***RAAP*: the obvious, the missing, the regrettable and the desirable**

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***Introduction (and a kind of “abstract”)***

In this article, a tentative analysis is made of the *RAAP v. PPI* judgment of the Court of Justice of the European Union (CJEU)[[2]](#footnote-2) (hereinafter: *RAAP*). Tentative because the Court’s rulings are very complex; so much that the commentator has also to cross a mine field of questions where great caution is needed; such as whether it might be the case that the Court has erred concerning certain key aspects of the case and that it even has stepped through the limits of the borderline between EU and Member States competences.

The article contains four substantive titles. The titles are construed in a way that they also sum up the key findings. In this way they, with some comments, may also serve together as a kind of “abstract”.

The first title is this: “*Certain rulings in RAAP are responses to preliminary questions that boil down to asking the Court whether or not the text of the relevant international, EU and national norms truly read in the way they obviously do*” (“the obvious”).This is reference to point 1 (if it is read alone), and in particular to point 3, of the rulings.

The second title reads as follows: *“There are certain conflicts of the Irish law and the PPI’s practice with the international and EU norms that are not touched upon either in the preliminary questions or in the CJEU judgement*”(“the missing”).The most basicconflict of the Irish Copyright and Related Rights Act (CRRA) with the international and EU norms is that, while – under both Article 15 of the WPPT and Article 8 of the Rental, Lending and Related Rights Directive (Directive 2006/115/EC) – the right to a *single* equitable remuneration of performers and producers of phonograms *to be paid by the users*, Article 208(1) of the CRRA provides that “[a] performer has a right to equitable remuneration *from the owner of the copyright in a sound recording*.” PPI seemed to base its practice on this provision to reduce the role of RAAP to a mere counter to pay the remuneration to those performers to whom PPI had distributed it.

It is the third title where the commentator needs great caution to address certain delicate issues. Nevertheless, under this title, this is opinion is presented: “*With due respect, it is regrettable that seems that the CJEU’s ruling on the obligation to apply the right provided in Article 8 of Directive 2006/115/EC to performances and phonograms of nationals of States that are non-members of the EU and are not protected under the WPPT is not well-founded; one cannot speak about the non-application of a non-existing right as a ‘limitation’ of a right; such performances and phonograms are outside the contours of copyright and related rights (and this is adequately clarified in the existing laws of the EU Member States)* (“the regrettable”). It is regrettable that the Court has derived its ruling from Article 52(1) of the Charter of Fundamental Rights of the European Union[[3]](#footnote-3) which is about the general criteria of applying limitations of IP rights, because there are no right to limit in the case of not-protected subject matter); that it has intervened (and not in a fortunate way) into the regulation of a system which had been adequately established and applied without any problem whatsoever; and that in this way it has created highly unexpected disruptions in well-functioning national systems to support creativity and protect cultural diversity-

The fourth and last title is this: *“It is desirable to make it clear in the EU law that no remuneration is due for the uses of performances and phonograms not protected in the EU; nevertheless, where the lump-sum paid by the users is still calculated to also cover such uses, (i) in the absence of EU legislative norms, the corresponding remuneration may be transferred to the foreigners on the basis of reciprocity; (ii) it may be transferred to foreigners without reciprocity; and (iii) it (as not-for-distribution remuneration) may be used in the same way as non-distributable fees, for cultural and social purposes”* (“the desirable”). Both measures are necessary; that is to reestablish the limits of international obligations and the elimination of the unexpected disruption of the well-functioning forms of using not-for-distributable remuneration in certain Member States the same way as non-distributable remuneration.

***I. Certain rulings in RAAP are responses to preliminary questions that boil down to asking the Court whether or not the text of the relevant international, EU and national norms truly read in the way they obviously do***

In countries following the common law tradition, usually the CMO of producers is authorized to collect the single equitable remuneration (or at least the payment that is supposed to correspond to such remuneration). This was a plausible solution when the right was introduced for performers, because producers of phonograms (in those legal systems usually called “sound recordings”) had been enjoying “copyright” already for a while. In a way, it is understandable (although unjustified) that the introduction of the “new-comer” right to be applied for the same acts for which previously only the producers had the right to collect remuneration did meet with resistance. The reluctant welcome to performers’ rights did – and still do – has had certain negative effects both on the enjoyment of their right to a share from the single equitable remuneration and on the exercise of the right, normally through their CMOs. This has been manifested in a spectacular manner in *RAAP*.

The CJEU has adopted the following rulings in *RAAP*:

1.  *Article 8(2) of Directive 2006/115/EC* […] on rental right and lending right and on certain rights related to copyright in the field of intellectual property *must*, in the light of Article 4(1) and Article 15(1) of the [WPPT], *be interpreted as precluding a Member State from excluding,* when it transposes into its legislation the words ‘relevant performers’ which are contained in Article 8(2) of the directive and designate the performers *entitled* to a part of the single equitable remuneration referred to therein, *performers who are nationals of States outside the European Economic Area (EEA), with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.*

2.  *Article 15(3) of the [WPPT| and Article 8(2) of Directive 2006/115 must,* as EU law currently stands, *be interpreted* *as meaning that reservations notified by third States under Article 15(3) of the [WPPT] that have the effect of limiting on their territories the right to a single equitable remuneration* laid down in Article 15(1) thereof *do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States,* *but such limitations may be introduced* by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. *Article 8(2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.*

3.  Article 8(2) of Directive 2006/115 must be interpreted as *precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration*, and does not share it with the performer who has contributed to that phonogram.[[4]](#footnote-4) [Emphasis added.]

There are two aspects of the rulings*.* In point 3 (and, when read alone, in point 1), the Court has stated what is obvious under the EU law and the WPPT. Namely that the Member States are obligated under Article 8(2) of Directive 2006/115/EC to provide that, where the producers collect the remuneration, they must share it with the performers (point 3 of the ruling) and that the single equitable remuneration must be granted also to the performers who are nationals of States outside the European Economic Area (EEA) in accordance with the relevant international treaties (point 1 of the ruling). In contrast, what is stated in particular in 2 is far from being obvious; it means no less than that the Court would introduce a new unilateral international obligation to the Member States which does not follow from the WPPT (or the Rome Convention). The application of these points of the rulings not only would mean new financial burdens to the Member States, but it would also lead to drying out the sources used by several EU Member States for the promotion of creativity and the protection of cultural diversity.

It point 3 of the rulings, the CJEU has answered to a preliminary question of the Irish court which concerned an *acte clair*: “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?’” There is good reason to consider that this is an *acte clair* under the EU law because Article 8(2) of Directive 2006/115/EC for which the national court sought interpretation provides as follows:

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. [Emphasis added.]

The Irish court’s question was surprising also because the Copyright and Related Rights Act of 2000 (“CRRA”) of Ireland provides, at least in respect of the nationals of Ireland and of the Member States of the European Economic Area (EEA), for an equitable remuneration to be paid by the producers to the performers for the acts covered by Article 8(2) of the Directive:

*Section 208(1)*:

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

(a) *played in public*, or

(b) *included in a broadcast or cable programme service*.” [Emphasis added.]

- *Section 287*:

„’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;”[[5]](#footnote-5)

The text in Article 8(2) of the Directive “to ensure that this remuneration is shared between the […] performers and phonogram producers” does not leave room for any contrary interpretation; thus, the CJEU has given the obvious response in point 3 of the rulings: “Article 8(2) of Directive 2006/115 must be interpreted asprecluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram.”

