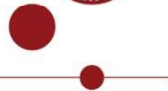


Property Rights and Remuneration Rights - A Matter of Enforcement

Professor Thomas Riis

UNIVERSITY OF COPENHAGEN



Remuneration rights and property rights

Case C-135/10 (SFC):

- Broadcasting of phonograms in a dental practice - Phonogram producers' rights
- **Infosoc** Directive 2001/29/EC, art. 3(2)(b): Right of communication to the public in respect of on-demand transmissions → Property right
- **Rental and Lending Rights** Directive 2006/115/EC, art. 8(2) Right to equitable remuneration for broadcasting by wireless means or for any communication to the public → Remuneration right (cf. Rome Convention art. 12)

*"It is clear from a comparison of Article 3(1) of [Infosoc] and Article 8(2) of Directive 92/100 that the **concept of communication to the public** appearing in those provisions is used in contexts which are **not the same and pursue objectives which, while similar, are none the less different to some extent.**" (para. 74)*



Property rights and remuneration rights are of a different nature

Property Rights: Damages

Enforcement Directive (2004/48/EC) art. 13:

"1. ... to pay the rightholder damages appropriate to the ***actual prejudice*** suffered by him as a result of the infringement

... taking into account e.g. ***lost profits, unfair profits made by the infringer*** and, ***moral prejudice***

= ***harm-based compensation***, or

(b) as ***an alternative to (a)***, they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of ***royalties or fees which would have been due if the infringer had requested authorisation*** to use the intellectual property right in question

= ***reasonable royalty***

Remuneration right: “Equitable remuneration”

RLR Directive Art. 3(6), 5(1) and **8(2)**, Sat/Cab Directive Art. 4, (Rome Convention Art. 12)

C-245/00 SENA

*“Pursuant to the principle of the autonomy of Community law, [the concept of equitable remuneration ...] must be **interpreted uniformly** in all Member States.” (Para. 24)*

*“In the absence of any Community definition of equitable remuneration, there is **no objective reason to justify the laying down by the Community judicature of specific methods** for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States... ” (para. 34)*

*“ ... whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of **the value of that use in trade**”. (Para. 37)*

“The value of that use in trade” ~ “Market value”

Remuneration right: "Fair compensation"

- Infosoc Articles 5(2)(a)-(b) and (e)
- 'When evaluating these circumstances, a valuable criterion would be the **possible harm** to the rightholders resulting from the act in question' (rec. 35)

C-467/08 Padawan

- " ...the purpose of fair compensation is to compensate authors 'adequately' for the use made of their protected works without their authorization ... The private copying exception must therefore include a system 'to compensate for the prejudice to rightholders' (para. 39)

= harm-based compensation (actual harm v. possible harm)

Remuneration right by agreement: “Appropriate remuneration”

Copyright Management Directive

Art. 16(2) ‘Licensing’

*‘Rightholders shall receive appropriate remuneration for the use of their rights... rights to remuneration shall be reasonable in relation to, i.a., the **economic value of the use of the rights in trade**’*

= “The value of that use in trade” ~ “Market value”

“Equitable remuneration” compared to “Fair compensation”

- Market value v. harm-based compensation (broad?)
(relate to ‘reasonable royalty’ v. ‘actual prejudice’ (IPRED, Art. 13))

Case C-277/10 (Luksan):

Re. private copying/blank media levy:

*‘It is true that in [the Rental and Lending Rights Directive] the European Union legislature used the term ‘remuneration’ instead of the term ‘compensation’ employed in [the Infosoc] Directive ... However, that concept of ‘remuneration’ is also designed to establish recompense for authors, since it arises in order **to compensate for harm to the latter**’ (para. 103, cf. case C-271/10 VEWA, para. 29)*

Plant Variety Rights Regulation (2100/94/EC)

Art. 13: Property right

Art. 94: Damages

'(1) [The infringer] may be sued by the holder to enjoin such infringement or to pay ***reasonable compensation*** [equivalent to the licence fee, cf. C-509/10, C-481/14] or both...

(2) Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for ***any further damage*** resulting from the act in question.

= ***harm-based compensation***

The Enforcement Directive supplements the PVR-Reg.

Art. 14: Statutory license = remuneration right

'**Farmers' privilege**": '... *farmers are authorized to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety ...*, which is covered by a Community plant variety right

'**Equitable remuneration**' (art. 14(3))

Equitable remuneration

Commission Regulation (EC) No 1768/95, art. 5(2)-(5): *'the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material ... the remuneration to be paid shall be 50 % of the amounts charged for the licensed production of propagating material'*

C-509/10 (Geistbeck)

'... the objective underlying the concept of 'equitable remuneration' referred to in ... Article 14(3) of PVR-Reg., read in conjunction with Article 5(5) of Regulation No 1768/95, is to ***establish a balance between the reciprocal legitimate interests of farmers and holders of plant variety rights.***

(para. 30)

Reasonable compensation – property rights

C-481/14 (Jungpflanzen Grünewald):

PVR-reg, art. 94: Resembles Art. 13 IPRED

- 66.000 €: Reasonable royalty (the normal market fee)
- 33.000 €: “infringement premium” 50% of reasonable royalty: To compensate for specific circumstances and ensure that it doesn't pay to infringe

C-481/14 (Jungpflanzen Grünewald)

AG Opinion

Circumstances of the specific case that can substantiate the a “reasonable royalty” is higher than the “usual royalty” (= premium)

No requirement under Article 94(2) or Article 13(1) of IPRED to fix the amount of damages by adding a flat-rate supplement but **it is an option** for the national court, provided **it reflects the harm suffered** by the right holder (not being arbitrary or punitive)

- PVR licensees have obligations of keeping account on the propagation of the protected variety contrary to infringers
- An infringer pays at a later time than a licensee (cost of liquidity, perhaps inflation)
- Distortion of the right holders licensing policy caused by infringement may be compensates as a type of harm (authorized v. unauthorized use)



C-481/14 (Jungpflanzen Grünewald)

Judgement

Article 94 of Regulation 2100/94 ... concerns exclusively compensation for damage suffered by the holder of a Community plant variety right (para. 30)

'Article 94 ... does not permit an infringer to be ordered to pay a **flat-rate 'infringer supplement'** since such a supplement does not necessarily reflect the damage suffered by the holder of the variety infringed, although ***[IPRED] does not prevent the Member States from laying down measures that are more protective***' (para. 40)

'the amount of the damage ... must be determined on the basis of the specific matters put forward in that regard by the holder of the variety infringed, if need be using a **lump-sum method** if those matters are not quantifiable' (para. 64)

Conclusion

- To the extent the CJEU/courts will not allow for an 'infringement premium' or a broad interpretation of 'additional damages' property rights tend to be enforced in the same way as remuneration rights
- Remuneration under remuneration rights is calculated in three different ways:
 - 1) **Market value** ('Equitable remuneration'/'appropriate remuneration': RLR-dir., Sat/Cab-dir., CRM-dir.) ~ 'Reasonable royalty'
 - 2) **Harm-based compensation** ('Fair compensation': Infosoc)
 - 3) **A balance between the reciprocal legitimate interests** ('Equitable remuneration': PVR-reg./'Remuneration': Art. 6 RLR-dir.)