THE ENTITLEMENT TO A SHARE OF THE RIGHT TO EQUITABLE REMUNERATION OF FOREIGN PERFORMERS

Por Paul L.C. Torremans
Professor of Intellectual Property Law
School of Law, University of Nottingham

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Resumen: El uso de fonogramas en la Unión Europea da lugar al derecho a una remuneración equitativa para los artistas, intérpretes o ejecutantes y los productores de fonogramas, pero a pesar de que este derecho está arraigado en las convenciones internacionales sobre derechos de autor y derechos conexos, a los artistas, intérpretes o ejecutantes europeos se les niega a menudo el derecho a una remuneración equitativa cuando los fonogramas en los que se han grabado sus interpretaciones se utilizan en el extranjero. La ley de derechos de autor y derechos conexos de Irlanda de 2000 (CRRA) prevé el derecho de los artistas, intérpretes o ejecutantes y productores de fonogramas a una remuneración equitativa y única [artículos 38(1) y 208(1)]. No obstante, junto a ello, la CRRA también contempla ciertos requisitos que los titulares de derechos o las prestaciones objeto de protección deben cumplir para poder beneficiarse de esta ley. En este sentido, la CRRA recoge una lista de países con los que el derecho de autor o los derechos conexos han de tener algún vínculo, que puede ser la ciudadanía, el domicilio o la residencia habitual del sujeto en cuestión en ese país. En cuanto a las interpretaciones grabadas en fonogramas, el artículo 288 CRRA establece la regla de que una interpretación puede beneficiarse de esta ley cuando haya sido realizada por una persona que cumpla los anteriores requisitos o en un país que los cumpla. No obstante, el artículo 8(2) de la Directiva de alquiler y préstamo, que reconoce el derecho a la remuneración equitativa y única de estos titulares de derechos afines, no limita su aplicación exclusivamente a los artistas, intérpretes o ejecutantes que sean nacionales de un Estado en el que se aplique la Directiva o cuya actuación tenga lugar en tal Estado, aunque tampoco hay nada que sugiera dentro de su tenor literal que la disposición deba extenderse a los artistas, intérpretes o

ejecutantes que actúan en un tercer Estado o son nacionales de un tercer Estado. En este trabajo se analiza la STJUE de 8 de septiembre de 2020 (C-265/19), sobre el derecho de remuneración de los artistas, intérpretes o ejecutantes extranjeros en un Estado miembro de la Unión Europea, en la que se aborda la interpretación del artículo 8(2) de la Directiva de alquiler y préstamo a la luz de los Tratados internacionales de los que la Unión Europea, o sus Estados miembros, forman parte.

Palabras clave: Artistas, intérpretes o ejecutantes, derecho a una remuneración equitativa y única, concepto autónomo del Derecho de la Unión, terceros estados, principio de trato nacional y principio de reciprocidad, derechos fundamentales de la Unión Europea.

Title: The entitlement to a share of the right to equitable remuneration of foreign performers

Abstract: The use of phonograms in the European Union gives rise to a right to an equitable remuneration for performers and producers of phonograms, but despite this right being rooted in the international copyright and related rights conventions European performers are often denied an entitlement to an equitable remuneration when the phonograms in which their performances have been recorded are used abroad. The Irish Copyright and Related Rights Act 2000 (CRRA) foresees the

[1] El artículo 8(2) de la Directiva 2005/115, de alquiler y préstamo, en su versión en inglés, emplea el término «relevant performers» para referirse a los «artistas, intérpretes y ejecutantes», que es el que se utiliza en la versión en español de esta misma Directiva.

performers and producers of phonogram's right to a single and equitable remuneration in its section 38(1), read in combination with its section 208(1). But the CRRA also includes certain provisions on qualification, according to which some conditions need to be met if one is to benefit from the Act. There is a list of countries that are qualifying countries and the link with copyright and related rights is made through the citizenship of, or domicile or ordinary residence in such a qualifying country of the person or individual concerned. Regarding performances that have been recorded in a phonogram, whose use is subject to this single and equitable remuneration, Section 288 CRRA lays down the rule that a performance is a qualifying performance if it is given by a qualifying individual or a qualifying person or if it takes place in a qualifying country. Nevertheless, nothing in the wording of Article 8(2) of the Directive 2006/115, on rental and lending right suggests that it merely applies to performers who are nationals of a State in which the directive applies or whose performance takes place in such a state, but neither is there anything that suggests that the provision applies to performers who perform in another state or who are nationals of such a third state. This paper analyses the ECJ Judgment of 8 September 2020 (C-265/19), on the entitlement to a share of the right to a single and equitable remuneration of foreign performers within an State Member of the EU, which deals with the interpretation of Article 8(2) of the Rental and Lending Directive in the light of the provisions of the International Treaties that have been signed both by the European Union or its State Members.

Keywords: Relevant performers, right to a single and equitable remuneration, autonomous concept of the EU Law, third states, principle of national treatment and principle of reciprocity, Fundamental rights in the EU law.

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I. INTRODUCTION

The use of phonograms in the European Union gives rise to a right to an equitable remuneration for performers and producers of phonograms, but it is frustrating to observe that despite this right being rooted in the international copyright and related rights conventions European performers are often denied an entitlement to an equitable remuneration when the phonograms in which their performances have been recorded are used abroad. Member States may be tempted to «retaliate» in their copyright acts and deny foreign performers their entitlement to a share of the equitable remuneration that is collected in Europe when their phonograms are used.

One way to do so is to insert a qualification requirement based on the nationality of the performer and to require the nationality of an EU or EEA country. However, is such an approach, involving a failure to qualify a performer by reference to the qualification of the sound recording or phonogram rules under Article 5 Rome Convention 1961 not a breach of Article 3(2) WIPO Performances and Phonograms Treaty 1996?[2] This issue also brings in the question of competence in the EU. This may well be an exclusive competence of EU law. And does the fundamental rights status of intellectual property allow for a related right to be denied completely in certain circumstances or for limitations to be placed on its exercise? The litigation between Recorded Artists Actors Performers Ltd and Phonographic Performance (Ireland) Ltd brought all these points together and went all the way to the Grand Chamber of the Court of Justice of the European Union (CJEU).[3] This provides a strong incentive to take a closer look at the case and the issues it raises.