Point 1 of the rulings seemed to be a response to preliminary question No. 2 asked by the Irish court:

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 domiciles or residents of an EEA country?*

Article 8(2) is to be regarded as implementing Article 15(1) of the WPPT on the right of the performers and producers of phonograms to a single equitable remuneration which the Contracting Parties (including the E.U. and its Member States), by virtue of Article 4(1) of the Treaty on national treatment, are obligated to grant also to the performers and producers who are nationals of other Contracting Parties. Except where a Contracting Party has made a reservation under Article 15(3) of the Treaty to exclude or limit the application of the right (which is not the case as regards the E.U. and its Member States) or where another Contracting Party has done so and, therefore, as provided in Article 4(2) of the Treaty, no Contracting Party is obligated to grant the right to the performers and producers who are nationals of that other Contracting Party to the same extent (see below). Therefore, in this aspect, point 1 of the rulings may be regarded also obvious if it is read alone in accordance with these provisions of the WPPT. However, when it is read together with point 2 of the rulings it may get another meaning.

***II. There are certain conflicts of the Irish law and the PPI’s practice with the international and EU norms that are not touched upon either in the preliminary questions or in the CJEU judgement***

Before turning to the more problematic point 2 of the rulings, it seems necessary to outline the reasons for which, in spite of what seemed to be *acte clair* issues, the Irish court, in spite of a thorough analysis it had made, still felt it necessary to submit these preliminary questions. There were a number of issues in the conflicts between RAAP and PPI that have not been addressed in *RAAP* – partly because the Irish court had not submitted specific preliminary questions about them to the CJEU, and partly because they were addressed in a parallel lawsuit between RAAP and PPI.[[6]](#footnote-6) Since those other issues concerned various significant aspects of collective management, it is justified to refer to them too.

The basic problem the High Court was faced with was the asymmetric status of the two categories of beneficiaries of the single equitable remuneration under the CRRA. By virtue of section 17(2)(b) of the Act, “sound recordings” (= phonograms) are protected by “copyright” which, in accordance with section 17(1) “is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright” and section 38(1) of the Act obligates users to make payments for the acts covered Article 15(1) of the WPPT to the producers as copyright owners. In this connection, there is no reference to the single equitable remuneration nature of the payments which would be also due to performers. In contrast, under section 208(1), performers have a stand-alone right to equitable remuneration. In the latter provision, there is no mention either about the *single* nature of the equitable remuneration to be paid *by the users* to performers and producers jointly; on the contrary, performers may only claim the remuneration *from the producers*.

It follows from this asymmetric regulation – although it is not stated in the judgment of the CJEU in *RAAP* (because the Irish court had not submitted preliminary questions about it) – that the CRRA was not in accordance with Article 8(2) of the Directive and Article 15(1) and (2) of the WPPT in two basic aspects: (i) no *singl*e equitable remuneration is provided but *two separate rights*; a stronger one to the producers to collect remuneration from the users and a subordinate right of performers to claim remuneration form the producers; and – in close connection with this, (ii) while under Article 8(2) of the Directive and the first sentence of Article 15(2) of the WPPT, the single equitable remuneration of the producers *and the performers* is due *from the* *users*, the performers’ right to an equitable remuneration may just be claimed *from the* *producers*.

It should be noted that the source of the apparent conflicts with the Directive and the WPPT is not the different legal characterization of the right of the producers as copyright, but that the principle of the “*relative* freedom of legal characterization” is not taken into account and respected.[[7]](#footnote-7) PPI applied a practice that reflected the belief that the producers are the only real owners of the right to a payment from the users; they just have to pay to performers for *the contributions to the producers’ productions* – the sound recordings – protected by “copyright”.

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In order to understand how serious problems have emerged as a consequence of the less-than-lukewarm attitude towards performers’ rights, it is necessary to refer to the status of RAAP and PPI under the Irish law. According to section 281 of the CRRA, three different types of CMOs (“licensing bodies”) may be registered with the Controller of Intellectual Propery: (i) a body “*to act” “until the contrary is proved””on behalf of the classes of rightsowners for whom it claims representation right*s”; or (ii)a body to act “on behalf of the rightsowners who have assigned rights to it”, or (iii)a body “exclusively licensed to act”. Both RAAP and PPI have been registered as CMOs (“licensing bodies”) in the first category; RAAP as the only CMO registered to claim remuneration for the class of performers and PPI as the only CMO registered to claim remuneration for the class of producers. That is, each of them is authorized to manage the rights of the given category of rightholders for which it has been registered in a presumption-based system (but not to manage the rights of other rightholders for which it has not been registered). In the case of RAAP, its registration effective during the legal proceeding as a “Licensing Body for Performers’ Rights” to operate a presumption-based collective management system applied to the representation of the following “classes of rightholders”(which clearly included the classes of performers whose performances are embodied in phonograms published for commercial purposes and used for broadcasting and communication to the public):

1. Musicians a) Featured Artists including Bands & Solo Artists;

b) Non-Featured Artists (session musicians);

c) Orchestras and Orchestra members;

2) Performers – Singers, Choirs, Comedians;

3) Actors[[8]](#footnote-8)

It follows from this that, since PPI is *not* registered to manage the rights of performers; it was not authorized to perform any management activities in respect of those rights apart from collecting the single equitable remuneration (in which also the performers’ share is included) and transferring the share due to any possible performers. For the fulfillment of all the other management activities, not the PPI (not a CMO of performers) but RAAP (the CMO of performers), which included:

(i) distributing and paying the corresponding amounts of share of the single equitable remuneration transferred by the PPI to its members and to the performers otherwise represented by it on the basis of the presumption of representation under Section 280(7) of the CRRA;

(ii) transferring the corresponding amounts of remuneration due to the performers represented by foreign CMOs as agreed upon in the reciprocal representation agreements concluded with those CMOs;

(iii) deducting amounts for cultural and social purposes, if any, in accordance with the decisions of the competent bodies of RAAP and with the reciprocal representation agreements concluded with foreign CMOs;

(iv) performing “diligent search” to identify and locate performers to whom remuneration is due;

(v) applying the policy established, and the decisions made, by the competent governing bodies of the organization on the use of non-distributable amounts of remuneration;

(vi) clarifying – on the basis of the available databases and a “diligent search” that may be needed – whether or not certain amounts correspond to the use of performances that do not enjoy protection (in other words, that are in the public domain) for some reason; such as because (a) their term of protection has expired; or (b) their performers are nationals of a country who – in the absence of treaty relationship – do not enjoy protection; or (c) although their performers are nationals of a country that is party to the WPPT, for the relevant acts, by virtue of Article 2(4) of the Treaty, they do not enjoy protection (there is no obligation to pay remuneration to them) because their country has made a reservation to the application of the right in respect of such acts;

(vii) taking care of the use of the amounts corresponding to the use of performances mentioned in the preceding point not covered by any treaty obligations and, thus, outside the contours of intellectual property rights, in accordance with the national laws that are competent to provide about their purposes, such as using the amounts for cultural and social purposes and the promotion and recognition of creative activities of performers.

PPI did not recognize RAAP’s authorization to carry out these collective management activities for performers in accordance with the Collective Management Directive (Directive 2014/26/EU; the CM Directive) as a CMO authorized to operate a presumption-based system. It took over, step by step, the various competences, reducing RAAP’s role practically just to paying out the remuneration to its members already distributed by PPI.[[9]](#footnote-9) Several conflicts emerged from these practices that were not necessarily dealt with in the lawsuit in connection with which the CJEU adopted its judgment. There was another judicial case just between RAAP and PPI where a number of conflicts were addressed.

In the other lawsuit, first the High Court[[10]](#footnote-10) and then the Court of Appeal,[[11]](#footnote-11) in general, approved and even encouraged PPI’s above-mentioned practices with one exception; namely that, while the High Court had found that PPI could also complete the distribution of the equitable remuneration to all the performers, irrespective of whether or not they are represented by RAAP (and just to transfer the distributed amounts to RAAP to pay the concrete amounts to the performers), the Court of Appeal at least reinstated the function of RAAP to distribute the equitable remuneration to the performers – but only who have explicitly trusted RAAP with the management of the right.[[12]](#footnote-12)

As mentioned above:

- under section 281 of the CRRA, there are three alternative forms – clearly separated by the conjunctive “or” – in which the Controller may register a CMO (“licensing body”): (i) a body “*to act” “until the contrary is proved””on behalf of the classes of rightsowners for whom it claims representation right*s”; *or* (ii)a body to act “on behalf of the rightsowners who have assigned rights to it”, *or* (iii)a body “exclusively licensed to act”.

