposes of communication to the public or broadcasting (it also includes the rights of the author in the underlying work which is being performed — they may sometimes coincide because there are singers who are singer-song writers).

141. In relation to the treatment per se of third-country nationals in the *acquis*, contrary to what PPI and Ireland suggest, suffice it to say that Directive 2006/115 does not say anything in that regard. Accordingly, it applies to all nationals.

142. As was pointed out by the Commission, where the *acquis* is silent, it applies to all nationals, unlike other areas of law, such as company law or accounting law, where one adheres to concepts such as establishment or residence and where the Union legislature makes specific provisions for it. That is not the case in the area of copyright *acquis* as a matter of principle. That legislation is neutral as to whom it applies. That is how the Union respects its obligations in the context of international treaties that provide for national treatment.

143. If one sought to circumvent the rights of third-country nationals, then it would be for the Union legislature to do, in an express manner, by a legislative technique. The silence in Directive 2006/115 is supported by the text, which does not exclude anyone on its terms. Indeed, to compare that directive with legislation where this is done, I refer to Directive 2001/84 (on the resale right for the benefit of the author of an original work of art). There the Union legislature made the express inclusion, in that directive, to ensure that only those other Contracting Parties of the Berne Union who had in their law an equivalent material provision for artists when they resell their works of art could benefit from the artist resale right.

144. In that case, the Union legislature provided expressly under the provision entitled 'Third-country nationals entitled to receive royalties' that 'Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title'.

145. A further example is, for instance, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases,[31] whereby the Union legislature introduced the *sui generis* right which had no known counterpart in any international treaty; a provision was included which had the effect that the right to prevent unauthorised extraction and/or re-utilisation in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, *only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community*.

31 OJ 1996 L 9, consolidated version, p. 1.

146. In Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works,[32] which was a derogation from the rights of authors and other related rights holders, conscious of its obligations under international agreements and in the interests of international comity, the Union legislature took the decision that it would not apply the rules to third- country nationals unless there was a reasonable view taken in the entire context of the case that they would be aware of the use that was being made of their work. Hence, third-country nationals were excluded from the possible harmful effects of the orphan works directive.

147. Next, the question arises as to whether one may, in the present case, also rely on the case-law relating to Article 3(2) TFEU, in particular, the judgment in *Commission* v *Council*, (C-114/12, EU:C:2014:2151), and Opinion 3/15 of the Court (*Marrakesh Treaty on access to published works*) (EU:C:2017:114).

148. I consider that — while those two situations concerned an international treaty which was yet to be negotiated and a treaty which had been negotiated — here the Union is justified in claiming exclusive competence on the intervening effect not only of the Court's case-law in the area of the interpretation of the copyright and related rights *acquis*, but the deepening of harmonisation by way of a significant body of rules[33]. Directive 2014/26/EU contains three definitions of provisions that are pertinent to resolving the present case: a neutral definition of the right holder, a neutral definition of the rights revenue, and a neutral definition of management. So for any act of exploitation of a person's copyright or related right in the Union that person derives rights revenue and any right holder may make a claim to that revenue.

149. Moreover, it may be noted, as was already argued by Advocate General Ruiz-Jarabo Colomer in *Merck*, that the agreements concluded jointly by the Union and the Member States reveal their common objective and bind them vis-à-vis the third countries that are party to those agreements; the principle of sincere cooperation laid down in Article 4(3) TEU requires the Member States to cooperate not only in the process of negotiation and conclusion of those agreements, but also in their implementation (Opinion 1/94 of the Court (*Agreements annexed to the WTO Agreement*) (EU:C:1994:384, paragraph 108)); this must be read in conjunction with the duty to achieve the effectiveness of Union law not only in the legislative sphere but also in the executive and judicial spheres.[34]

150. I would point out that there is arguably another exclusive competence of the Union that could be relevant here: that of the common commercial policy (Article 3(1)(e) TFEU). In judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland* (C-414/11, EU:C:2013:520, paragraphs 52 and 53), the Court held that the rules in TRIPS fall within that competence. Indeed, certain of those rules concern precisely performers' and producers' rights.[35] Therefore, whilst, technically, there is no overlap between the TRIPS and the WPPT, the presence of a certain connection is indisputable.