II. THE PROVISION UNDER DISCUSSION

Directive 2006/115[4] deals, amongst many other things, also with certain aspects of related rights. The starting point for its approach is found in Recital 5 of the Directive. There are two parties involved, authors and performers on the one hand and producers of phonograms and films on the other hand. Both parties make an essential contribution and are in need of protection. That protection should consist of securing a return on their efforts and contributions on the market, which in turn will allow them to make a living out of their efforts and

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[2] R. ARNOLD, *Performers' Rights*, Sweet & Maxwell (5th ed, 2015).

[3] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677.

[4] 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 [2006] OJ L 376/28. See I. STAMATOUDI and P. TORREMANS (eds), *EU Copyright Law: A Commentary*, Edward Elgar publishing (2014), Chapter 6, pp. 149 *et seq*.

contributions and which will enable them to continue making these efforts and contributions to the benefit of society at large.

In more prosaic terms, authors and performers need to be able to make an adequate income on the basis of their artistic and creative work if it is to form the springboard for further artistic and creative works. And producers of phonograms and films should be able to recoup their particularly risky and high investments for the production of phonograms and films.[5] It is also important to note that both parties need each other if they are to succeed. Performers are to a large extent self-employed and do not have the means to produce, and exploit to the largest possible extent, the phonograms in which their performances are recorded[6] and producers need the performers to provide the «raw material» for their recordings and the phonograms that contain them.

The Directive also recognises in Recital 7 that an international framework to address these issues is already in existence. It consists broadly speaking of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, the TRIPS Agreements 1994 and the WPPT(WPPT)1996. The Directive sets out to approximate the legislation of the Member States in this area, but it does so very explicitly in a way that does not conflict with the international conventions in this area. That is, of course, also logical, as these conventions underpin the national laws of the Member States in this area.[7]

The key tool deployed by the Directive is an unwaivable equitable remuneration for authors and performers, as well as for phonogram producers. Article 8 of the Directive calls this a single equitable remuneration for both performers and producers of phonograms and specifies that this equitable remuneration is payable by the user.[8] It covers phonograms that are published for commercial purposes, as well as reproductions of such phonograms[9]. The equitable remuneration then becomes payable when the phonogram or one of its reproductions is used for broadcasting by wireless means and when they are used for any communication to the public. The right is clearly compensatory in nature.[10] The equitable remuneration is to be shared between the «relevant» performers and phonogram producers. The details of that sharing operation can be agreed

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[5] Recital 5 of Directive 2006/115.
[6] Recital 6 of Directive 2006/115.
[7] Recital 7 of Directive 2006/115.
[8] We are dealing here with re-communication. This remuneration therefore comes on top of the remuneration paid by the broadcaster when a hotel re-communicates the performances to guests. Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*, ECLI:EU:C:2012:141, paragraph 55.
[9] I. STAMATOUDI and P. TORREMANS (eds), *EU Copyright Law: A Commentary*, Edward Elgar publishing (2014), Chapter 6, p. 187.
[10] Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso*, ECLI:EU:C:2012:140, paragraph 75.

between the parties and in the absence of an agreement between the parties the national legislator can lay down the conditions as to the sharing of the remuneration.[11]

III. THE SITUATION IN IRELAND

The Republic of Ireland has introduced the right to an equitable remuneration for performers and producers of phonograms in the Copyright and Related Rights Act 2000 and more specifically in its section 38(1), read in combination with its section 208(1). On the basis of these provisions two Irish collective management organisations did conclude an agreement concerning the sharing of the sums collected as equitable remuneration.[12] On the one hand, Recorded Artists Actors Performers Ltd (RAAP)[13] represents the performers and, on the other hand, Phonographic Performance (Ireland) Ltd (PPI)[14] represents the producers of phonograms. In practice, PPI collects the fee for the playing in public or the broadcasting of recorded music. This is the single equitable remuneration for both the performers and the producers of phonograms to which the Directive refers. It then logically follows that PPI will share those fees with RAAP, that represents the performers.[15] So far, so good…[16]

The Copyright and Related Rights Act 2000 (CRRA) does, however, also include provisions on qualification. The conditions set out in these provisions need to be met if one is to benefit from the provisions of the Act, including, obviously, its sections 38(1) and 208(1). There is a list of countries that are qualifying countries and the link with copyright and related rights is made through the citizenship of, or domicile or ordinary residence in such a qualifying country of the person or individual concerned. For our current purposes we deal with performances that have been recorded in a phonogram. Section 288 CRRA brings all these elements together by laying down the rule that a performance is a qualifying performance if it is given by a qualifying individual or a qualifying person or if it takes place in a qualifying country. That provision gives rise to the bone of contention between RAAP and PPI because the Act only lists

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[11] Article 8(2) of Directive 2006/115. Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*, ECLI:EU:C:2003:68, paragraph 33.

[12] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 26-31.

[13] https://www.raap.ie/.

[14] https://www.ppimusic.ie/.

[15] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 32-34.

[16] The parties can agree how to share the fees, see Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*, ECLI:EU:C:2003:68, paragraph 33.

Ireland and the other Member States of the European Economic Area (EEA) as qualifying countries. Other countries can be added by order, but that has not happened yet.[17]

There is therefore a certain logic in the conclusion drawn by PPI that the fees do not need to be shared where the music played was performed by a performer who is neither a national nor a resident of a EEA Member State, unless the performances come from a sound recording carried out in an EEA Member State. On the mere basis of the provisions of the Copyright and Related Rights Act 2000 that logic makes sense. The underpinning reciprocity rational that Irish performers often do not get a share of rights collected abroad[18] on the basis of their performances can also not be ignored completely. By insisting on these qualification requirements and reciprocity the Republic of Ireland gives itself a powerful negotiation tool when it tries to secure entitlement to fees collected abroad for its own performers. However, as RAAP pointed out, Article 8(2) of the Directive merely creates a single right that is to be shared between performers and producers of phonograms. There is no reference to the performer's nationality or residence and letting the producers of phonograms keep the total amount in certain cases is an outcome that seems to have no basis in Article 8(2) of the Directive.[19]

IV. RELEVANT PERFORMERS

The answer to the question whether the Irish qualification requirements can exclude certain performers and take account of the place where their performances took place hinges on the interpretation of the words «relevant performers» in Article 8(2) of the Directive. According to Article 8(2) of the Directive only those «relevant performers» will be entitled to a share of the equitable remuneration that is to be paid. Can a member state on this basis exclude performers who are nationals of a member state outside the EEA, unless they reside in the EEA or unless their performance and contributions to the phonogram was made in the EEA? Can one use qualification requirements in national copyright law, or any other legal tool that produces the same effect, to interpret the words «relevant performers» in this sense? These are the key issues that require an answer if the court is to resolve the dispute between the parties.