- RAAP has *not* been registered in the second alternative form as a body to act only “on behalf of the rightowners who have assigned rights to it” (definitely, there is no such limitation in RAAP’s registration); RAAP has *not* been registered either in the third alternative form as a body to act only to the extent that it is “exclusively licensed to it” (definitely, there is no such limitation in RAAP’s registration); instead of this, RAAP has been registered in the first form to represent the following “classes” (in RAPP’s registration explicitly the authority of representation of “*classes of righholders*” is indicted): “1. Musicians a) Featured Artists including Bands & Solo Artists; b) Non-Featured Artists (session musicians); c) Orchestras and Orchestra members; 2) Performers – Singers, Choirs, Comedians; 3) Actors”, which – beyond any imaginable doubts – mean any performers whose performances are embodied in phonograms (“sound recordings”) published for commercial purposes;

* under section 281, a CMO (“licensing body”) registered in this form rather than in the second or third forms may (is authorized to) act (= may (is authorized to) carry out all the relevant activities of management of rights) “until the contrary is proved” “on behalf of the classes of rightholders for whom it claims representation rights;”
* PPI – as any other organization apart from RAAP – has not been registered to manage performers’ rights; neither in the first alternative form to manage the rights of any class of performers, nor in the second alternative form to manage the rights of any performer who has assigned his or her right; nor in the form to manage the rights of any performer who has exclusively licensed it to do so; PPI has no authority other than to collect the remuneration (the nature of which must be, as much as it is possible – and it is quite clearly possible – to be interpreted in accordance with the EU law, as a single equitable remuneration to be shared with performers in accordance with Article 8(2) of Directive 2006/115/EC and transfer it to RAAP to carry out all the rest of collective management tasks mentioned above[[13]](#footnote-13) (including the task to take care of a possible – but not probable – situation where “the contrary” is “proved”, a task of any CMO to operate either a presumption-based or an extended collective management system, now regulated also in Article 12 of the Digital Single Market Directive).

In view of this clear legal situation, it would have been normal that, if any question had been asked in a court case about the collective management activities for which RAAP has been registered and is authorized to carry out, the obvious answer would be this:

The registration of a licensing body confers a presumptive right to act, until the contrary is proved, on behalf of all performers within the registered classes without any requirement for assignment or licensing. Applying this to the acts of the case, RAAP is entitled to collect the equitable remuneration not only on behalf of those individual performers who have actually assigned the right, but also on behalf of all rightholders for whom it is presumed to act, until the contrary is proved.

Instead of this, the High Court adopted this ruling[[14]](#footnote-14) – and the Court of Appeal agreed with it (with the exception that the representation is supposed to be based necessarily on assignment)[[15]](#footnote-15) and tried to justify it by various arguments:

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

The arguments of the Court of Appeal may be summed up in this way and the reasons for which, with due respect, they are not well-founded are as follows:

First, in view of the Court, it is in conflict with the CM Directive to provide in a national law a rebuttable presumption that a CMO may also act on behalf of a class of rightholders who have not individually assigned their rights or otherwise licensed the CMO. Therefore, any interpretation of section 281 of the CRRA according to which a CMO registered for the management of certain classes of rightholders – such as RAAP for the relevant classes of performers – may act, until the contrary is proved, on behalf of the classes of rightsowners for whom it claims representation rights, would be in conflict with the EU law with which the CRRA must be interpreted as much in accordance as possible. The Court of Appeal has founded this argument, with reference on the provisions CM Directives[[16]](#footnote-16) on the freedom of rightholders to choose which CMO and to what extent they authorize to manage their rights, if at all, and the requirements that a CMO may only act as licensed by individual rightholders, in particular Articles 4(7) and (8) and 5(2) and (4). The Court has stated as follows: “I am satisfied that the mandatory collective management of rights, the presumption of authorisation of a CMOs or the exclusive collective management of rights through one licensed CMO is inconsistent with the provisions of s.280 of the Act of 2000[[17]](#footnote-17) and of the Directives”[[18]](#footnote-18). It is submitted that, the “satisfaction” of the Court is unjustified. In the Directive, recital (12) – otherwise also quoted by the Court[[19]](#footnote-19) – makes it clear that ”[t]his Directive[…]*does not interfere with arrangements* concerning the management of rights *in the Member States such as*[…] extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations“. [Emphasis added.]

Second, according to the Court, if section 281 were interpreted in a way that a CMO, may be registered to act, until the contrary is proved, on behalf of the classes of rightholders (like RAAP on behalf of the relevant classes of performers) for which it has been registered, the second part of section 281 would be superfluous.[[20]](#footnote-20) It is difficult to understand what is meant by this argument. Nevertheless, it is quite evident that it is not valid. It is not because, where, in a legal norm, it is provided that either alternative A may be applied *or* alternative B may be applied *or* alternative C may be applied and it is found that alternative A is the right alternative to apply, it does not mean that the rest of the provision becomes “superfluous”; just in the given case, the other two alternatives are not applied. It could hardly be found any reason to find, on the basis of the principles of interpretation of legal texts or the basic rules of logic, that if there are three alternatives and one is chosen, it should be applied along with another alternative. It goes without saying that this applies also to the three alternatives in section 281.

Third, in the opinion of the Court, in section 281, the proviso “until the contrary is proved” does not refer to the authorization of a CMO, like RAAP, to act, until the contrary is proved, on behalf of the classes of rightowners represented according to the registration, but it refers to the validity of the certificate (and, thus, to the validity of the registration) from the viewpoint of the question of whether or not a CMO may act on behalf of the given classes of rightholders.[[21]](#footnote-21) It is submitted that not only nothing like this follows from the text of section 281 – which is about COMs’ acting on behalf of the classes indicated in the certificate and not about the validity of a certificate – but it is also self-contradictory. A situation where a certificate does not apply anymore for a class of rightholders originally certified may only emerge where the certificate is modified. The other possibility mentioned by the Court is that CMO does not actually claim the representation to manage the rights of a class of righholders mentioned in the certificate. It is an imaginable situation which certainly does not apply to RAAP, which does wish to manage the rights of performers in accordance with the certificate. If, however, such situation emerged, it would nothing do with the general question of the applicability of a presumption-based system; in such a case, simply the certificate (and the underlining registration) would have to be modified or withdrawn.

To sum up: RAAP, also on the basis of section 281 of the CRRA, and definitely in accordance with the CM Directive – the recital (12) of which is confirmed now also by the provisions of the Digital Single Market Directive[[22]](#footnote-22) – is authorized to manage the rights of performers to the single equitable remuneration for the relevant classes of performers in accordance with its registration and certificate. It is not the case what the Court alleges; namely that the certificate and registration of RAAP would only mean “to hold itself out as available to represent the proposed classes, but this does not dispense with the necessity for those individual performers to request representation and to grant the requisite assignments, or exclusive licences, to authorise the licensing body to act on their behalf.”[[23]](#footnote-23) By this, the Court suggests that RAAP has been registered and certified according to the second or third alternatives mentioned in section 281 and, thus, it is only authorized to act on behalf of individual rightholders who have assigned there rights to – or exclusively licensed – it, respectively. However, the fact is that RAAP has been licensed and has certificate to act on behalf of the relevant classes of performers and, in accordance with section 281, it is has authorization to act on behalf of all performers, until the contrary is proved.

