

C-265/19 - 1  
MLG

**THE HIGH COURT**

2016 No. 6897 P.

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED  
MINISTER FOR JOBS ENTERPRISE AND INNOVATION  
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**ORDER FOR A REFERENCE TO THE COURT OF JUSTICE OF THE  
EUROPEAN UNION**

Abbreviations

- “2006 Directive” 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
- “Rome Convention” International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- “WPPT” WIPO Performances and Phonograms Treaty 1996
- “CRRA 2000” Copyright and Related Rights Act 2000

**1. THE REFERRING COURT**

- 1. This request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) is made by the High Court of Ireland (Mr Justice Simons). The contact details for communications from the Court of Justice are as follows.

Principal Registrar  
The High Court  
Four Courts, Inns Quay  
Dublin 7, Ireland.

Registered at the  
Court of Justice under No. 1111 214  
Luxembourg, - 1. 04. 2019 For the Registrar  
Fax / E-mail: \_\_\_\_\_  
Received on: 29 03 19  
Lynn Hewett  
Principal Administrator

**CURIA GREFFE**  
Luxembourg  
29. 03. 2019

## **2. THE PARTIES TO THE MAIN PROCEEDINGS AND THEIR REPRESENTATION**

2. The Plaintiff is represented by Michael Collins, SC; Noel Travers, SC; and Yvonne McNamara, BL of the Bar of Ireland, instructed by Linda Scales & Company Solicitors, Castlevew, 22 Sandymount Green, Sandymount, Dublin 4, Ireland.
3. The Defendant is represented by Paul Gallagher, SC; Jonathon Newman, SC; and Jennifer O'Connell, BL of the Bar of Ireland, instructed by Helen Sheehy & Company, 63 Patrick's Street, Dun Laoghaire, Co. Dublin, Ireland.
4. The Irish State is represented by Patrick McCann, SC; and James Bridgeman, SC instructed by the Office of the Chief State Solicitor, Osmonde House, Little Ship Street, Dublin 8, Ireland.

## **3. THE SUBJECT-MATTER OF THE MAIN PROCEEDINGS AND THE RELEVANT FACTS**

5. The outcome of the main proceedings depends on the correct interpretation of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("*the 2006 Directive*"). The referring court wishes to know to what extent, if any, is it permissible to interpret the 2006 Directive by reference to the concept of "national treatment" provided for under the Rome Convention and WIPO Performances and Phonograms Treaty 1996 ("WPPT").
6. The dispute in the main proceedings concerns the collection and distribution of licence fees payable in respect of the playing of recorded music in public, or the broadcasting of recorded music. Under national legislation, the owner of a bar, night club or any other public place who wishes to play recorded music is required to pay a licence fee in respect of same. Similarly, if a person wishes to include a sound recording in a broadcast or a cable programme service then they too must pay a licence fee in respect of same. This obligation is set out in detail under domestic law in the *Copyright and Related Rights Act 2000*. The legislation envisages that the user will pay a single licence fee to a licensing body representing the producer of the sound recording, but that the sum so collected will then be shared as between the producer and the performers.
7. The Plaintiff represents certain performers, the first named Defendant represents certain producers and the second, third and fourth named Defendants are the Minister for Enterprise and Innovation, the Irish State and the Attorney General of Ireland respectively. The Plaintiff and Defendant are in dispute as to the interpretation and operation of the contractual agreement entered into between them. The resolution of this dispute necessitates the interpretation of domestic legislation, which in turn must be interpreted in the light of European law.

8. Irish domestic law employs different qualifying criteria for producers and performers, respectively. A producer, as the copyright owner, will qualify to share in the equitable remuneration in circumstances where the sound recording is first lawfully made available to the public in the Irish State or in a European Economic Area (“EEA”) country. A producer also has the benefit of the so-called thirty-day rule. By contrast, a performer is not entitled to share in the equitable remuneration unless they are (i) an Irish citizen or domiciled or resident in Ireland, or (ii) domiciled or resident in an EEA country. (A performer will qualify separately if the performance takes place in Ireland or an EEA country).
9. The central issue in the main proceedings is whether it is consistent with EU law to exclude certain *performers* from the benefit of a share in this equitable remuneration in circumstances where the *producer* of the same sound recording will be paid. The fact that the domestic legislation treats EEA domiciles and residents in the same manner as Irish nationals means that the legislation does not offend against the general principle of non-discrimination under EU law. However, the Plaintiff complains that the 2006 Directive, when properly interpreted, requires that a performer—irrespective of their domicile or residence—must be afforded a right to a share of the equitable remuneration in circumstances where their performance has been fixed in a sound recording which itself qualifies for protection. On this argument, it is not permissible to employ criteria based primarily on the domicile or residence of the performer.
10. A further issue arises as to whether—on the assumption that the provisions of the WPPT do govern the interpretation of the 2006 Directive—the approach taken under the domestic legislation is justified as a response to a *reservation* entered by some parties pursuant to article 15 of the WPPT.