151. It is true that the specific right at issue here is not in the TRIPS Agreement (what is required is to abide by the national treatment obligations and the most favoured nation status provisions of TRIPS). In any case, that does not preclude the Union from providing such a right, it simply means that it does not figure in the context of the TRIPS Agreement.

32 Text with EEA relevance. OJ 2012 L 299, p. 5.

33 For example, Directive of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).

34 The Opinion in *Merck* refers to Kahl, W. 'Artikel 10', in Callies, C. and Ruffert, M., *Kommentar zu EU-Vertrag und EG-Vertrag*, Ed. Luchterhand, 2nd ed. revised and extended, Neuwied and Kriftel, 2002, p. 451 et seq. These arguments are supported also by Etienne, J., *Arrêt «Merck Genéricos»: la compétence d'interprétation d'un accord international conclu par la Communauté et les Etats membres*, Journal de droit européen, 2008, p. 46.

35 See Article 14 of the TRIPS Agreement.

152. Therefore, it follows from the foregoing considerations that if the Union legislature wishes to modify Directive 2006/115 and exclude third-country nationals, then that is for the Union to undertake and not for the 27 Member States to attempt in a multitude of ways. Indeed, to leave it to Member States would alter the scope of the common rules adopted by the Union.

153. The following question arises *obiter*: if, in respect of WPPT in its entirety, the Union is regarded as having taken the place of the Member States, what legal consequences would the reservations made by Member States under that treaty have (see the declarations by the Kingdom of Denmark, the Republic of Finland, the French Republic, the Federal Republic of Germany, and the Kingdom of Sweden in Notification No 78 to that treaty, as well as the declaration by the Republic of Finland in Notification No 88 annexed to that treaty)?

154. In my view, it follows from the considerations in the present Opinion that, in so far as the effect of those reservations would be to hinder the application of EU law, those reservations should not be applicable.

155. Accordingly, the answer to the third question is that Member States enjoy no discretion in an area that is the exclusive competence of the Union and are precluded from responding to the reservations entered by other Contracting Parties or from applying criteria other than those set out in Article 8(2) of Directive 2006/115.

D. Fourth question

1. Summary of the arguments of the parties

156. RAAP and the Commission consider, in essence, that it is not permissible to confine the right to equitable remuneration provided for in Article 8(2) of Directive 2006/115 to the producers of a sound recording, that is, to deny the right to the performers whose performances have been fixed in that sound recording in circumstances where the producers are accorded the right.

157. PPI contends that, by the fourth question, the referring court asks, in essence, whether it is permissible under the WPPT to treat producers and performers differently, in particular by recognising the right of producers to equitable remuneration while withholding that right from performers. It submits that that question can be answered in the affirmative.

158. Ireland submits that it is entitled in transposing Directive 2006/115, and having regard to the reservation made by the United States, if necessary to afford national treatment to performers either performing or resident/domiciled in an EEA country, together with the option to expand the categories of performers by way of executive order. This discretion exists by reason of the wording of the directive, its legislative history, and its recital addressed to economic actors in the European Union. Ireland has the right, in particular given the corresponding lack of rights afforded in the domestic law of the United States but also because WPPT is not directly effective, to decouple the right to remuneration available to producers from the rights available to performers where the performances have otherwise been fixed in a phonogram by reason of domestic law rules in respect of first publication in another Contracting State.

2. Assessment

159. By its fourth question, the referring court wishes to know whether it is permissible to limit the right of equitable remuneration in such a way that performers whose performances are fixed in that sound recording receive no remuneration and it accrues only to the benefit of the record producer.

160. As pointed out by RAAP, Article 8(2) is explicit in obliging Member States to provide remuneration rights both to performers and to producers. This was an intended deviation from the position in international law as set out in the Rome Convention at the time of the adoption of Directive 2006/115.[36] The accession of the European Union to the WPPT aligned the international position and the position under the directive.