It is respectfully suggested that the reason for which the Court has adopted these badly founded rulings is that it too lightly reached the finding – contrary to what is stated in recital (12) of the CM Directive – that a presumption-based collective management system is in conflict with the Directive. It is another matter in which cases and for what reasons it is necessary to apply presumption-based (or extended or mandatory) collective management system. One of the reasons is to avoid the consequence that inevitable occur if the Court’s “only to hold itself out” theory were applied, namely that, in the absence of collective management, several performers would lose their chance to exploit their rights (or if they still would like to exercise it individually, they would have to reach agreement about their share with the CMO of producers which do not have registration to manage their rights and represent the parties in the negotiations – with interests conflicting with the performers interests). The Court sincerely recognizes that such a situation would emerge to the detriment of the exercisability of the rights of a number of performers,[[24]](#footnote-24) but it alleges that it is inevitably follows from the obligation of the Court to interpret the provisions of the CRRA in accordance with the CM Directive under which a presumption-based system cannot be applied[[25]](#footnote-25). As analyzed above, this does not follow from the CRRA; exactly the contrary follows from section 281 of the Act in due accordance with recital (12) of the CM Directive and as confirmed by the provisions of Article 12 of the Digital Single Market Directive.

Concerning the amounts of the remuneration collected for foreign performers, separate comments should be made. PPI has introduced the practice that, in those cases where foreign performers did not enjoy the right to remuneration, it transferred the relevant amounts to the producers of the phonograms concerned. PPI justified – on the basis of what seemed to be a correct legal analysis[[26]](#footnote-26) – the transfer of the remuneration to the US producers that it had collected for acts in respect of which, by virtue of Article 4(2) of the WPPT (since the U.S, has made reservations concerning those acts), Ireland did not have obligation to apply the right to remuneration under Article 15(1). The basis of the view of PPI has been that – since no international obligations apply for the remuneration of such acts – there is no obstacle to use it in such a generous way and pay it to US producers despite the absence of international obligations. However, it is another matter that, since PPI does not have authorization (registration) to manage performers’ rights – but RAAP has such authorization – it is RAAP which is supposed to take the necessary arrangements for the amounts corresponding to the use of the performances of performers who, in the absence of international obligations, do not enjoy the right.

***III. With due respect, it seems regrettably that the CJEU’s ruling on the obligation to apply the right provided in Article 8 of Directive 2006/115/EC to performances and phonograms of nationals of States that are non-members of the EU and are not protected under the WPPT is not well-founded; one cannot speak about the non-application of a non-existing right as a ‘limitation’ of a right; such performances and phonograms are outside the contours of copyright and related rights (and this is adequately clarified in the existing laws of the EU Member States***

The CJEU did not share the position outlined above. In response to the preliminary questions submitted by the Irish court, in point 2 of its rulings, as quoted above, it stated as follows:

Article 15(3) of the [WPPT| and Article 8(2) of Directive 2006/115 must,as EU law currently stands, *be interpreted* *as meaning that reservations notified by third States under Article 15(3) of the [WPPT] that have the effect of limiting on their territories the right to a single equitable remuneration* laid down in Article 15(1) thereof *do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States,* *but such limitations may be introduced* by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. *Article 8(2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.* [Emphasis added.]

The ruling implies that Article 4(2) cannot be used directly as a basis to exclude the application of the right to a single equitable remuneration provided in Article 8(2) of Directive 2006/115/EC. According to the Court, the right is granted to any performers and producers without any limitations of their nationality irrespective of whether or not their Contracting Parties have made reservations and even irrespective of whether or not their countries are Contracting Parties of the WPPT at all. According to this point of the rulings, the application of Article 4(2) of the Treaty would mean a „limitation” of this right for which, however – as the Court has pointed out – a provision would be needed in accordance with the requirements of Article 52(1) of the Charter of Fundamental Rights. With due respect, this ruling does not seem to be well-founded for various reasons:

First, Article 4(2) of the WPPT reads as follows: “*The obligation* provided for in paragraph (1) [to grant national treatment, inter alia, with regard to Article 15 on the right to a single equitable remuneration] *does not apply* to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty” [emphasis added]. That is, *there is no obligation* of the E.U. and its Member States to provide for the right; *there is no beneficiary, there is no right to limit.* The same is true for the absence of treaty relationship. *The acts* performed in these cases *are outside the contour of the protection of intellectual property rights*.

Second, therefore, since *the limitation of non-existing rights of non-existing beneficiaries conceptually is not possible*, the applicability of *Article 52(1) of the Charter – on the question of limitations of intellectual property rights – may hardly emerge.* (Otherwise, it is also doubtful that any concrete right and claim might be derived from Article 17(2) of the Charter according to which intellectual property rights are protected, and the same seems to be true concerning concrete limitations. It is not the Charter but the specific EU norms – in accordance with the relevant international treaties – which determine what “intellectual property rights” are provided and what limitations under what conditions may be applied.) In this connection, it should also be seen that – in contrast for example with the US Constitution, Article 17(1) is a dumb provision without any substantive element leaving the determination of intellectual property rights to the provisions of various branches thereof on the basis of the criteria applicable in those branches.[[27]](#footnote-27)

Third, there are two methods applied in national laws to extend protection to nationals of foreign countries. One is the system that is usually applied in common law countries, where the extension takes place *through separate orders or decrees*; in the E.U., this is not frequent but Ireland happens to apply it.[[28]](#footnote-28) The other method is – and it is what the overwhelming majority of EU Member States apply – the *inclusion of a general provision in national laws* to state that, in addition to the rights provided for nationals (and the nationals of the EEA Member States), rights are granted also to the nationals of countries *in accordance with the obligations under the international treaties* binding the Member States concerned.[[29]](#footnote-29) These provisions fulfill the role of the possible need for clarification referred to in point 2 of the *RAAP* rulings; they have been applied without any problem to determine what is protected and what is not. The question, if it has been raised at all, has been solved satisfactorily at Member States level through these provisions since the establishment of the E.U. and even since the setting up of the predecessor European integration frameworks. If now it has become an issue in Ireland, it has not derived from the absence of an EU level provision in the Directive to clarify the status of foreigners, but because the CRRA, as the CJEU has found it, does not provide a right to equitable remuneration in accordance with Article 8(2) of the Directive, and because Ireland apparently has not applied any of the above-mentioned two methods of extending the right to foreign performers in accordance within its obligations under the WPPT.

Fourth, granting national treatment in respect of the uses of the performances of foreign nationals in accordance with Article 4(1) of the WPPT is an obligation of the E.U. and its Member States; however, on the understanding that the obligation does *not* extend to the cases mentioned in Article 4(2) of the Treaty. It is not realistic to presume that, when the competent organs of the E.U. decided to ratify and implement the Treaty, they had the intention either not to apply the obligation to grant national treatment or to extend it to cases where there is no such obligation. As any other cases where national treatment – with or with limitations – is to apply, it was considered to be obvious (as it really was) that the rights of foreigners were to apply in accordance with the obligations under the international treaties within the limits thereof. It was also clear that national laws had duly clarified this as mentioned in the preceding point.

Fifth, it seems that the reason for which, in general, there are no provisions about this issue in the EU legislation was exactly the obviousness of the issue settled by the international treaties. This was certainly the reason for which the CJEU in *SENA[[30]](#footnote-30)* did not include in the judgment the analysis and statements made by Advocate General Antonio Tizzano in his opinion, who pointed out that national treatment provided in the international treaties binding the E.U. and its Member States is part of the EU law. Although the case concerned the application of Article 8(2) of the Rental, Lending and Related Rights Directive in its original Directive 92/160/EEC version before the implementation of the WPPT in the E.U., the analysis and statements made in view of treaties applicable at that time – the TRIPS Agreement and the Rome Convention – were of a general nature about the question of national treatment obligations.[[31]](#footnote-31) This is such a key point of the extent of protection that, if the CJEU had not agreed with the AG, it certainly would had clarified it in the judgment; but it did not, certainly because it had not found the AG’s analysis and statements badly founded*.*

Sixth, it would hardly be a well-founded assumption that the E.U. and its Member States did not consider it clear that the provisions of the WPPT on the obligation of national treatment and its limitation in Article 4(2) are parts of the EU law, because the delegations of the E.U (at that time, the European Community) and its Members States were key negotiators insisting on the adoption of Article 4(2) which corresponded to the consistently represented policy of the Community to avoid accepting unilateral legal and financial burdens.