#### **4. RELEVANT LEGAL PROVISIONS**

##### ***National legislation***

11. Section 37(1) of the Copyright and Related Rights Act 2000 (No. 28 of 2000) (“CRRRA 2000”) provides that the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of certain specified acts, including, relevantly, the right to make the work available to the public. The definition of “work” includes a “sound recording”. A “sound recording” is defined, under section 2, as meaning 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. Section 19 provides that copyright shall not subsist in a sound recording until the first fixation of the sound recording is made.
12. Section 38 then provides for a licence as of right in certain circumstances.

“38.—(1) Notwithstanding the provisions of section 37, where a person proposes to—

- (a) play a sound recording in public, or

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

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

- (i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a licensing body, and
- (ii) complies with the requirements of this section.

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

- (a) gives notice to each licensing body concerned of his or her intention to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,
- (b) informs each of those bodies of the date on and from which he or she intends to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,
- (c) makes payments to the licensing body at intervals of not less than 3 months in arrears,
- (d) complies with any reasonable conditions relating to payments under this section as may be notified to him or her by the licensing body from time to time, and
- (e) complies with any reasonable requests for information from the licensing body to enable it to calculate and manage payments under this section.”

(3) A person who satisfies the conditions specified in subsection (2) shall be deemed to be in the same position as regards infringement of copyright as if he or she had been the holder of a licence granted by the owner of the copyright in question at all material times.

(4) Where the person intending to play sound recordings in public or to include sound recordings in a broadcast or a cable programme service and the licensing body fail to reach agreement as to fair payment under subsection (2) within a reasonable time, the terms of the proposed agreement shall be referred to the Controller for determination of the amount and terms of payment.

[...]”.

13. Section 184 prescribes the circumstances in which *inter alia* a sound recording shall qualify for copyright protection.

- “184.—(1) A literary, dramatic, musical or artistic work, sound recording, film, typographical arrangement of a published edition or an original database, shall qualify for copyright protection where it is first lawfully made available to the public—
- (a) in the State; or
  - (b) in any country, territory, state or area to which the relevant provision of this Part extends.
- (2) For the purposes of this section, lawfully making available to the public a work in one country, territory, state or area shall be deemed to be the first lawful making available to the public of the work even where the work is simultaneously lawfully made available to the public elsewhere; and for this purpose, lawfully making available to the public of a work elsewhere within the previous 30 days shall be deemed to be simultaneous.”
14. The effect of these provisions is that, insofar as *producers* are concerned, one of the principal criteria is the place of first publication of the sound recording.
15. A producer may also qualify for copyright protection by reference to their domicile or residence in a Convention country. This is the combined effect of section 183 of the CRRA 2000 and the Copyright (Foreign Countries) Order 1996 (S.I. No. 36 of 1996). The Order provides for copyright protection on the basis of reciprocity. See Article 9.
- “9. Copyright subsisting by virtue only of this Order in a sound recording shall not include the right to equitable remuneration under section 17(4) (b) of the Act unless that right or a right giving rise to a claim for equitable remuneration subsists in the country in which the sound recording was first published.”
16. This Order is preserved by virtue of the transitional provisions under the CRRA 2000. See Paragraph 3(5) of Part 1 of the First Schedule of the CRRA 2000.
- “(5) Notwithstanding the repeal of the Act of 1963, any regulation, rule or order made under the Act of 1963 and which is in force immediately before the commencement of Part II of this Act shall continue in force and be deemed after the commencement of the said Part II to be made under the corresponding provisions of this Act.”
17. The qualifying criteria for performers are set out as follows at Part III, Chapter 9 of the CRRA 2000.