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[17] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 26-31.

[18] In countries such as the United States.

[19] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 34-42.

1. Autonomous concepts of EU law

The Directive does not offer a definition of the terms «relevant performers'. Neither does the Directive refer to other instruments of EU law or to the law of the member states in this respect. That brings us to a well-established principle in the case law of the CJEU. In the absence of both a definition in EU law and an express reference to the national law of the member states those member states are not free to define such terms and concepts as it pleases them or as it sounds logical to them. Instead, these terms and concepts are to be given an autonomous and uniform interpretation throughout the European Union.[20] The CJEU will provide such an autonomous and uniform interpretation whilst taking into account the wording of the provision that is interpreted, its context and the objective that are pursued by the rules and the instrument of European Law it forms part of.[21]

This approach to establish uniform interpretations as autonomous concepts of EU law has already been applied to the area of copyright law on numerous occasions. One thinks for example of the concepts of «public» and, even closer to our current purposes, «equitable remuneration'.[22] It does therefore not come as a surprise at all that the CJEU insists on providing an autonomous and uniform interpretation of the concept of «relevant performers» in the dispute between the two Irish collective management organisations.[23]

2. Relevant performers as an autonomous concept of EU law

In that exercise of defining «relevant performers» as an autonomous concept of EU law we are nevertheless off to a false start. The first element to take into account is the wording of Article 8(2) of the Directive, but the wording of that provision does not point towards any conclusion.[24] There is no wording

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[20] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 3.

[21] Case C-287/98 *Linster* ECLI:EU:C:2000:468, at paragraph 43 and Case C-673/17 *Planet49* ECLI:EU:C:2019:801, at paragraph 47.

[22] Case C-245/00 *SENA* ECLI:EU:C:2003:68, at paragraph 24; Case C-306/05 *SGAE* ECLI:EU:C:2006:764, at paragraph 31 and Case C-271/10 *VEWA* ECLI:EU:C:2011:442, at paragraphs 25 and 26. P. Torremans, «El papel de los conceptos autónomos del Tribunal de Justicia como elemento armonizador de la legislación sobre derechos de autor en el Reino Unido» in P. CÁMARA ÁGUILA and I. GARROTE FERNANDEZ-DIEZ (eds), *La Unificación del Derecho de Propiedad Intelectual en la Unión Europea*, Valencia: Tirant Lo Blanch (2019) 615-658.

[23] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 48.

[24] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 3.

to suggest that it merely applies to performers who are nationals of a State in which the directive applies or whose performance takes place in such a state, but neither is there wording to suggest that the provision applies to performers who perform in another state or who are nationals of such a third state.[25] There is, however, a much better starting point when one turn attention away from the wording of the provision and towards the context and objectives of the Directive, and in particular of its article 8(2). Recitals 5 to 7 make it very clear that the Directive aims to stimulate further creative work by authors and performers through the creation of a harmonised level of protection in intellectual property law that gives them the opportunity to secure an adequate income and to recoup investments made in the course of the creative process. That aim of the Directive is explicitly put against the horizon of the international conventions in the area of copyright and related rights to which many of the Member States of the European Union adhere[26] and any conflict with these international conventions excluded *expressis verbis*.[27] That harmonised level of protection is put in place in the context at issue through the right to an equitable remuneration for the relevant performers and producers of phonograms and the key (autonomous) concept of «relevant performers» must then be defined and interpreted in a manner that is consistent with the international copyright and related rights conventions.[28]

If one is looking at performers and their rights from a perspective of consistency with the international convention one cannot ignore article 2 of the WPPT1996, as that article defines the concept of performers as all persons «who act, sing, deliver, declaim, play in , interpret, or otherwise perform literary and artistic works or expressions of folklore'.[29] Phonograms are then inter alia the fixation of the sounds of such a performance.[30] The reference to all persons implies here to that the WPPT1996 does not distinguish between performers on the basis of nationality.[31] Consistency then means that article 8(2) of the Directive confers a right on the performers that article 2(a) WPPT covers. Both provisions deal with the same performers and the definition in the WPPT1996 extends to the

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[25] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 49.

[26] More specifically the WIPO Performances and Phonograms Treaty 1996, The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 and the TRIPS Agreement 1994.

[27] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 50.

[28] Case C-476/17 *Pelham GmbH, Moses Pelham and Martin Haas v Ralf Hütter and Florian Schneider-Esleben* ECLI:EU:C:2019:624, at paragraph 53.

[29] Article 2(a) WPPT 1996.

[30] Article 2(b) WPPT 1996.

[31] K. Messang-Blansché, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 3.

Directive. When it comes to the right that Article 8(2) of the Directive confers on them the terms of the Directive, including its recitals 5 to 7, specifies that that right is compensatory in nature and that the right is triggered by the communication to the public of the performance that is fixed in a phonogram if the latter has been published for commercial purposes. The CJEU already made that analysis a couple of years ago in *Reha Training*.[32] The heading of chapter II of the Directive, in which Article 8(2) finds its place, puts the compensatory right in the category of rights that are related to copyright.[33]

That seems to result in a simple conclusion that the performer is entitled to the compensatory right. Irrespective of the fact that the question whether any performer is entitled to the right or whether the word relevant can still bring in a restriction still needs an answer, it is not merely the performer who is entitled to the right. Article 8(2) of the Directive does indeed create a right that is shared between the performer and the phonogram producer. It is a single equitable remuneration so whoever is responsible for the communication to the public of the performance that is fixed in a phonogram that has been published for commercial purposes will have to make a single payment. The performer and the phonogram producer are the beneficiaries of the payment and they will need to work out how they will share the single remuneration. Recitals 5, 12 and 13 of the Directive indicate that the share of the performer depends on the importance of his or her contribution to the phonogram and must be adequate. One cannot in those circumstances reduce the share of the performer to zero and de facto take away his or her entitlement to (a share of) the right. In the absence of an agreement between the parties each Member State will have to determine the manner in which the remuneration will be shared between the performer and the producer of the phonogram, but also in these circumstances both parties must be entitled to the right and the right must be shared between them.