Seventh, it is a basic principle of the CJEU – stated in a number of judgements[[32]](#footnote-32) – that the interpretation of the EU norms should be in accordance, as far as possible, with the provisions of the international treaties binding the E.U. and its Member States. It is respectfully submitted that there was no good reason for which the CJEU did not apply this principle in the interpretation of Article 8(2) of Directive 2006/115/EC and introduced instead a burdensome new obligation for the E.U. and its Member States that does not follow from their Treaty obligations.

Eighth, where foreign nationals do not enjoy a right – not because an exception to or limitation of an otherwise existing right is applied, but because no such right is granted in absence of international obligations – the use of the subject matter is free; in that respect, it is part of the public domain. In such a case, one cannot speak about any term of protection of the subject matter – in the given case, the phonograms published for commercial purposes. This is made clear in Article 7(2) of the Terms Directive (Directive 2006/116/EC) which provides as follows concerning the terms of protection of related rights under Article 3 of the Directive: “without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.” This is in full harmony with Article 4(2) of the WPPT and it follows from it, in the same way as from the provision of the Treaty, that there is no obligation under Article 8(2) of Directive 2006/115/EC to grant the right to the nationals of other Contracting Parties to the extent that they have made reservations and do not provide the right – in other words, to the extent that reservations apply, the term of protection is zero.

If point 2 of the *RAAP* rulings were applied as stated by the CJEU, an unexpected financial burden would emerge for the Member States about which they had been persuaded – and rightly enough – that it did not exist and did not follow from their international obligations. If the logic of the CJEU were recognized as justified, the same burden would emerge in the application of other rights provided in EU law in respect of which it is not stated – because it has been considered, also rightly enough, that it is obvious – that they only apply to foreign nationals in accordance with the international treaties within the limits of the obligations under the treaties. For example, the rights provided in the Information Society Directive (Directive 2001/24/EC) implementing the WCT and the WPPT would become applicable to all foreigners irrespective of whether or not there is an obligation to apply national treatment or there would be any treaty relationship at all with the countries of which they are nationals.

The CJEU has not dealt with the question of the applicable time of the newly recognized obligation introduced in *RAAP*; therefore, in principle, it might be understood that point 2 of the rulings applies also retroactively, since normally the judgments of the Court clarifying an existing legal situation apply in that way (*ex tunc*). This would create grave financial problems for the Member States in view of the foreseeable massive number of lawsuits to claim remuneration for all acts covered by Article 8(2) of the Rental, Lending and Related Rights Directives performed since its entry into force, in its original version, at the beginning of 1993, provided that the prescription time has not elapsed yet. However, it seems that the problem – the possible retroactive application of the newly introduced obligation – may be settled also on the basis of the established case law of the CJEU. It was as early as in the *Sabena* case[[33]](#footnote-33) in 1976 that the European Court of Justice clarified that *ex nunc* application (only from time of the adoption of a judgment) may still be justified if two conditions are fulfilled: first, the judgment is adopted in an unexpected way in the sense that there was previously no indication that the issue would emerge at all and that it would be settled in identifying a previously not recognized and not applied obligation and, second, the retroactive (*ex tunc*) application of the newly applicable obligation, due to the number of claims with which the Member States did not have reason to calculate, would mean potentially a sudden, big and disproportional financial burden.[[34]](#footnote-34) It seems that as regards the potential impact of point 2 of the RAAP rulings, both of these conditions are undoubtedly fulfilled.

***V. It would be desirable to make it clear in the EU law that no remuneration is due for the uses of performances and phonograms not protected in the EU; nevertheless, where the lump-sum paid by the users is still calculated to also cover such uses, (i) in the absence of EU legislative norms, the corresponding remuneration may be transferred to the foreigners on the basis of reciprocity; or (ii) it may be transferred to foreigners without reciprocity; or (iii) it (as not-for-distribution) may be used in the same way as non-distributable remuneration for cultural and social purposes***

Of course, the disrespect of this ruling of the Court might not be an attractive, but it would be necessary to clarify that point 2 of the ruling is not applicable retrospectively (in an *ex tunc* manner), and it would also be desirable to find an appropriate solution to delay or suspend the application of this ruling until the European Parliament and The Council confirm in a legislative norm too (what seems to clear also without this) that the right provided in Article 8 of Directive 2006/115/EC, in addition to the nationals of the EU Member States, is only applies to those performers and producers of phonograms whose right are to be protected under the international treaties.

As regards the need for getting rid of the newly introduced obligation which does not follow from the E.U.’s international obligations and from its consistently applied copyright and related rights policy concerning national treatment and its desirable limitations, the CJEU itself has offered a possible solution in point 2 of the rulings; namely, to state in Directive 2006/115/EC that Article 8(2), is only applicable to the nationals of Contracting Parties other than the EEA Member States in accordance with the obligations of the E.U. and its Member States under the international treaties (which would correspond to the already existing provisions in the national laws of the majority of the Member States). (However, in view of the analysis above, it is submitted that this would go also without such a clarification.)

It should also be taken into account that it might create unnecessary *a contrario* implications regarding the application of the rights provided in other directives – such as in particular the Information Society Directive – without such a clarification. Nevertheless, the problems created by the unexpected ruling of the CJEU could be eliminated, including the serious negative impact that the ruling would create by suddenly doing away significant sources applied to pursue important cultural objectives. This is discussed below along with the broader questions of whether or not the application of the “no collection without distribution” principle is necessarily justified and how and for what purposes the amounts collected for acts not covered by international obligations might be used.

At present, the use of the not-for-distribution amounts of remuneration is a matter of national legislation and case law of the Member States. It is possible to apply the generous practice foreseen (with due respect, not in a well-balanced manner ) in *RAAP* and applied by Ireland (provided, however, that the management of the share due to performers must not be a matter of the organization of the producers but the association of performers); it is also possible, however, to use the remuneration collected but not distributable – due to the absence of international obligations – for the promotion of creativity and related cultural purposes, which, under Article 6(c) of the Treaty on the Functioning of the EU, is basically a matter of competence of the Member States. As regards the principle of “no collection without distribution” (see below), it may also be applied by some Member States, but not necessarily in the sense that the collected remuneration must be distributed also to those whose rights are not protected, but as regards the determination of the ways of using the amounts corresponding to the non-protected phonograms and performances.

It goes without saying that CMOs may deduct the costs of management before distributing and transferring the amounts due to the rightholders in accordance with their distribution rules. The use of the remuneration for any other purposes may only be possible with the permission of the rightholders. Such permissions may be granted in different ways: individually, case by case (which is not typical in practice), by accepting the conditions of membership in the organization (which is fairly frequent), through the decision of the bodies representing rightholders (which also takes place often) or by means of reciprocal representation agreements between CMOs (which is quite common practice).

The purposes other than covering actual costs and distribution of the remuneration for which the use of a certain percentage of collected sums is authorized are, in general, cultural or social purposes. Deductions for such purposes are quite typical in the case of “traditional” CMOs, such as musical performing rights societies. Cultural purposes normally mean promotion of national creativity (through prizes, competitions, fellowships, etc.), while social purposes serve health insurance or pension funds. Of course, rightholders are free to dispose of their remuneration as they wish, but it should be based really on their decisions either directly or through the competent bodies of their CMOs (the latter mainly applies in the relationship with foreign organizations). In this respect, the basic legal principle of *nemo plus iuris transferre potest quam ipse habet* (that is, nobody may transfer more rights than he himself has) should be respected. This means, for example, that the assembly of a collective management organization, which essentially consists of rightholders who are nationals of the country concerned, is not entitled to exercise its “generosity” by using the remuneration of *foreign* rightholders for cultural and/or social purposes without authorization granted by those rightholders or by the CMOs representing them.