“Chapter 9  
Qualification: Performances

287.—In this Part, and in Part IV—

‘qualifying country’ means—

- (a) Ireland,
- (b) another Member State of the EEA, or
- (c) to the extent that an order under section 289 so provides, a country designated under that section;

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

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

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

18. As appears from the foregoing, in order for a performance to qualify for the right of remuneration provided for under section 208, either (i) there must be a connection between the performer and a qualifying country, or (ii) the performance itself must have taken place in a qualifying country. A qualifying country is defined as including Ireland and any member of the European Economic Area (“EEA”). Thus, for example, if a performance takes place in a recording studio in France, i.e. if the place of performance is an EEA country, then the performers involved will be entitled to the right of remuneration in respect of the subsequent use of that sound recording irrespective of their individual citizenship, residence or domicile. If, however, the performance takes place in a non-EEA country, for example the United States, the performers will only be entitled to the right of remuneration if they satisfy the criteria of citizenship, residence or domicile.
19. The qualifying criteria for performers make no reference to the place of first publication of the sound recording. It is this omission which gives rise to the dispute in the present case.
20. Section 289 provides for orders designating additional countries, i.e. over and above Ireland and EEA countries, as qualifying countries.

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

- (2) For the purposes of this section, an ‘Irish performance’ means a performance—

- (a) given by an Irish citizen, or by an individual who is domiciled or ordinarily resident in the State, or
  - (b) taking place in the State.
- (3) Where the law of that country, territory, state or area provides adequate protection only for certain descriptions of performance, an order under subsection (1) designating that country, territory, state or area may contain provision limiting to a corresponding extent the protection afforded by this Part or Part IV in relation to performances connected with the country, territory, state or area.”
21. No order has yet been made under section 289.

### *EU legislation*

#### *Directive 2006/115/EC*

22. Articles 8(1) and (2) of Directive 2006/115/EC read as follows.

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

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

### *International Conventions and Treaties*

#### *(i) Rome Convention 1961*

23. The long title of the Rome Convention is the “International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations”. The Rome Convention was “done” at Rome on 26 October 1961. The European Union is not a party to the Rome Convention.
24. Relevantly, the Rome Convention introduces the concept of “national treatment”. This is defined at article 2(1)(a) as meaning the treatment accorded by the domestic law of the Contracting State, in which protection is claimed, to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory. In effect, this requires that qualifying performers are entitled to the full benefit of the rights provided under domestic law.

25. Article 4 provides as follows.

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

- (a) the performance takes place in another Contracting State;
- (b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;
- (c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.”

26. Article 4(b) is of particular relevance to the main proceedings as it forges a link between performers’ rights and those of producers.

27. Article 5 provides as follows.

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

- (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);
- (b) the first fixation of the sound was made in another Contracting State (criterion of fixation);
- (c) the phonogram was first published in another Contracting State (criterion of publication).

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

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

28. The term “publication” is defined under article 3(d) as meaning the offering of copies of a phonogram to the public in reasonable quantity.

**(ii) *WIPO Performances and Phonograms Treaty 1996 (“WPPT”)***

29. The WPPT was adopted in Geneva on 20 December 1996. The European Union deposited its instrument of ratification on 14 December 2009, and the WPPT

entered into force in respect of the European Union on 14 March 2010. (Ireland ratified the WPPT on the same date). See the earlier Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

30. The relationship between the WPPT and the Rome Convention is explained as follows at article 1(1) of the WPPT.

“(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the ‘Rome Convention’).”

31. A requirement for national treatment is provided for under article 4 of the WPPT as follows.

“National Treatment

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

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

32. Relevantly, article 15(1) provides that performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms.

33. The concept of “nationals of other Contracting Parties” is defined at article 3(2) as follows.

“(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.”

## **5. THE GROUNDS FOR THE REFERENCE**

34. The case law of the CJEU establishes that it is necessary to have regard to the provisions of the WPPT when interpreting the 2006 Directive. See, in particular, *Stichting ter Exploitatie van Naburige Rechten (SENA)*, Case C-245/00,

EU:C:2003:68; *Società Consortile Fonografici (SCF)*, Case C-135/10, EU:C:2012:140; *Sociedad General de Autores y Editores de España (SGAE)*, Case C-306/05, EU:C:2006:764.