161. This is corroborated by the context and purpose of that directive. As is evident from recitals 5, 7 and 10 in particular, the objectives of that directive include the protection of performers, harmonisation of certain of their rights throughout the European Union, and ensuring that Member States give effect to the rights in question in accordance with their obligations in international law.

162. Suffice it to point out that the text of Article 8(2) of Directive 2006/115 requires Member States to ensure that there is a sharing of remuneration. 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 (see recitals 12 and 13 of the directive in this respect).

163. As the referring court recognises, it follows from *SENA*[37] that Article 8(2) of Directive 92/100 (now Article 8(2) of Directive 2006/115) must be interpreted uniformly in all the Member States and applied by each Member State. The Court ruled that whether remuneration is equitable, which represents the consideration for the use of a commercial phonogram inter alia for broadcasting purposes, is to be assessed, in particular, in the light of the value of that use in trade.

164. Even the Commission admits that the Member States have discretion to determine, in their territory, the most appropriate criteria for assuring, within the limits imposed by Union law and Directive 2006/115 in particular, adherence to that Union concept of whether the remuneration, which represents the consideration for the use of a commercial phonogram, is equitable, in particular, in the light of the value of that use in trade.

165. However, I consider that the reference to the 'appropriate criteria for assuring adherence' does not extend to a determination *ratione personae* of the beneficiaries under Article 8(2). Rather, Member States' discretion is limited, in principle, to an assessment of what is equitable in terms of the remuneration.

166. Otherwise, it would defeat the object of the Directive 2006/115 to establish harmonised legal protection in the field of intellectual property, if Article 8(2) could be used by the Member States as a basis to delineate the beneficiaries of that remuneration. Such an approach would run counter to recital 17.[38]

167. Finally, it may be pointed out that the copyright laws of a majority of Member States (at least 18 Member States[39]) provide *explicitly* that, in the absence of agreement, the single equitable remuneration — after deduction of the legitimate costs of management — should be shared equally (50:50) between performers and producers.

36 See, for example, Walter, M., von Lewinski, S., *European Copyright Law: A Commentary*, Oxford University Press, Oxford, 2010, paragraph 6.8.13.

37 Judgment of 6 February 2003 (C-245/00, EU:C:2003:68). This judgment addresses the extent to which international agreements may be used as an aid in interpretation of the directive.

38 'The harmonised rental and lending rights and the harmonised protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States …'.

39 Belgium, Bulgaria, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Lithuania, Hungary, Malta, the Netherlands, Austria, Portugal, Romania, Slovenia, and Sweden.

168. It follows that the answer to the fourth question is that it is inconsistent with Article 8(2) to limit the right of equitable remuneration in such a way that performers whose performances are fixed in the sound recording receive no remuneration and it accrues only to the benefit of the record producer.

IV. Conclusion

169. For those reasons, I propose that the Court should answer the questions referred for a preliminary ruling by the High Court (Ireland) as follows:

(1) Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property is to be interpreted in the light of the requirements of the World Intellectual Property Organisation ('WIPO') Performances and Phonograms Treaty ('the WPPT') to which the Union is party and as such it is consistent with the Union's obligation to provide national treatment as required by Article 4 of the WPPT without the need for a specific provision to this effect.

(2) A Member State does not have discretion to prescribe criteria for determining which performers qualify as 'relevant performers' under Article 8 of Directive 2006/115. In particular, a Member State cannot restrict the right to share in equitable remuneration to circumstances where the performance takes place in the European Economic Area (EEA) irrespective of whether the performers are domiciled in or residents of an EEA country.

(3) Member States enjoy no discretion in an area that is the exclusive competence of the Union and are precluded from responding to the reservations entered by other Contracting Parties to the WPPT or from applying criteria other than those set out in Article 8(2) of Directive 2006/115.

(4) It is inconsistent with Article 8(2) of Directive 2006/115 to limit the right of equitable remuneration in such a way that performers whose performances are fixed in the sound recording receive no remuneration and it accrues only to the benefit of the record producer.