When rightholders join, or are otherwise represented by, a CMO, such deductions as a rule are simply parts of the membership package. It is difficult to speak about individual decisions of rightholders, in general, and in the case of foreign rightholders in particular, in whose name their CMOs agree to such deductions. Therefore, although the deduction of a certain percentage may be acceptable, that percentage should be quite low; otherwise, doubts might emerge concerning the legality of such a practice.[[35]](#footnote-35)

There are, however, specific categories from this viewpoint. For example, just in respect of the management of the right of performers and producers of phonograms covered in this article, somewhat different considerations apply as regards the share due to performers from the single equitable remuneration. One of the recognized purposes of these rights is to counterbalance the losses that performers suffer by losing employment opportunities as a result of widespread uses of performances included in phonograms. For this reason, in the application of those rights, cultural and social considerations may be even more important than in the case of authors' rights. This also means that the use a relatively higher percentage of the collected sums for the promotion of creativity and for social purposes may be justified.

It is discussed in relatively detailed manner above how the CJEU in *RAAP* would introduce the obligation for the Member States – not existing under the WPPT (by virtue of Article 4(2) of the Treaty) – to grant the right also to nationals of those other Contracting Parties which, in the given cases, do not grant the right to the nationals of the EU Members States (since they have made reservations to the application of the right provided in Article 15(1) of the Treaty as allowed by Article 15(3) or even they are not party to the WPPT (and even to the Rome Convention). As mentioned, one of the negative consequences of the newly introduced obligation to collect and transfer remuneration for all performers irrespective of whether or not there is an international obligation to do so, would be that several Member States would be deprived from important financial sources they have been legitimately used for cultural purposes, with serious negative effect for the promotion of creativity and social status of performers.

As discussed, the introduction of such a new obligation for the Member States is not justified and it is necessary to clarify (by means of a quickly included provision in Rental, Lending and Related Right Directive) that it does not apply. Hopefully, this will take place, in which case the question emerges whether it is justified to collect remuneration at all where there is no beneficiary of the right under the WPPT.

This issue was discussed quite intensively at the 2000 Diplomatic Conference on the rights of audiovisual performers. Although not the rights of performers covered by the WPPT were involved, in the debate, the position of the E.U. (at that time, the European Community) and the Member States on this issue – also applicable for performers whose performances are embodied in phonograms – became quite clear. Before the closure of the – in that stage not fully successful – Conference, the Chairman of Main Committee I made the following statement intended to become an agreed statement in accordance with Article 31.2(a) of the Vienna Treaties Convention:

[D]uring the work of Main Committee I, a proposal was made to include in the Treaty a provision stating that no Contracting Party should allow collection of remuneration in respect of performances of nationals of another Contracting Party, unless distribution of such remuneration is made to those nationals. Such rules have not been taken to the text of the Treaty. It is understood that there is no legal basis for collection of remuneration in a Contracting Party in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore, all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they receive the remuneration collected on their behalf.[[36]](#footnote-36)

It is to be noted that two different cases were covered in this would-be agreed statement: in the first four sentences, the case where – as under Article 4(2) of the WPPT – there is no right in view of which and no beneficiary for whom collection would be justified, and in the last sentence, where there is a proper mandate to collect remuneration. The real issue which was debated at the Conference was the case covered by the first four sentences. After the given session, the delegation of the European Community made the following declaration:

The European Community and its member States have taken note of the declaration of the Chairman of Main Committee I regarding Article 4.

In reaction to this, the European Community and its member States submit the following declaration for inclusion in the proceedings of the Conference:

“The declaration made by the Chairman of Main Committee I in relation to Article 4 is of a unilateral nature and in no way implies a commitment for the members of Main Committee I or for the future Contracting Parties to the Treaty.”[[37]](#footnote-37)

This declaration reflects the position of the E.U. that it is appropriate to collect remuneration for the rightholders of such related rights also where it is not distributed because there is no right to be applied and no beneficiary. Three points should be made in this connection:

First, in principle, the amounts corresponding to the acts of communication to the public and broadcasting may truly be transferred to the foreign nationals concerned even if such an obligation does not follow from the WPPT due to Article 4(2); however, it would be a unilateral gesture and, instead of this, it should rather be linked to reciprocity (which would require further analysis from the viewpoint of EU law and possibly also new legislative norms).

Second, it is understandable that, commercial users and consumers do support the “no collection without distribution” principle – with strong emphasis on the “no collection” aspect – because paying for what is not protected may rightly be felt by them as an unjustified economic burden. It follows from this that the laws of Member States may (as some of them in fact do) exclude collection of fees for those foreigners who do not enjoy the right under Article 15(1) and obligate the CMOs to adapt their tariff system to this.

Third, nevertheless, in certain countries, not only the non-distributable amounts (in the case of which the rightholders cannot be identified and/or located) but also the not-for-distribution amounts (in the case of which – due to absence of obligation to grant national treatment or the application of reciprocity – no fees are due to foreign rightholders) are used for cultural purposes. In several EU Member States, the single equitable remuneration is collected irrespective of whether they are distributable, non-distributable or not-for-distribution. The non-distributable amounts (in principle due to rightholders who, however cannot be identified and/or located) are to be used in accordance with relevant provisions of the CM Directive[[38]](#footnote-38) (frequently, to a great extent, for cultural purposes). In contrast, the collection of not-for-distribution amounts is rather similar to (and it might even be regarded as a kind) of *domain public payant* not covered by genuine copyright and related rights norms. Such amounts normally – as in the given cases – do serve the purposes of cultural policy, including the fulfillment of the obligation of the E.U. and its Member States to protect cultural diversity, in accordance with the relevant provisions of the TFEU and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions binding the E.U. and its Member States. It does not mean that such amounts are supposed to be used exclusively for the promotion of creativity and the protection of cultural diversity in the country where they are collected. One of the purposes may also be to use it for cooperation purposes to promote due recognition of performers’ rights and to establish the infrastructure and organizations to manage their rights in the developing world.

As regards deductions for cultural and social purposes from the remuneration the amounts of which are due to rightholders, different considerations apply to national and foreign rightholders. Under the international treaties – the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO “Internet Treaties” – there is no obstacle to provide for deductions from the amounts due to *national* rightholders. Although this is not too elegant, these kinds of provisions may also fix a level of protection lower than what the international norms require. Such provisions, however, are not applicable in respect of *foreign* owners of rights, since, for their protection, at least, the minimum level prescribed by the relevant international norms applies.

There are two specific categories of remuneration in the case of which the governments have broader freedom to prescribe deductions for cultural purposes. The first one is a horizontal category that may concern various rights; namely, the amounts of non-distributable remuneration collected as mentioned above. The second category relates to certain rights to remuneration, such as, in particular, the right to remuneration for private copying, in the case of which the percentage of the deduction for cultural and social purposes may be higher[[39]](#footnote-39), provided that the remaining part is sufficient to eliminate, or at least decrease to a reasonable level, the unreasonable prejudice caused by widespread private copying to the legitimate interests of rightholders.

Recently, attempts have been made by some performing rights societies to eliminate, from the reciprocal representation agreements, the provisions on deductions for cultural and/or social purposes, or at least drastically reduce the level thereof below the traditionally recognized acceptable 10% level. Although there is no legal obstacle to this, and although it is a legitimate wish of such CMOs to get as high an amount of remuneration with as little deductions as reasonable, it should be seen that the sums set aside for such deductions may contribute to strengthening the “public relations” position of copyright in the countries where such amounts are “left”. Through grants for the promotion of creativity, prizes for the recognition of outstanding creative achievements, and/or financial support to young talents or to authors in need, it may be made more easily perceivable that copyright functions for the objectives that it is supposed to serve. Through this, the creative community of the countries concerned will stand more firmly behind the CMOs and the entire copyright system. With the readiness of the community to fight for its own interests and rights – and, through this, for efficient, high level copyright protection, in general – it is easier to obtain the support of the governments to create the necessary legal and practical conditions to protect the rights of all rightholders; both national and foreigners.