35. In each instance, however, the Court of Justice was considering circumstances where the provision of the 2006 Directive in issue mirrored a provision of the WPPT, e.g. “communication to the public” or “equitable remuneration”. The novel aspect of the main proceedings is that the provisions of the WPPT upon which the Plaintiff relies have no direct counterpart under the 2006 Directive. This raises the question of whether the interpretative obligation extends to concepts under the international agreements which have no express equivalent under the 2006 Directive.
36. On behalf of the Plaintiff, emphasis is placed on the requirement to take account of the *context* in which concepts are found, and the *purpose* of the international agreements. It is said that a direct lineage can be traced from the provisions of article 8(2) of the 2006 Directive not only to article 15 of the WPPT (which is equivalent to article 8(2)) but also through to article 4 of the WPPT (national treatment) which expressly refers to article 15. On this argument, the equivalent concept common to both the 2006 Directive and the WPPT is a right on the part of performers to share in the equitable remuneration payable in the case of communication to the public. Article 4 of the WPPT indicates that—subject always to the possibility of a reservation under article 4(2)—the beneficiaries of the right are the nationals of the other Contracting Parties as defined in article 3(2) of the WPPT. Article 3(2), in turn, provides in effect that the beneficiaries are those nationals who meet the criteria for eligibility for protection under the Rome Convention. The combined effect of articles 4 and 5 of the Rome Convention is that once the sound recording is protected, then both producers and performers are entitled to share in the equitable remuneration. Article 5 of the Rome Convention, as a result of the thirty-day rule, extends the benefit to producers generally. The result, or so it is said, is that the beneficiaries of the right to a share of equitable remuneration include a broad range of producers and performers far beyond persons just from the particular Contracting States.
37. Reference is also made to article 23(1) of the WPPT which provides that the Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of that treaty. Counsel observes that the European Union, as a Contracting Party, is subject to this obligation, and goes on to argue that one of the ways in which the EU meets this obligation is through article 8(2) of the 2006 Directive.
38. The counterargument on behalf of the Defendants is that there is no principle of law which allows for detailed provisions of the Rome Convention and the WPPT to be imported wholesale into the 2006 Directive. Counsel describes article 8(2) as a precise provision, which does not prescribe details such as who the qualifying performers are to be. Had the EU legislature wished to be prescriptive as to which producers and performers are to qualify to share the right to remuneration—rather than leave it to the Member States to determine—then this would have been set out in the 2006 Directive. Instead, there is no equivalent concept under the 2006 Directive. The 2006 Directive goes no further than saying in its recitals that it is

not intended to conflict with the international conventions on which the copyright and related rights laws of the Member States are based.

39. Counsel makes the further point that the expansive interpretation of the 2006 Directive urged upon the court by the Plaintiff would override the opt-out which is expressly provided for under article 4(2) of the WPPT. Thus it is said that even if the 2006 Directive did engage with the question of which producers and performers qualify—which the Defendant says it does not—there has been no suggestion that the 2006 Directive overrides the WPPT, and, accordingly, the right to respond to a reservation by another contracting party under article 4(2) applies. The recitals of the 2006 Directive make it clear that it is intended not to conflict with international convention.
40. Reference is also made to the transitional provisions of the 2006 Directive. These, it is submitted, involve an acknowledgment of the domestic legislation of the Member States and that it applies to the rights protected as of 1 July 1994. This, it is said, negates any suggestion (i) that the rights are being dealt with in the 2006 Directive; (ii) that the rights are being harmonised; or (iii) that the national legislation is inconsistent with the 2006 Directive or indeed the WPPT.
41. The State, in its oral submissions, drew attention to the wording of Recital 6 and the use of the phrase “a harmonised legal protection within the Community”. This, it was suggested, indicated that the target of the 2006 Directive is economic actors within the Community, and not intended to address the position of economic actors *outside* the Community.
42. The referring court has come to the conclusion that the interpretation of article 8 of the 2006 Directive is not *acte clair*. In particular, the extent to which it is legitimate to rely upon provisions of the WPPT and the Rome Convention to interpret article 8 remains uncertain. Advocate General Tizzano in *SENA* had concluded that the rules on national treatment under the Rome Convention are an integral part of European law. Notwithstanding that the Advocate General’s conclusion was not formally endorsed by the Court of Justice in its judgment in *SENA*, the very fact that such an eminent Advocate General seems to have been prepared to accept that the requirement for national treatment under the Rome Convention informs the interpretation of the concept of “equitable remuneration” even in the absence of any express provision to like effect under the 1992 Directive itself is—at the very least—relevant to the question of whether the interpretation of article 8(2) of the 2006 Directive is *acte clair*.
43. In the event that the Court of Justice were to rule that the concept of “national treatment” does apply to the 2006 Directive, it will then be necessary for the referring court to address the question of whether the provisions of the Copyright and Related Rights Act 2000 represents a lawful response to the reservation entered by some of the Contracting Parties to the WPPT. As appears from the summary of the relevant provisions of the WPPT set out at paragraph 29 *et seq.* above, the obligation under article 4 to extend the right of equitable remuneration to the nationals of other Contracting Parties is subject to the possibility of a reservation under article 15(3). The Contracting Parties enjoy a wide measure of discretion as to the type of reservation which they may enter. The right to a single

