

Court of Justice EU, 25 January 2017,
Stowarzyszenie



LITIGATION

National legislation under which the holder of an intellectual property right may demand (i) either compensation from the person who has infringed that right for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, (ii) or – without him having to prove the actual loss - payment of a sum corresponding to twice the appropriate fee is not precluded by Article 13 EU Enforcement Directive 2004

- In the light of the foregoing, the answer to the question referred is that Article 13 of Directive 2004/48 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.

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Court of Justice EU, 25 January 2017

(J.L. da Cruz Vilaça, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and F. Biltgen.)

JUDGMENT OF THE COURT (Fifth Chamber)

25 January 2017 (*)

(Reference for a preliminary ruling — Directive 2004/48/EC — Article 13 — Intellectual and industrial property — Infringement — Calculation of damages — Legislation of a Member State — Twice the amount of the royalties normally due)

In Case C-367/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 15 May 2015, received at the Court on 14 July 2015, in the proceedings
Stowarzyszenie ‘Oławska Telewizja Kablowa’
v

Stowarzyszenie Filmowców Polskich,
THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 July 2016,
after considering the observations submitted on behalf of:

- Stowarzyszenie ‘Oławska Telewizja Kablowa’, by R. Comi and A. Comi, radcowie prawni,
- Stowarzyszenie Filmowców Polskich, by W. Kulis and E. Traple, adwokaci,
- the Polish Government, by B. Majczyna, M. Drwięcki and M. Nowak, acting as Agents,
- the Greek Government, by A. Magrippi and E. Tsaousi, acting as Agents,
- the Austrian Government, by C. Pesendorfer and G. Eberhard, acting as Agents,
- the European Commission, by J. Hottiaux and F. Wilman, acting as Agents,

after hearing [the Opinion of the Advocate General](#) at the sitting on 24 November 2016,
gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum at OJ 2004 L 195, p. 16).

2. The request has been made in proceedings between Stowarzyszenie ‘Oławska Telewizja Kablowa’, established in Oława (Poland) (‘OTK’), and Stowarzyszenie Filmowców Polskich, established in Warsaw (Poland) (‘SFP’), concerning an action for infringement of intellectual property rights.

Legal context

International law

3. Article 1(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (OJ 1994 L 336, p. 214; ‘the TRIPS Agreement’), which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3), provides:

‘Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. ...’

4. Article 19 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 (‘the Berne Convention’), provides:

‘The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.’

5. Article 2(2) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 (‘the Rome Convention’), provides:

‘National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.’

EU law

6. Recitals 3, 5 to 7, 10 and 26 of Directive 2004/48 are worded as follows:

'(3) ... without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property ... is applied effectively in the [European Union]. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the internal market.

...

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States' international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

...

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

...

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property

right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.'

7. Article 2 of Directive 2004/48, headed 'Scope', provides:

'1. Without prejudice to the means which are or may be provided for in [EU] or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by [EU] law and/or by the national law of the Member State concerned.

...

3. This Directive shall not affect:

...

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

...

8. Article 3 of Directive 2004/48, headed 'General obligation', provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

9. Article 13 of Directive 2004/48, headed 'Damages', provides in paragraph 1:

'Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement,

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.'

Polish law

10. Article 79(1) of the ustawa o prawie autorskim i prawach pokrewnych (Law on copyright and related rights) of 4 February 1994 (consolidated text, Dz. U. of 2006, No 90, heading 631), in the version in force on the date when the main action was brought (*'the UPAPP'*), provided:

'A rightholder whose economic rights of copyright have been infringed may request the person who infringed those rights to:

...

(3) remedy the loss caused:

(a) on the basis of general principles, or

(b) by payment of a sum of money corresponding to twice, or, in the event of a culpable infringement, three times, the amount of the appropriate fee which would have been due at the time it was sought if the rightholder had given permission for the work to be used;

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

11. SFP is an organisation collectively managing copyright which is licensed in Poland and entitled to manage and protect copyright in audiovisual works. OTK broadcasts television programmes by means of a cable network in the town of Oława (Poland).