However, it is to be underlined again, that the category of not-for-distribution amounts of remuneration discussed in this article is a specific category. Within the limits and in the forms discussed above, it is up the legislations and governments of the EU Member States and other parties of the international treaties to determine the use of the amounts (and also whether in the tariff systems they are supposed to take into account at all).

1. \* Member of the Hungarian Copyright Experts Council, former Assistant Director General of WIPO. [↑](#footnote-ref-1)
2. Recorded Artists Actors Performers Ltd [RAAP] v. Phonographic Performance (Ireland) Ltd, [PPI], Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General, (Case C-265/19; ECLI:EU:C:2020:677) [↑](#footnote-ref-2)
3. Article 52(1) of the Charter reads as follows:

   1.   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. 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. [↑](#footnote-ref-3)
4. The preliminary questions to which the CJEU has responded in this way has been submitted by the Irish High Court as ruled in its judgment of January 11. 2019 ([2018] the High Court 2016 Bo 6897P; hereinafter: judgement of the referring court). [↑](#footnote-ref-4)
5. Until the lawsuit, no such country had been designated (for reciprocal protection what would follow from item (c)). [↑](#footnote-ref-5)
6. *See* High Court order [2019] No. 10801 P. and Court of Appeal Record Number: 2019/22fi. [↑](#footnote-ref-6)
7. The WIPO Glossary defines “the principle of *relative* freedom of legal characterization of acts and rights” in this way [emphasis is added to the adjective “relative”]:

   1. It is a broadly applied practice in national legislation to use terms other than those appearing in the *international norms on copyright and related rights* concerning certain acts covered by such rights, and consequently by the rights themselves; that is, to characterize the acts and rights concerned in a way different from the way they are characterized legally in the said international norms. For example, several countries grant a “*right of public performance*” in a way that it covers more or less all *non-copy-related rights* (in particular, also the *right of broadcasting* and the *right of communication to the public by cable (wire)*, which, in the *Berne Convention* are construed as separate rights), or it is also frequent in national laws that a broader *right of broadcasting* is provided which also covers the *right of communication to the public by cable (wire)*, a separate right under the *Berne Convention*.

   2. Such a practice is accepted and regarded as legitimate, provided that the level of protection granted by the legislation of the given country, in spite of the differing legal characterization of the acts and rights concerned, corresponds to the minimum level of protection prescribed by the relevant *international norms on copyright and related rights* (such as in respect of the nature of the rights – whether *exclusive rights* of *authorization* or a mere right to *remuneration* – or the scope of *exceptions* to *and limitations* on them). For example, if the concept of *broadcasting* is extended also to *communication to the public* and even to (interactive) *making available to the public*, this does not authorize the legislators of the country concerned to extend the *limitations* allowed in Article 11*bis*(2) of the *Berne Convention* (*non-voluntary licenses* or *obligatory collective management*) beyond the scope of the *right of broadcasting* determined in the *Berne Convention* (in its Article 11*bis*(1)[…]. (Mihály Ficsor “*Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of the Copyright and Related Rights Terms*”, WIPO publication No. 891(E), (hereinafter: WIPO Guide and Glossary), p. 294.)

   It is submitted that this principle equally applies not only to the legal characterization of acts covered by copyright and related rights and the exceptions to and limitations of the rights but also to the legal characterization of the subject matter of rights.

   “Phonogram” is determined in Article 2(b) of the WPPT in this way: “(b) ‘phonogram’ means the fixation of the sounds of a performance or other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.” The Rental, Lending and Related Rights Directive does not contain a definition of “phonogram”. At the time of its adoption in 1991, certainly the definition in Article 3(b) of the Rome Convention was taken into account which was simpler but, in key aspects, it was the same as the definition in the WPPT: “(b) ’phonogram’ means any exclusively aural fixation of sounds of a performance or of other sounds”. Although the the European Union is not party to the Rome Convention, it is a Contracting Party to the WPPT; thus, it is hardly questionable that this definition as provided in Article 2(b) of the Treaty is applicable in the E.U. and in its Member States.

   In section 2(1) of the CRRA, “sound recording” is defined in this way: “’sound recording’ means a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced.” One element is missing in the definition due to which it may not be regarded to be in full accordance with the Rome and WPPT definitions; namely, it is not sufficiently clearly clarified that it is an *exclusively aural* fixation. This, however, hardly creates a substantive delimitation problem in the given context; if any question emerged in this respect, it could be easily settled through appropriate interpretation of the provisions.

   Having clarified this, it may be found that the CRRA definition in essence corresponds to the definition in Article 2(b) of the WPPT. It is about the same subject matter of intellectual property rights. In fact the term “sound recording” is the same in English as the Greek-rooted term “phonogram”: “phono”= sound + “gram” = writing, recording”. Therefore, there is no doubt that the provisions of the Irish law on “sound recordings” would have to be in accordance with the provisions on the protection of “phonograms” under the EU law and the relevant international norms. The characterization of sound recordings/phonograms as subject matter of copyright rather than subject matter of related rights in itself would not create a conflict with the international and EU norms. It would not be a problem either if more rights were granted to the producers (from the viewpoint of the international norms certainly not and, from the viewpoint of the EU law, there would not be either if the same extra rights were granted also to the national of the other EU Member States). However, the different legal characterization must not result in the denial or in an inappropriate limitation of a right to be granted under the EU law. Unfortunately, in Ireland, the characterization of the rights of producers of phonograms as “copyright” in contrast with the rights of performers embodied in phonograms seems to result in conflicts with the chance of exercising the rights of performers through their organization represented them as discussed under this title. [↑](#footnote-ref-7)
8. Order No. P/21/03/0004/. [↑](#footnote-ref-8)
9. The erosion of the competences of RAAP by PPI was taking place as follows:

   * Originally, there was an agreement between the two CMOs under which PPI was to transfer 50% of the equitable remuneration (after the deduction of the costs) to RAAP for distribution among its members. However, PPI developed the theory that, although it had the right to collect remuneration for the use of phonograms published for commercial purposes, it was only obligated to transfer to RAAP the share for the use of “qualified performances” and to keep the rest (which then it considered to be transferable to the producers of “qualified sound recording” as copyright owners).
   * PPI outsourced the collection of its non-broadcasting revenues to IMRO (the Irish musical performing rights CMO) in 2016. Although the arrangement covered collecting on behalf of performers as well as producers, and although RAAP bore 50% of the costs of the arrangement, PPI refused to give RAAP information as to the nature and contents of the agreement on the grounds of "commercial sensitivity*"*.

   - Later, PPI adopted and applied an interpretation of the agreement according to which it required proof from the RAAP that it had “mandate” for the management of the rights of performers even in respect of “qualified performances” (that is, PPI refused the application of section 281 of the CRRA under which a CMO registered for the management of rights on behalf of a class of rightsowners (in the given case, RAAP for the management of any performers), until the contrary is proved, has the right to act on behalf of any rightsowner in the given class.

   - PPI has also outsourced the calculation of the performer’ share of the remuneration to PPL, a CMO in the United Kingdom managing both producers’ and performers’ rights. Again PPI has refused to give RAAP information as to the basis for the arrangement with the PPL concerning the management of the rights of performers for which RAAP has been certified in Ireland.