3. Does the word «relevant» add something?

Article 2 WIPO Performance and Phonograms Treaty 1996 and the way its definition of a performer links in with the right created in Article 8(2) of the Directive do therefore not allow for any discrimination on the basis of nationality. There are however other elements that could lead to the conclusion that the word «relevant» may after all put a restriction on the kind of performers that are entitled to a share of the equitable remuneration. The first of these

[32] Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:379, at paragraphs 30 and 32.

[33] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 57.

elements that need to be considered is the territorial scope of the Directive in general and of Article 8(2) in particular. The Directive contains no provisions on its territorial scope and there is therefore no departure from the territorial scope of EU legal instruments that is laid down in the Treaties. More specifically, Article 52 Treaty on European Union[34], which needs to be considered in combination with Article 355 Treaty on the Functioning of the European Union, leads to a territorial scope for directives that comprises the entirety of the territories of the Member States of the European Union. That brought the Advocate General in point 80 of his Opinion[35] to the conclusion that the right to equitable remuneration and the right of the performer to a share of that right covers any situation where the use of the phonogram or of a reproduction thereof takes place in (the territory of) the European Union. The CJEU agreed with this conclusion.[36] The emphasis as a basis for triggering the right is after all on the use of the phonogram rather than on the person of the performer. This additional element does therefore not provide any ground to discriminate between performers on the basis of nationality.

V. QUALIFICATION AS AN ADDITIONAL OPTION

The second element that we need to consider is that of qualification under the provisions of the WPPT1996.[37] The Treaty becomes relevant beyond the Directives stated willingness to align itself on substance with it because EU law recognises the primacy of international instruments over secondary legislation. This flows from Article 216(2) Treaty on the Functioning of the European Union.[38] That primacy rule applies to the WPPT1996, as the European Union and its Member States are parties to it.[39] That brings us to the qualification issue under the terms of the WPPT1996, as they have a direct influence on which performers qualify and that may in turn translate itself into what are «relevant performers'. Article 3 of the WPPT1996 states in very broad terms that contracting states shall afford the protection provided under it to the performers

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[34] Case C-17/19 *El Dakkak and Intercontinental* ECLI:EU:C:2017:341, at paragraphs 22 and 23.

[35] Opinion of Advocate-General Tanchev in Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:512, at paragraph 80.

[36] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 58-59.

[37] On the issue of qualification see S. RICKETSON and J. GINSBURG, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford: Oxford University Press (2006), pp.239-278 and P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford: Oxford University Press (9th ed, 2019), Ch 11.

[38] Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864, at paragraph 50.

[39] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 15.

and producers of phonograms who are national of other Contracting Parties. Article 4 then follow up with the standard national treatment rule found in the vast majority of international intellectual property instruments. Nationals of other Contracting Parties are therefore entitled to the treatment a Member State accords to its own nationals with regard to the right to equitable remuneration. Performers and producers of phonograms who are nationals of a contracting party are then defined more precisely by means of a cross-reference in Article 3(2) to the qualification or eligibility rules of the Rome Convention 1961.[40] That results in protection if the performance takes place in a Contracting State or if the performance is incorporated in a phonogram the producer of which is a national of a contracting state, or for which the fixation of the sound or its publication took place in another contracting state.[41]

Amongst the protection that is then afforded under the provisions of the WPPT1996 to the performers who qualify and whose performances are eligible Article 15 stands out for our current purposes. Article 15(1) provides after all for the rights to equitable remuneration for performers and phonogram producers where phonograms published for commercial purposes are used for broadcasting or for communication to the public. That is the mirror provision of Article 8(2) of the Directive. When it comes to defining the concept of «relevant performers» there is no ground in here for any discrimination on the basis of nationality and in our Irish facts under examination there is no basis here for a national rule that distinguished on the basis of nationality and limits protection to nationals of the EEA or to performances inside the EEA for nationals of third countries.[42]

VI. LIMITATIONS UNDER THE WPPT 1996

There is, however, a further element in Article 15 WPPT1996 that could still lead to a different conclusion. Article 15(3) does allow Contracting Parties to express a limitation in respect of Article 15(1). Such a limitation can restrict the application of Article 15(1) on the territory of the Contracting State concerned and it allows for a departure from the rule of national treatment. One could then treat performers from (certain) other states differently and one could potentially deny then the benefit of the right to equitable remuneration. The problem for the Republic of Ireland is that the European Union, nor any of its Member States (including Ireland, of course) did express such a reser-

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[40] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 3.

[41] Articles 4 and 5 Rome Convention 1961.

[42] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 68.

vation. None was received by the Director General of WIPO and registered in the register of notifications. That means that there is no ground here either to exclude nationals of non-member states of the EEA unless the contribution to the phonogram was made in the EEA or unless they are resident there.[43] And the further reservations that Article 3(3) WPPT allows in relation to Articles 5(3) and 17 Rome Convention 1961 can only restrict obligations under the Rome Convention 1961 arising from these provisions.[44] It does not create an obligation for the Contracting State emitting the reservation, let alone could there be a ground here for a different interpretation of Article 8(2) of the Directive.[45]

The lack of direct effect of Articles 4 and 15 of the WPPT1996 cannot alter matters. The need to interpret Article 8(2) in a way that is consistent with that international agreement remains in place.[46] And in turn that imposes an obligation on national courts to interpret Irish national copyright law in a way that its application of the Directive is consistent with the provisions of the WPPT1996.

All this leads the CJEU to the following conclusion:

«In the light of all the foregoing, the answer to the first and second questions referred is that Article 8(2) of Directive 2006/115 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 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.'[47]

VII. RESERVATIONS BY THIRD PARTIES

The fact that the European Union and its Member States have does issued reservations under Article 15(3) of the WPPT1996 does not means that no

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[43] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 4.

[44] Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140, at paragraph 50.

[45] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 72.

[46] Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140, at paragraphs 48, 51and 52.