12. After notice of termination was given on 30 December 1998 of a licensing agreement that set out the rules on payment between the parties to the main proceedings, OTK continued to make use of copyright works and filed an application with the Komisja Prawa Autorskiego (Copyright Commission, Poland) seeking, in essence, that the fee payable for use of the copyright managed by SFP be set. By decision of 6 March 2009, that commission set the fee at 1.6% of the net income, exclusive of value added tax, earned by OTK from its retransmission of works by cable, not including certain charges borne by it. OTK itself calculated the amount due on that basis and paid SFP the sum of PLN 34 312.69 (roughly EUR 7 736.11) in respect of the income received for the period from 2006 to 2008.

13. On 12 January 2009 SFP brought an action against OTK, by which it sought, on the basis, inter alia, of Article 79(1)(3)(b) of the UPAPP, an order prohibiting OTK from retransmitting the protected audiovisual works until a new licensing agreement had been entered into and requiring OTK to pay it the sum of PLN 390 337.50 (roughly EUR 88 005.17) together with statutory interest.

14. By judgment of 11 August 2009, the Sąd Okręgowy we Wrocławiu (Regional Court, Wrocław, Poland) ordered OTK to pay SFP the sum of PLN 160 275.69 (roughly EUR 36 135.62) together with statutory interest and, essentially, dismissed the action as to the remainder. After the appeals which both of the parties to the main proceedings brought against that judgment were dismissed, they both brought an appeal on a point of law. By judgment of 15 June 2011, the Sąd Najwyższy (Supreme Court, Poland), however, referred the case back for fresh examination to the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław, Poland), which, on 19 December 2011, delivered a

second judgment. This judgment was also set aside by the Sąd Najwyższy (Supreme Court) in an appeal on a point of law and the case was again referred back to the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) for fresh examination. OTK brought an appeal on a point of law against the judgment subsequently delivered by the latter court.

15. The Sąd Najwyższy (Supreme Court), which is now required, in the context of this most recent appeal, to examine the case for a third time, has doubts as to whether Article 79(1)(3)(b) of the UPAPP is compatible with Article 13 of Directive 2004/48. It states that under that provision of the UPAPP it is possible, at the request of a person whose economic rights of copyright have been infringed, for compensation to consist in payment of a sum of money corresponding to twice or three times the amount of the appropriate fee. That provision therefore entails a form of penalty.

16. Furthermore, the referring court is uncertain whether, in order for a person holding economic rights of copyright to be compensated pursuant to Directive 2004/48, he must prove the event giving rise to the loss, the loss suffered and its extent, the causal link between that event and the loss and the fact that the acts of the perpetrator of the infringement are culpable.

17. In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 13 of Directive 2004/48 to be interpreted as meaning that the rightholder whose economic rights of copyright have been infringed may seek redress for the damage which it has incurred on the basis of general principles, or, without having to prove loss and the causal relationship between the event which infringed its rights and the loss, may seek payment of a sum of money corresponding to twice the amount of the appropriate fee, or, in the event of a culpable infringement, three times the amount of the appropriate fee, whereas Article 13 of Directive 2004/48 states that it is a judicial authority which must decide on damages by taking into account the factors listed in Article 13(1)(a), and only as an alternative in certain cases may set the damages as a lump sum, taking into consideration the elements listed in Article 13(1)(b) of that directive? Is the award, made at the request of a party, of damages as a predetermined lump sum corresponding to twice or three times the amount of the appropriate fee permissible pursuant to Article 13 of the directive, regard being had to the fact that recital 26 thereof states that it is not the aim of the directive to introduce punitive damages?'

Consideration of the question referred

18. By its question, the referring court asks, in essence, whether Article 13 of Directive 2004/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may choose to demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without

him having to prove the actual loss and the causal link between the event giving rise to the infringement and the loss suffered, payment of a sum corresponding to twice or, in the event of a culpable infringement, three times the appropriate fee which would have been due if permission had been given for the work concerned to be used.

