



LINDA SCALES + ASSOCIATES
solicitors

Memorandum

For: Members of RAAP

Re: Judgment of the European Court of Justice delivered 8th September 2020

Date: 22nd September 2020

This memorandum summarises the recent judgment of the Court of Justice and its place in the proceedings taken by RAAP against PPI and the Irish State. The outcome represents a significant success for RAAP.

Key finding of the Court

The key finding in the judgment is that when protected sound recordings are played in the European Union, the performers on those recordings must share in the revenues generated. Producers (record labels) are obliged to share those revenues with performers, whatever the nationality of the performer or the place where the recording took place. This finding should enable the Irish Court to make a ruling that prevents PPI from diverting performer income to producers (record labels) on the grounds that some performers fail to qualify for payment under Irish law.

Background to the judgment

The case in which the Court of Justice gave judgment is one of two cases taken by RAAP. This case is against both PPI and the Irish State (in its capacity as legislator). The cases are about the sharing of the money collected by PPI for the broadcasting and public performance of sound recordings. Producers (record labels) are permitted under Irish law to collect this money from broadcasters and other users. They must then make a payment to the performers who qualify for payment.

The right of performers to share in the remuneration arises under an EU Directive, which in turn reflects a right granted to performers by international treaties, the WPPT in particular. All EU Member States, including Ireland and the EU itself, are parties to this treaty. The international practice adopted by treaty parties is to divide the remuneration between performers and producers (record labels) on a 50:50 basis.

Castlevue House, Sandymount Green, Dublin 4
t +353(0)1 2837784 m +353(0)86 3691456
linda@lindascales.com www.lindascales.com

Irish legislation implementing both the directive and the international treaty is very poor. It goes back to 2000, when performers were first given rights under Irish law. It does not set out a clear mechanism for the sharing of the remuneration between producers (record labels) and performers. In addition, while it effectively qualifies all sound recordings for payment, whatever the nationality of the producer (record label) or the place of recording, only performers who have a certain connection with Ireland/the EU/the EEA, or whose performances were made in one of those places qualify. So, all producers (record labels) qualify for payment, but only some performers.

The litigation arose because, in 2014, PPI abandoned an agreed system of sharing the remuneration with RAAP and devised a new system which they have been attempting to impose on RAAP ever since. In broad terms, PPI first of all calculates the “net distributable revenue” (gross receipts less expenses and some other disputed deductions). It then takes 50% of the net distributable revenue for producers (record labels). Where the other 50% (the performers’ share) is concerned, PPI has engaged PPL in the UK to calculate the royalties due to all individual performers on played recordings, both those who they consider qualify and those who do not. When that is done, PPI ring-fences the amount due to the performers who, in their judgment, do not qualify. They then take that money for producers (record labels) *in addition* to their own 50% share. Although RAAP is contesting some of the deductions and the right of PPI to make the individual calculations, it is this taking of the money for the “non-qualifying” performances that was the issue in the reference to the Court of Justice. In practical terms the amount of money PPI diverts to producers (record labels) on this account is about €1 million annually.

The proceedings leading to the judgment

In this case - the first of the two cases taken by RAAP - one of the things the Irish court was asked to find was that whenever a producer (record label) qualifies for payment (that is, effectively in all cases), the performers on the recording must also be paid. At a legal level, this involves investigating the extent to which Irish law must conform to the obligations in the directive and in the treaty. The Irish court was unsure about aspects of this analysis and made a “preliminary reference” to the European Court. The Irish court asked a number of questions.

The judgment

In answering the questions asked by the Irish Court, The Court of Justice found:

- The right of the performer to share the remuneration is triggered every time the work is communicated to the public in the European Union, irrespective of the nationality or place of residence of the performer, and of the place where the recording is made.
- As the treaty obliges the EU and all its Member States to grant the shared right for performers and producers (record labels) to the nationals of all contracting parties to the treaty, it follows that the right in the directive simply cannot be

implemented by a Member State in such a way as to exclude performers who do not have the connection to Ireland/the EU/the EEA that Irish law stipulates.

- The right in question is protected as a fundamental right under the Charter of Fundamental Rights of the European Union. Any limitation of the right must therefore be specifically provided in EU law and be clearly and precisely defined. It is for the EU legislature alone to provide for any such limitations. “As EU law currently stands” the Court said, there are no such provisions in EU law and Member States cannot therefore limit their obligations under the treaty.
- It is not permissible to confine the right to remuneration to the producers (record labels) of a sound recording, while denying the right to performers on the same recording. As the remuneration “has the fundamental characteristic of being shared”, the remuneration must be apportioned between the two sets of right-holders.

Impact of the judgment

While the judgment of the Court of Justice is extremely positive for RAAP, the case has yet to go back to the Irish court, which will apply the judgment for the purpose of deciding the legal issues before it. The issues are complex and PPI is aggressive in the pursuit of the collaborative “system” it has designed with PPL to take over the Irish calculations. However obvious the outcome appears, it would be foolish to second-guess the finding of the Irish Court.

For RAAP, this decision is a key part of the jigsaw of judicial findings that RAAP needs in order to achieve a proper share of the remuneration for performers.

At a wider level, the case is ground-breaking. A clear link is forged between national law, European law and international treaty. The “exclusive competence” of the EU to legislate in relation to the right in question means that Member States have no individual leeway, the judgment emphasising the need for harmonised legal protection across the EU.

The judgment of the Court puts down a very strong marker in terms of the level of protection of the rights of performers in the European Union.



LINDA SCALES