[47] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 75.

such reservations have been notified to the Director General of WIPO. Third state have indeed notified such reservations[48] and the question arises whether such a notification can have an influence on the situation in the European Union when it comes to the question whether performers who are nationals of such thirds states are entitled to a share of the right of equitable remuneration.

This is where the principle of reciprocity that was codified in Article 21(1) of the Vienna Convention on the Law of Treaties comes in. The Contracting State that issues a reservation reduces modifies the application of treaty provision concerned in its relationship with other Contracting Parties, but the principles of reciprocity then means that the application of that provision is modified to the same extent for those other Contracting Parties. If the provision contained an obligation that the reserving state does not wish to be bound by in its relation with other Contracting States the reciprocity principle will then also take away that obligation from these other Contracting States in their relationship with the reserving state. In the context of Article 15(1) WPPT1996 with which we are concerned, one can take the example of the reservation notified by the United States. As another Contracting State Ireland can then invoke the reciprocity principle to argue that its obligations vis-à-vis US performers under Article 15(1) have also been modified. This could potentially justify a refusal to give them an entitlement to the right of equitable remuneration. Article 4(2) WPPT1996 confirms that reciprocal reduction of obligations.[49]

Public international law does create an option, so much is clear, but how is this option reflected in EU law? The Directive, and more specifically its heading for its chapter II, classifies the right to equitable remuneration for performers and producers of phonograms as a right related to copyright.[50] That means that inside the EU legal order we are dealing with an intellectual property right and those rights are protected as fundamental rights.[51] That fundamental rights status of intellectual property is enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union.[52] That does not make the right an absolute right though. First of all, there are other fundamental rights that has the same legal status and they may be impacted negatively by an unrestricted

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[48] See https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20.

[49] Case C-386/08 *Brita* ECLI:EU:C:2010:91, at paragraph 43 and case C-266/16 *Western Sahara Campaign* ECLI:EU:C:2018:118, at paragraph 58.

[50] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 57.

[51] Case C161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* ECLI:EU:C:2018:634, at paragraph 41 and Case C476/17 *Pelham GmbH, Moses Pelham and Martin Haas v Ralf Hütter and Florian Schneider-Esleben* ECLI:EU:C:2019:624, at paragraph 32.

[52] P. TORREMANS, «Article 17(2)», in *S. Peers,* T. HERVEY, J. KENNER and A. WARD (eds.), *The EU Charter of Fundamental Rights: a commentary,* Hart/Beck (2014), 489-517.

exercise of the intellectual property right concerned. In the current context the straightforward example is the right to conduct a business. The CJEU does not go into detail on this point in the case at issue, but the court does raise the point that the refusal by third states to grant all performers an entitlement to the right to equitable remuneration may prejudice the ability of certain performers to be involved in the music business. This clearly impacts the freedom to conduct as business, as would a reciprocal measure by the European Union or a Member State.

How do we handle the impact of other fundamental rights? Could that impact, e.g. of the right to conduct a business that is impacted by the reservation of third states, allow for a discriminatory re-adjustment of the related right, i.e. of the entitlement for performers of that third state to the right of equitable remuneration in Ireland? This depends on the manner in which one strikes a balance between the conflicting fundamental rights. As we will see, it makes a massive difference whether one goes for a balance external to copyright or for a balance internal to copyright.

1. The need to strike a balance external to copyright

Even if one merely sees copyright and freedom of expression and information as two separate fundamental rights this often results in the primacy of the right to freedom of expression, which than acts as an external limit to copyright. Freedom of expression is seen as a very strong fundamental rights and the property based rights such as copyright are often considered to be less strong. National courts have gone down this path on a number of occasions. A case that demonstrates this clearly is the Dafurnica decision of the District Court of the Hague from 2011.[53] «Darfurnica» is a painting from the Danish artist Nadia Plesner that criticizes our society's current media culture that seems to prioritise entertainment over serious news items. Plesner took the then crisis in Darfur as an example and included an African child that seems to hold a Louis Vuitton bag, as well as a Chihuahua in the painting whose of overall impression links it with Picasso's Guernica painting. Plesner» painting is part of an art series by the name of «Simple Living» highlighting the paradox between the luxury Louis Vuitton product and the famine striking in Africa Louis Vuitton was no pleased and sued for copyright infringement. Louis Vuitton succeeded with the copyright claim in the preliminary proceedings[54], but that decision was overruled by the District Court. The District Court held that the artist's right to freedom of

[53] *Nadia Plesner Joensen v Louis Vuitton Malletier SA*, District Court of The Hague, 4 May 2011, IER 2011/39.

[54] *Louis Vuitton Malletier SA v Nadia Plesner Joensen*, District Court of The Hague, 27 January 2011, LJN: BP9616 KG RK 10-214.

expression should prevail. Her fundamental right to freedom of expression prevailed over the fundamental right of copyright of Louis Vuitton.[55] The balance is therefore struck at a level external to copyright.

There have also been a number of cases in France that have used other fundamental rights as an external limit to copyright, which is not really surprising for a country with strong moral rights.[56] The best known of these cases is after all the case in which Victor Hugo's heirs tried to invoke the moral rights of the author which they were entitled to exercise after his death to prevent a sequel to his famous work «Les Misérables» being written by a third party. The case went all the way up to the Cour de Cassation, the French Supreme Court and in the judgment priority is given to the third party's right to freedom of expression, i.e. in this case their freedom of artistic creation. The French Supreme Court relied strongly on Article 10 of the European Convention on Human Rights or ECHR and held that freedom of expression and creativity prevented the original author of the work or his heirs from hindering the production of a sequel after the exclusive economic right in the original work had expired.[57] Obviously, this was subject of the moral rights of paternity and integrity of the original work that was in a sense being adapted by the production of the sequel, but that does not detract from the conclusion that the right of freedom of expression is being used here as an external limit to copyright.[58]

The Cour de Cassation returned to the topic in 2015. This time the case arose in the always tricky copyright context of the creative re-use of copyright protected photographs in a painting. Whereas the lower court had ruled that the painting infringed the copyright in the photographs the Supreme Court reversed that finding of infringement. Once more the judgment relies on Article 10 of the European Convention on Human Rights to advocate strong protection for the freedom of expression of the painter and to let it take precedence over the copyright in the photographs. It was stated in the judgment that the Court of Appeal had failed to show exactly how the fair balance between the freedom of expression and the copyright had been achieved and that the Court of Appeal did not sufficiently justify its decision in light of the importance attached to the right to freedom of expression in the European Convention on Human Rights.[59]

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[55] L. GUIBAULT, «The Netherlands: Darfurnica, Miffy and the Right to Parody!', (2011) 2 J. Intell. Prop. Info. Tech. & Elec.Com.L.236, at 237.