19. It should be stated at the outset that, after the order for reference in the present case was made, the national provision at issue in the main proceedings, namely Article 79(1)(3)(b) of the UPAPP, was declared partially unconstitutional by a judgment of 23 June 2015 of the Trybunał Konstytucyjny (Constitutional Court, Poland), in so far as that provision permitted a person whose economic rights of copyright were infringed to claim, in the event of a culpable infringement, payment of a sum corresponding to three times the amount of the appropriate fee. As the decision of the Trybunał Konstytucyjny (Constitutional Court) has retroactive effect, the question referred for a preliminary ruling has become hypothetical and, therefore, inadmissible in so far as it relates to legislation that has been declared unconstitutional.

20. Since the referring court has nevertheless maintained its question, the question referred is, accordingly, to be understood as designed to establish whether Article 13 of Directive 2004/48 must be interpreted as precluding national legislation which provides for the possibility of demanding payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used (*'the hypothetical royalty'*).

21. It should be noted, first of all, that, as is apparent from recital 3, Directive 2004/48 seeks to ensure that the substantive law on intellectual property is applied effectively in the European Union. Thus, Article 3(2) of the directive requires the measures, procedures and remedies provided for by the Member States to be effective, proportionate and dissuasive.

22. Whilst recital 10 of Directive 2004/48 refers, in this context, to the objective of ensuring a high, equivalent and *'homogeneous'* level of protection, of intellectual property in the internal market, the fact remains that, as is apparent from Article 2(1), the directive applies without prejudice to the means which are or may be provided for, in particular, in national legislation, in so far as those means may be more favourable for rightholders. It is quite clear from recital 7 of the directive that the term *'means'* that is used is general in nature, encompassing the calculation of damages.

23. Consequently, as the Court has already held, Directive 2004/48 lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective (see judgment of 9 June 2016, [Hansson](#), C-481/14, EU:C:2016:419, paragraphs 36 and 40).

24. Next, in accordance with recitals 5 and 6 and Article 2(3)(b) of Directive 2004/48, it is necessary, for the purpose of interpreting the directive's provisions, to take account of obligations on the Member States resulting

from international agreements, including the TRIPS Agreement, the Berne Convention and the Rome Convention, which could apply to the dispute in the main proceedings. Article 1 of the TRIPS Agreement as well as Article 19 of the Berne Convention and Article 2 of the Rome Convention permit Contracting States to grant the holders of the rights concerned wider protection than that respectively laid down by those instruments.

25. Accordingly, Article 13(1)(b) of Directive 2004/48 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the holder of economic rights of copyright that have been infringed may require the person who has infringed those rights to compensate for the loss caused by payment of a sum corresponding to twice the amount of a hypothetical royalty.

26. That interpretation cannot be called into question by the fact, first, that compensation calculated on the basis of twice the amount of the hypothetical royalty is not precisely proportional to the loss actually suffered by the injured party. That characteristic is inherent in any lump-sum compensation, like that expressly provided for in Article 13(1)(b) of Directive 2004/48.

27. Nor, secondly, is that interpretation called into question by the fact that Directive 2004/48, as is apparent from recital 26, does not have the aim of introducing an obligation to provide for punitive damages.

28. Contrary to the view that the referring court appears to take, the fact that Directive 2004/48 does not entail an obligation on the Member States to provide for *'punitive'* damages cannot be interpreted as a prohibition on introducing such a measure.

29. In addition, without there being any need to rule on whether or not the introduction of *'punitive'* damages would be contrary to Article 13 of Directive 2004/48, it is not evident that the provision applicable in the main proceedings entails an obligation to pay such damages.

30. Thus, it should be pointed out that, where an intellectual property right has been infringed, mere payment of the hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, given that payment of that royalty would not, in itself, ensure reimbursement of any costs — referred to in recital 26 of Directive 2004/48 — that are linked to researching and identifying possible acts of infringement, compensation for possible moral prejudice (see, in this latter respect, judgment of 17 March 2016, [Liffers](#), C-99/15, EU:C:2016:173, paragraph 26) or payment of interest on the sums due. Indeed, OTK confirmed at the hearing that payment of twice the amount of the hypothetical royalty is equivalent in practice to compensation of an amount remaining below what the holder would be able to claim on the basis of *'general principles'*, within the meaning of Article 79(1)(3)(a) of the UPAPP.