equitable remuneration under article 15(1) may (i) be applied in respect of certain uses only; (ii) be limited in some other way; or (iii) not be applied at all.

44. The USA is a Contracting Party to the WPPT but has entered a reservation under article 15(3) as follows.

“Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided for under United States law.”

45. But for this reservation, the Irish State *would have been* obliged under the WPPT to afford national treatment to US nationals. A US producer would be entitled to copyright protection on the basis of either (i) their being a US domicile or resident (the combined effect of section 183 of the CRRA 2000 and the Copyright (Foreign Countries) Order 1996), or (ii) the sound recording having been first published in the USA (section 184 of the CRRA 2000). In order for a US performer to be entitled to copyright protection, it *would have been* necessary for the Minister to make a designation order under section 289 in favour of the USA. (A US performer does not meet the existing qualifying criteria under section 287 and 288 for the obvious reason that the USA is not an EEA country).
46. Of course, the fact that the USA has entered a reservation under article 15(3) has the consequence that the Irish State is relieved of the obligation to extend national treatment to US nationals. However, the actual effect of the CRRA 2000 is that US producers will, in many instances, qualify for copyright protection, whereas US performers will usually not qualify. This difference in treatment occurs because a US producer can avail of the “first publication” criteria under section 184 to qualify for copyright protection, whereas a US performer cannot. The upshot of all of this is that in the case of some sound recordings involving US producers and US performers, the *entirety* of the licence fee payable under section 38, i.e. the equitable remuneration, accrues for the sole benefit of the producer.
47. The referring court is seeking a ruling from the Court of Justice as to whether this asymmetric treatment of producers and performers represents a legitimate response to an article 15(3) reservation.

## 6. ***QUESTIONS REFERRED FOR A PRELIMINARY RULING***

1. Is the obligation on a national court to interpret the Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (“the Directive”) in the light of the purpose and objective of the Rome Convention and/or the WPPT confined to concepts which are expressly referenced in the Directive, or does it, alternatively, extend to concepts which are only to be found in the two international agreements? In particular, to what extent must Article 8 of the Directive be interpreted in light of the requirement for “national treatment” under Article 4 of the WPPT?
2. Does a Member State have discretion to prescribe criteria for determining which performers qualify as “relevant performers” under Article 8 of the Directive? In particular, can a Member State restrict the right to share in equitable remuneration to circumstances where either (i) the performance takes place in a European Economic Area (“EEA”) country, or (ii) the performers are domiciles or residents of an EEA country?
3. What discretion does a Member State enjoy in responding to a reservation entered by another Contracting Party under article 15(3) of the WPPT? In particular, is the Member State required to mirror precisely the terms of the reservation entered by the other Contracting Party? Is a Contracting Party required not to apply the 30-day rule in Article 5 of the Rome Convention to the extent that it may result in a producer from the reserving party receiving remuneration under Article 15(1) but not the performers of the same recording receiving remuneration? Alternatively, is the responding party entitled to provide rights to the nationals of the reserving party on a more generous basis than the reserving party has done, i.e. can the responding party provide rights which are not reciprocated by the reserving party?
4. Is it permissible in any circumstances to confine the right to equitable remuneration to the *producers* of a sound recording, i.e. to deny the right to the *performers* whose performances have been fixed in that sound recording?

Dated 20 March 2019.



---

Mr Justice Garrett Simons

## **APPENDIX**

Judgment of the High Court delivered on 11 January 2019.