[56] C. GEIGER, «Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?» (2018) 8 UC Irvine Law Review 413, at 441-442.

[57] *Hugo v Plon SA,* Cass., 1e civ., Jan. 30 2007, (2007) 38 IIC 736, 738. C. Geiger, «Copyright and the Freedom to Create – A Fragile Balance», (2007) 38 IIC 707.

[58] *Hugo v Plon SA,* Cass., 1e civ., Jan. 30 2007, (2007) 38 IIC 736, 738.

[59] Cass., Bull. 1e civ., May 15, 2015, Bull. civ. I, No. 13-2739. E. Rosati, Not Sufficiently «Transformative» Appropriation of a Photograph Held Infringing by French Court», (2018).13 J. Intell. Prop. L & Prac. 525.

One should not derive from these high profile cases that the balance struck at the external level will always tilt in favour of the right to freedom of expression. A relatively recent judgment of the Court of First Instance in Paris makes that very clear. American artist Jeff Koons had made a sculpture that had been inspired by a French photograph. Despite there being a need to put Koons' right to freedom of expression into the balancing exercise with copyright the court held that the statue infringed the copyright in the photograph and gave precedence to copyright.[60] The key element in this case's balancing act that determined its outcome seems to have been the fact that Jeff Koons could not justify the need of using the photograph representing of a couple of children in his artistic speech and expression without the authorization of its author. That meant that there was no evidence for the fact that a full implementation of the copyright of the photographer would have restricted Koons' freedom of expression in a disproportionate manner, as he may have obtained a licence had he requested one. Despite the different outcome, this case also highlights the need to carry out a balancing act between the various fundamental right involved. And yet again there is a factor external to copyright involved in the balance and the balance is struck outside copyright.[61] The decision was recently upheld by the court of appeal with a judgment emphasizing once more the need to strike a balance between the various fundamental rights.[62]

2. The move to an internal balance in the Grand Chamber of the CJEU

Eventually, the issue of the relationship between copyright, as part of the fundamental property right in article 17 of the Charter of Fundamental Rights of the European Union, on the one hand and, and the fundamental right to freedom of expression and information in article 11 of that Charter of Fundamental Rights, on the other hand, became the crucial issue in two important cases that were referred to the CJEU for a preliminary decision. Given the importance of the matter, and most crucially the question whether the balance can merely be established inside copyright or whether external factors can decide the matter and go beyond what copyright allows, the Court decided to deal with the matter in front of its Grand Chamber. The seminal judgements in both cases delivered by the Court on 29th July 2019.

The first of these two cases is *Funke Medien v Bundesrepublik Deutschland*[63] and the case is often referred to as the Afghanistan papers case. The German armed forces conducted an operation abroad in Afghanistan and in accordance with

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[60] TGI Paris, Mar. 9, 2017, No. 15/01086.
[61] C. GEIGER, «Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?» (2018) 8 UC Irvine Law Review 413, at 442-443.
[62] CA Paris, pole 5-1, 17 December 2019, RG n° 17/09695.
[63] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623.

German Law the Federal Republic of Germany prepared a military status report on a weekly basis. These papers are confidential and copyright is claimed in them.

The copyright case at issue arose when the German newspaper Westdeutsche Allgemeine Zeitung published the Afghanistan papers, rather than to the publicly available summaries, to publish them, at least in part, on its website that is operated by Funke Medien. The application for access was refused by the German authorities on the grounds that the weekly Afghanistan papers contained information that was vital for the security of the German armed forces on the ground in Afghanistan. Their lives and other security interests could be put at risk if the papers, rather than the cleaned up summaries, were made available to the public. Despite being referred to the summaries by the authorities, Funke Medien managed, one way or another, to gain access to the Afghanistan paper and published large parts of them on the website. The Federal Republic of Germany then sued Funke Medien for copyright infringement of its copyright.[64] In its defence, Funke Medien argued that its behavior was covered by certain limitations and exceptions in article 5 of Directive 2001/29[65], but crucially for our current purposes, it also relied independently on article 11 of the Charter of Fundamental Rights of the European Union.

The second of these two cases is *Spiegel Online v Volker Beck*.[66] Volcker Beck wrote a contribution to a book on the topic of criminal policy in the area of sexual offences committed against minors in 1988. There is an argument, pursued over the years by Mr Beck, that the publisher of the book changed the title of the book and shortened one of Mr Beck's sentences. Clearly, the content of the article started to become a problem for Mr Beck when he became a member of the German Federal Parliament, the Bundestag, in 1994 and ever since he has made efforts to distance himself from the article and its content.

During the election campaign in 2013 the contribution resurfaced from the archives and clearly embarrassed Volcker Beck. Spiegel Online decided to get to the bottom of this via their Internet news portal. This resulted in the publication through that portal of an article that demonstrated that Mr Beck was lying and that the central statement in his contribution had not been altered by the publisher of the book. The piece argued that Mr Beck had misled the public over the years and to further back up that claim Spiegel Online added hyperlinks to the original versions of the manuscript and the contribution to the book.[67] Mr Beck sued for copyright infringement, Spiegel Online raised freedom of expression and freedom of the press in its defence.

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[64] *Ibid.*, paragraphs 9-11.
[65] Directive 2001/29/EC 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 [2001] OJ L 167/10.
[66] Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625.
[67] *Ibid.*, at paragraphs 10-13.

The issue of the potential for external exceptions or more precisely exceptions and limitations to the exclusive rights of copyright that go beyond the exceptions and limitations provided for in article 5 of Directive 2001/29 therefore became the key question which the judgments of the CJEU needed to answer in the cases *Funke Medien* and *Spiegel Online*.

The Court starts its analysis by repeating that recital 32 of Directive 2001/29 makes it clear that the list of exceptions and limitations in article 5 of the directive is an exhaustive list. Member States are under no obligations to implement each and every one of these exceptions and limitations, but the list is exhaustive, meaning the member states can merely choose from the exceptions and limitations on the list.[68] That point was indeed already made by the Court in earlier judgments such a *Renckhoff*[69] and *Soulier and Doke*[70].