31. It is admittedly possible that, in exceptional cases, payment for a loss calculated on the basis of twice the amount of the hypothetical royalty will exceed the loss actually suffered so clearly and substantially that a claim to that effect could constitute an abuse of rights,

prohibited by Article 3(2) of Directive 2004/48. It is apparent, however, from the Polish Government's observations at the hearing that, under the legislation applicable in the main proceedings, a Polish court would not be bound in such a situation by the claim of the holder of the infringed right.

32. Thirdly and finally, as regards the argument that, inasmuch as the injured party could calculate the damages on the basis of twice the amount of the hypothetical royalty, he would no longer have to prove the causal link between the event giving rise to the copyright infringement and the loss suffered, it must be stated that that argument is based on an excessively strict interpretation of the concept of 'causality', under which the holder of the infringed right should establish a causal link between that event and not only the loss suffered but also its precise amount. Such an interpretation is irreconcilable with the very idea of setting damages as a lump sum and, therefore, with Article 13(1)(b) of Directive 2004/48, which permits that type of compensation.

33. In the light of the foregoing, the answer to the question referred is that Article 13 of Directive 2004/48 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.

Costs

34. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.

delivered on 24 November 2016 (1)

Case C-367/15

Stowarzyszenie 'Oławska Telewizja Kablowa' w Oławie

v

Stowarzyszenie Filmowców Polskich w Warszawie (Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Intellectual and industrial property rights — Infringement — Calculation of damages — Directive 2004/48/EC — Legislation of a Member State providing for damages equivalent to two or three times the amount of the royalties which would have been due had there been an authorisation to use the intellectual property right in question)

1. By this request for a preliminary ruling, the Court is asked to rule on the interpretation of Directive 2004/48/EC on the enforcement of intellectual property rights (2) and, in particular, on the question whether Article 13 of that directive precludes a rule under national law allowing a rightholder to claim damages from an alleged infringer of a pre-determined amount which might, to use the terminology of the referring court, be described as 'punitive'.

EU law

2. Recitals 2 and 3 of Directive 2004/48 state:

'(2) *The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the internet.*

(3) *However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the [European Union]. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market.'*

3. According to recital 8 of Directive 2004/48:

'*The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the [European Union]. This situation does not promote free movement within the Internal Market or create an environment conducive to healthy competition.'*

4. According to recital 10 of Directive 2004/48:

'*The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.'*

5. Recital 17 of Directive 2004/48 is worded as follows: '*The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific*

features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.’

6. According to recital 26 of Directive 2004/48:

‘With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.’

7. Article 2 of Directive 2004/48 is entitled ‘Scope’. Paragraph 1 provides:

‘Without prejudice to the means which are or may be provided for in [EU] or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by [EU] law and/or by the national law of the Member State concerned.’

8. According to Article 3 of Directive 2004/48:

‘1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.’

9. Article 13 of Directive 2004/48 is entitled ‘Damages’.

Paragraph 1 provides as follows:

‘Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate

cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

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.’

Polish law

10. Article 79(1) of the Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (Polish Law on Copyright and Related Rights of 4 February 1994; ‘the law on copyright’), in the version in force at the material time, provided:

‘A rightholder whose economic rights in copyright have been infringed may request the person who infringed those rights to:

1. cease the infringement;
2. repair the effects of the infringement;
3. remedy the loss caused:

(a) on the basis of general principles, or

(b) by payment of a sum of money corresponding to twice, or, in the event of a culpable infringement, three times, the amount of the appropriate fee which would have been due at the time it was sought if the rightholder had given permission for the work to be used;

4. recover any profits obtained.’

Facts, procedure and the question referred

11. The Stowarzyszenie Filmowców Polskich (the Polish Filmmakers’ Association; ‘the Filmmakers’ Association’), is an organisation which is authorised to manage and protect copyrighted audiovisual works, including those (re)transmitted via cable television networks. It operates on the basis of a licence issued by the Polish Minister for Culture and the Arts. The Stowarzyszenie Oławska Telewizja Kablowa (Cable Television Association of the Town of Oława; ‘the Cable TV Association’) broadcasts programmes on cable television in the town of Oława in Lower Silesia.