   - PPI did not even recognize the very right of RAAP to manage the rights of performers for the management of which it has been registered. Instead of RAAP, PPI began managing performers’ rights in nearly all relevant aspects of collective management, including individual distribution of the remuneration due to them, reducing in this way the role of RAAP to a post box and pay desk. It calculated, with the assistance of PPL, the amounts to be distributed to individual performers who were members of RAAP for “qualified performances” (only), and just transferred the amounts to RAAP simply to take care of the payment of the already distributed amounts to its members. [↑](#footnote-ref-9)
10. High Court order [2019] No. 10801 P., para. 86. (hereinafter: High Court in RAAP v. PPI). [↑](#footnote-ref-10)
11. Judgement of the Court of Appeal delivered on April 3, 2020 (Court of Appeal Record Number: 2019/22fi) (hereinafter: Court of Appeal in RAAP v. PPI). [↑](#footnote-ref-11)
12. *See* Court of Appeal in RAAP v. PPI, paras 59 -60. [↑](#footnote-ref-12)
13. *See* para. 5.11.14. [↑](#footnote-ref-13)
14. High Court in RAAP v. PPI, para. 62. [↑](#footnote-ref-14)
15. Court of Appeal in RAAP v. PPI, para. 37. The Court of Appeal disagreed that assignment was necessary; it has found that only some form of contractual arrangement is sufficient (*see* para. 57 of the judgment). [↑](#footnote-ref-15)
16. Which has been transposed frequently in a verbatim manner, to the Irish law by the European Union (Collective Rights Management) (Directive 2014/267EU) Regulations 2016. [↑](#footnote-ref-16)
17. The Court, in para. 19, quotes, in particular, paragraphs (5) to (7) of section 280. However, in these provisions, there is nothing that might be relevant from the viewpoint of the question of applicability of a presumption-based system. Paragraph (5) reads as follows: “The Controller shall register an applicant or renew a registration where the Controller is satisfied that (a) the applicant comes within the definition of a licensing body specified in section 265, and (b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration”. In paragraph (6), it is determined what information must be presented: the name and address of the applicant; the names of the members of the board, a copy of the memorandum and article of association, etc., and, *inter alia*, also “the class of rightsowners represented or proposed to be represented by the applicant”. Paragraph (7) is about the format in which the information should be presented. The indication of the class of rightsowners represented or proposed to be represented by the applicant certainly is not an obligation for the Controller to choose the first form of registration under section 281, but it is one of the three possible alternatives mentioned there. The provision is not informative of the applicability or non-applicability of presumption-based systems from the viewpoint of the CM Directive. [↑](#footnote-ref-17)
18. Court of Appeal in RAAP v. PPI. para. 43. [↑](#footnote-ref-18)
19. *Ibid*., para 24. [↑](#footnote-ref-19)
20. *See* *ibid.,* para. 49: “[I]f the entitlement to act arose from the fact of registration in respect of a particular class of rights and it extended, as a result, to all performers coming within the class (absent those who opted out of such representation), the second part of s.281 would be superfluous, as assigment of rights or exclusive licensing of rights would be unnecessary in order to authorise the CMO to manage the rights of the right-holders.” [↑](#footnote-ref-20)
21. *See* Court of Appeal in RAAP v. PPI, para. 52: “The phrase ‘until the contrary is proved’ in s.281, to my mind, deals with a situation where there may be a discrepancy between the certificate granted and the actual authorisation of the licensing body; the licensing body may cease to satisfy the requirements set out in s.280(6), or may have ceased to act in respect of certain classes of rights in respect of which it was registered, or where individual performers have withdrawn their authorisation of the CMO to act on their behalf.” [↑](#footnote-ref-21)
22. *See* Recitals (33), (44) and (46) and Article 12(1)(b) of the Directive. [↑](#footnote-ref-22)
23. *See* Court of Appeal in RAAP v. PPI, para. 37. [↑](#footnote-ref-23)
24. *See ibid.* paras. 55 and 77 [↑](#footnote-ref-24)
25. *See ibid.* para. 55, where the Court of Appeal remarks: “whether this leaves such right-holders with inadequate protection is not a matter which can alter the proper construction of the legislation”. Also *see* para. 70 where its states as follows: “It may be that the legislative regime is ineffective in practice adequately to protect the fights of performers who do not actively manage their rights, either individually or by authorising a cmo to manage their rights. That is a matter upon which I make no observation. But, that cannot alter the proper construction of the statute as enacted, and in light of existing EU law.” [↑](#footnote-ref-25)
26. See para.101 of the judgement of the referring court which reads as follows:

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

    : [↑](#footnote-ref-26)
27. [↑](#footnote-ref-27)
28. In sections 287(c) and 289 of the SCCR, as quoted above, this is foreseen also in respect performers’ rights, but as discussed, no such order had been adopted before the judgment in *RAAP.* [↑](#footnote-ref-28)
29. See, for example, Article 97(2) of the Copyright Law of Austria, Article L 511-11 of the Intellectual Property Code of France, Section 125(5) of the Copyright Law of Germany, Article 90(4) of the Copyright Law of Poland or Article 200(3) of the Intellectual Property Code of Spain. [↑](#footnote-ref-29)
30. Case C-245/00 (ECLI:EU:C:2003:68). [↑](#footnote-ref-30)
31. The AG’s opinion reads as follows:

    [T]he scope of the prohibition of discrimination on grounds of nationality in this area extends beyond the terms of Article 12 EC alone. In fact, as far as related rights are concerned, that prohibition encompasses a range of operators who, although citizens of third countries and therefore not protected under Article 12 EC, enjoy the protection provided by the World Trade Organisation TRIPS Agreement and the Rome Convention.

    The TRIPS Agreement binds the Community and all its Member States; it is also common ground that, notwithstanding the debate on its direct applicability, the rules on national treatment which it contains are an integral part of the law with which the Court must ensure compliance, in accordance with Article 220 EC. The effect of the reference in Article 1(3) of the TRIPS Agreement is to incorporate within it Articles 2, 4 and 5 of the Rome Convention, which require the application of the principle of national treatment to a broad category of operators and situations that have no defined link with the Community, be it membership or establishment, and are not therefore, in principle, protected under Article 12 EC. Consequently, it is as a result of those provisions of TRIPS and the Rome Convention, as well as the provisions of Article 12 EC, that the freedom of action of the Member States in applying the Directive, and particularly Article 8(2) thereof, is limited.(ECLI:EU:C:2002: 543, paras 43-25). [↑](#footnote-ref-31)
32. See, *inter alia*, judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraph 5, and of 11 April 2013, *HK Danmark*, C‑335/11 and C‑337/11, EU:C:2013:222, paragraphs 28 to 30 – to which also the CJEU refers in para.62 of *RAAP* concerning this principle. [↑](#footnote-ref-32)
33. Gabrielle Defrenne v Sabena, case 43-75 (ECLI:EU:C:1976:56). [↑](#footnote-ref-33)
34. The relevant paragraphs of the judgement read as follows:

    69 The governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect same into existence.

    70 In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.[…]

    73 The fact that, in spite of the warnings given , the Commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.

    74 In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.

    75 Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment. [↑](#footnote-ref-34)
35. The rule of a 10% upper limit of deductions had been traditionally part of the CISAC Model Contract for reciprocal representation agreements between performing rights CMOs, which, for anti-trust reasons, is not quite applied in practice anymore. The Model Provisions had codified best practices of contractual relations between the great number of CMOs, the smooth and correct cooperation of which is a basic condition of adequate management of copyright. The 10% rule drew attention to the desirability of such deductions for the promotion of creativity in the various countries and as a matter of solidarity among creators and, at the same time, it also determined its acceptable maximum level. [↑](#footnote-ref-35)
36. *See* document IAVP/DC/37, 59, paras 423–24. [↑](#footnote-ref-36)
37. Document IAVP/DC/39. [↑](#footnote-ref-37)
38. Articles 8(5)(b) and (e), 13(4) and (6) and 21(1)(i) and point 2(c)(vii) of the Directive. [↑](#footnote-ref-38)
39. *See* for example the judgment of the CJEU in the *AustroMechana* case, where the Court has found that even 50% of the private copying remuneration may be used for cultural and social purposes. (Case C-521/11 (ECLI:EU:C:2013:515). [↑](#footnote-ref-39)