It then turns to the need for there to be a fair balance of rights. The Court sees this as a vital component of Directive 2001/29 and as a component that operates at the same level as the idea that the list of exceptions and limitations is an exhaustive one. The Court derives from recitals 3 and 31 of Directive 2001/29 that the harmonisation put in place by that directive aims to safeguard a fair balance between the interest of the owners copyright and related rights in the protection of their intellectual property rights as they are guaranteed as fundamental property rights by Article 17(2) of the Charter of Fundamental Rights of the European Union, on the one hand, and the protection of the interests and fundamental rights of users of protected subject matter, and in particular their freedom of expression and information that is guaranteed as a fundamental right of utmost importance by Article 11 of the Charter, on the other hand. The public interest is also part of the balancing act that is particularly important in the electronic environment dominated by the internet.[71] The Court refers in this respect especially to paragraph 41 of its earlier *Renckhoff* decision.[72] And a further reference to the balancing of right is found in another seminal judgment of the court in the *Pelham* case.[73]

That, of course, begs the question how such a fair balance is to be achieved. But the combination of the fact that the court sees the balance as a vital component

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[68] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 56 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 41.

[69] Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* EU:C:2018:634, at paragraph 16.

[70] Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* EU:C:2016:878, at paragraph 34.

[71] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 57 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 42.

[72] Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* EU:C:2018:634, at paragraph 41.

[73] Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben* ECLI:EU:C:2019:624, at paragraph 33.

of Directive 2001/29 on the one hand and the fact that it cuts off the obvious option to introduce additional exceptions and limitation in the copyright regime established by directive 2001/29 by reiterating that the list of exceptions and limitations in article 5 of the Directive is an exhaustive list clearly points in the direction of a solution that is to be found inside Directive 2001/29 and therefore also inside copyright. The Court argues on that basis that the elements for the balance of rights are found in the directive with on one side the exclusive right in its articles 2 to 4 and on the other side the exceptions and limitations in its article 5. In transposing these articles into national law and later in applying them member states must put the balance of rights into practice. The court refers on this point back to the *Promusicae* case where it made a similar point.[74] The concept is clearly that in defining the exclusive rights when transposing articles 2 to 4 of Directive 2001/29 the member states must already take into account no just the interests of copyright and the principle of the high level of protection given to the author that is often mentioned in EU copyright law, but also of the interests of other fundamental rights that are contained in the Charter of Fundamental Rights of the European Union.[75] The same applies when the national regime of exceptions and limitations is defined on the basis of article 5 of Directive 2001/29.[76] And, obviously, the regime of exceptions and limitations can assist in adjusting and fine-tuning the balance in relation to the exclusive rights. The exceptions and limitations can accommodate the interests of other fundamental rights despite the apparent strength of the exclusive rights in appropriate circumstances.[77]

It does therefore not come as a surprise that one of the goals of intellectual property right in general, and of copyright in particular, is to guarantee freedom of expression and the public's right to information.[78] The court finds a reflection of that goal in article 5(3) (c) and (d) of Directive 2001/29, when they provide exceptions and limitations to the exclusive right of copyright for quotations for purposes such as review and criticism and reproduction of works by the press. Here the interests reflected in article 11 of the Charter can clearly be given precedence over the exclusive right of the copyright owner, but the interest of the latter are also taken into account in the balancing act as a proper

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[74] Case C275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54, at paragraph 66.

[75] C. GEIGER and E. IZYUMENKO, «Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way», CEIPI Research Paper 2018-12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293735 (accessed 31st January 2020), at 9.

[76] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 58 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 43.

[77] C. GEIGER and E. IZYUMENKO, «Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way», CEIPI Research Paper 2018-12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293735 (accessed 31st January 2020), at 9.

[78] P. TORREMANS, «Copyright (and other Intellectual Property Rights) as a Human Right», in P. Torremans (ed), *Intellectual Property and Human Rights,* Kluwer Law International (3rd ed, 2015), pp. 221-254.

acknowledgment of the name of the author is guaranteed, as the court already pointed out in the *Painer* case[79]. These exceptions are particularly relevant in the tow case before the court, as they take account of the freedom of the press of both *Spiegel Online* and *Funke Medien*.[80] Coming back to the balancing exercise the court also points out that article 5(5) of Directive 2001/29 also has a role in making sure that the interest of the copyright owner are taken into account by requiring that the exceptions and limitations that are implemented in national law are only applied in certain special cases which do not conflict with the normal exploitation of the work or other subject matter and which do not unreasonably prejudice the legitimate interests of the copyright owner.[81]

The CJEU therefore comes on the basis of exactly the same reasoning to the conclusion in both cases that freedom of expression and information and freedom of the press, as they are enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, are not capable of justifying, a derogation from the author's exclusive rights of reproduction and of communication to the public beyond the exceptions and limitations provided for in Article 5 of Directive 2001/29.[82]

One has to assume that the same approach will apply to all fundamental rights and therefore e.g. also to the freedom to conduct a business. Competition law, as referred to above, may play an important role in this area, but it cannot cover all scenarios. Suffice it to refer here to the *Dior v Evora* case[83], where on the basis of the doctrine of exhaustion in trade mark law the CJEU decided that copyright was ancillary and should follow suit. That meant that the use of a copyright protected image was possible even in the absence of a copyright exception that covered such use. Indeed, the commercial exceptions in copyright law are far and few between and have a narrow scope. But arguably one cannot apply *Dior v Evora* any more in the blunt way the judgment itself seems to suggest. If one is to frame the approach in the new doctrine one may have to argue that this is covered by the quotation exception in copyright.[84] This may

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[79] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and others* ECLI:EU:C:2013:138, at paragraph 135.

[80] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 60 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 45.

[81] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 61 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 46.

[82] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paragraph 64 and Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, at paragraph 49.

[83] Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* ECLI:EU:C:1997:517 and Supreme Court of the Netherlands, 20th October 1995.

[84] T. Synodinou, «Wider implications of the CJEU's Case law on Other Fundamental Rights: Is the freedom of expression the only «victim» of Spiegel Online?», presentation at the 6th Annual Conference on Media & Communication Law: Digital Platforms & Social Media: Legislative Developments & Current Challenges, Athens 7th February 2020.

be a first example of the broad interpretations of the copyright exceptions and limitations to which this new approach will lead.[85]

3. Where does all this lead us for our current purposes?

Two key elements emerge from the conclusion reached by the CJEU. On the one hand, copyright is not an absolute property right despite its fundamental right status in article 17 of the Charter of Fundamental Rights of the European Union. The principle that a balance needs to be struck between copyright and other fundamental rights is clearly recognized as a principle of EU law in general and EU copyright law in particular.

On the other hand, and perhaps even more importantly, the idea of an external balance that could give rise to additional exceptions and limitations to protect the interest of other fundamental rights that had been put forward by some academic authors and for which they seemed to have found support in certain decisions of national courts clearly no longer has a future.

That is important for our current purposes, as the older national cases seemed to show that the respect for other fundamental rights could result in an external factor completely denying the application of a copyright rule. This could here have led to an argument that the impact of a reservation by a third state on the freedom to conduct a business is such that it needs to be remedied by restoring a level playing field for all performers by blocking the entitlement of foreign performers to the right of equitable remuneration. That would be the use of an external restriction to restore the balance between the various fundamental right.

The CJEU has clearly ruled that there is no place for such additional external exceptions and limitations to the exclusive rights. Instead the balance needs to be struck internally, inside copyright itself. This is to be done by taking all fundamental rights and their interests into account when defining the exact scope of the exclusive rights and by establishing the contours of the national regime of exceptions and limitations. That is the scope of «the» exclusive right, i.e. as it applies to all. And there is no option to completely block the application of a right. The balance needs to imply that both rights can be exercised in harmony.

For our current purposes that means that the balance of fundamental rights cannot provide a basis to completely deny an entitlement to a right of equitable remuneration. And neither can such an entitlement be denied on the basis of the nationality of the performer.

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[85] SEE C. GEIGER and E. IZYUMENKO, «The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!» 51 (2020) (3) IIC 282.

But this is not merely about balancing Article 17(2) of the Charter of Fundamental Rights of the European Union with other fundamental rights. The non-absolute character of the fundamental rights status of intellectual property also means that there can be limitations on the exercise of the right related to copyright, i.e. of the right to equitable remuneration. Article 52(1) of the Charter makes such limitations possible, whilst preserving the essence of the fundamental rights at issue. Such a limitation must, however, be provided for by law.[86] A mere reservation by a third state in accordance with Article 15(3) WPPT does not meet this threshold. It does not amount to a limitation provided by law and it does not clearly tell the foreign performer in precisely what way his or her rights to an equitable remuneration are limited.[87]

More is needed, but this begs the question how the threshold of Article 52(1) of the Charter could be met. Could a national law bring about such a limitation? Could a provision of Irish law, such as the qualification rule be seen to bring about such a limitation? The problem with such a suggestion is that with Article 8(2) we are in the presence of a harmonized rule of EU law dealing with the right to an equitable remuneration. That means that the matter has become an exclusive competence of EU law and that any limitation must be provided for by EU law, as it would reduce the scope of Article 8(2) of the Directive.[88] At present there is no trace of such a limitation in EU law.[89] That leads to the conclusion that Member States are precluded from limiting the entitlement to the right to a single equitable remuneration in respect of performers and phonogram producers who are national of third States.[90]

A final question that arises is whether a Member State could in certain circumstances allocate the entirety of the equitable remuneration to the producer of the phonogram. Could one in other words reduce the share of the performer to zero? The CJEU sees such a suggestion as something that would necessarily compromise the observance of the right set out in Article 8(2) of the Directive.[91] Sharing means that each of them receives something! The aim of the Directive to ensure further creative and artistic work of author and performers would

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[86] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 4.

[87] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 87.

[88] See Article 3(2) Treaty on the Functioning of the European Union and cases C-114/12 *Commission v Council* ECLI:EU:C:2014:2151, at paragraphs 68 and 70 and C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925, at paragraph 113.

[89] K. MESSANG-BLANSCHÉ, «L'inclusion d'interprètes et de producteurs d'Etats tiers à L'Union européenne dans la détermination des bénéficiaires de la "rémunération équitable"» [2020] 21 Les Màj de l'IRPI 4.

[90] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraph 91.

[91] I. STAMATOUDI and P. TORREMANS (eds), *EU Copyright Law: A Commentary*, Edward Elgar publishing (2014), Chapter 6, p. 187.

also be undermined if the entire equitable remuneration were to be allocated to the producer of the phonogram.[92]

VIII. CONCLUSION

The single right of equitable remuneration arises from use in the European Union and needs to be shared by performers and phonogram producers. The aim to compensate them for the use of their work and to stimulate creation. Zero percent for certain performers is therefore not an option.

Discrimination on the basis of the nationality of the performer or the place of the performance is something Member States cannot introduce. The matter has been harmonized and is therefore part of the exclusive competence of EU law. This case also demonstrates that even in the absence of a detailed reference the CJEU will not hesitate to apply general principles of the international IP conventions, such as national treatment, as part of EU IP law. This demonstrates once more that the CJEU is building the EU IP system wherever the legislator did not adopt a comprehensive approach and that more and more bits of competence move from the Member States to the EU.

Related rights, such as the right of equitable remuneration, are part of intellectual property and as such protected as fundamental rights under Article 17(2) of the Charter of Fundamental Rights of the European Union. A balance will need to be struck with other fundamental rights, but this cannot means completely overruling the application of a fundamental rights. And any limitation on the exercise of the right of equitable remuneration will need to be put in place by law, European law that is.

In short, there is no basis for the discrimination on the basis of nationality and place of performance put in place by Irish law. Foreign performers are therefore entitled to a share of the single right of equitable remuneration. However, by way of final footnote it needs to be mentioned that the right (and the share if the performer in the right) is transferable.[93] There is therefore nothing wrong with a contractual transfer of the performer's share of the right to equitable remuneration to the producer of the phonogram or to any third party.

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[92] Case C-265/*19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, ECLI:EU:C:2020:677, paragraphs 92-96.

[93] I. STAMATOUDI and P. TORREMANS (eds), *EU Copyright Law: A Commentary*, Edward Elgar publishing (2014), Chapter 6, p. 190.