12. On 4 October 1995, the parties concluded a licensing agreement setting out the rules governing the fees payable by the Cable TV Association to the Filmmakers’ Association. On 30 December 1998, the latter gave notice of termination of that agreement and proposed that the parties enter into a new agreement on modified terms. Those terms involved paying a higher licensing fee, namely 2.8% of the Cable TV Association’s net monthly income, a figure which had already been accepted by a significant number of other operators in the Polish cable television market.

13. The Cable TV Association did not accept the Filmmakers’ Association’s proposals. On 17 April 2008, it filed an application with the Komisja Prawa Autorskiego (Polish Copyright Authority) with a view to having the dispute between the parties resolved. (3) By decision of 6 March 2009, that authority ordered that the licence fee be set at 1.6% of monthly net income, excluding value added tax and installation and connection fees. The Cable TV Association

subsequently paid the Filmmakers' Association the sum of PLN 34 312.69 (4) in respect of its income for the period from 2006 to 2008, based on that monthly figure.

14. On 12 January 2009, the Filmmakers' Association brought proceedings seeking an order prohibiting the Cable TV Association from (re)transmitting audiovisual works by cable television before a new licensing agreement had been entered into and requesting that the defendant be ordered to pay the principal sum of PLN 390 337.50 (5) in respect of the period from the date on which the action was lodged until the date of actual payment. Those claims were made on the basis of Article 79(1)(1) and (3)(b) of the law on copyright.

15. By judgment of 11 August 2009, the Sąd Okręgowy (Regional Court) in Wrocław declared that there was no need to adjudicate as regards the sum of PLN 84 120.51, (6) prohibited the Cable TV Association from (re)broadcasting programmes before a new licensing agreement had been concluded with the Filmmakers' Association, awarded the latter the principal sum of PLN 160 275.69 (7) and dismissed the remainder of the action. That court found that there had been a breach of Article 79(1) of the law on copyright since the defendant had culpably (re)broadcast programmes in the knowledge that it did not hold a licence. An amount equal to three times the appropriate fee was therefore due to the applicant by virtue of that provision.

16. Both parties appealed against that judgment before the Sąd Apelacyjny (Court of Appeal) in Wrocław. By judgment of 12 March 2010, that court dismissed the appeals. Subsequently, the parties lodged appeals before the referring court which, by judgment of 15 June 2011, set aside the judgment of the Court of Appeal and remitted the case for re-examination by that court. By judgment of 19 December 2011, the Court of Appeal varied the judgment under appeal by ordering the Cable TV Association to pay a further PLN 145 941.30 (8) to the Filmmakers' Association and dismissed the appeal brought by the Cable TV Association. On the case being heard by the referring court a second time, that court, by judgment of 27 March 2013, again set aside the judgment under appeal and remitted the case for re-examination by the Court of Appeal. By letter of 28 August 2013, the Filmmakers' Association partially withdrew the claim for an order prohibiting the Cable TV Association from effecting any (re)broadcast. On re-examining the case, the Court of Appeal noted that the only outstanding matter between the parties was the question of the amount of damages payable under Article 79 of the law on copyright.

17. The dispute is now before the referring court for the third time. That court observes that the Cable TV Association has consistently argued that Article 79 of the law on copyright is contrary to Article 13 of Directive 2004/48, in particular in so far as it provides for the award of 'punitive' damages amounting to two or three times the appropriate fee.

18. Since it is uncertain as to the interpretation to be given to the provisions of that directive, the referring court decided to stay the proceedings and to refer the

following question to the Court of Justice for a preliminary ruling:

'Is Article 13 of [Directive 2004/48] to be interpreted as meaning that the rightholder whose economic rights of copyright have been infringed may seek redress for the damage which it has incurred on the basis of general principles, or, without having to prove loss and the causal relationship between the event which infringed its rights and the loss, may seek payment of a sum of money corresponding to twice the amount of the appropriate fee, or, in the event of a culpable infringement, three times the amount of the appropriate fee, whereas Article 13 of Directive 2004/48 states that it is a judicial authority which must decide on damages by taking into account the factors listed in Article 13(1)(a), and only as an alternative in certain cases may set the damages as a lump sum, taking into consideration the elements listed in Article 13(1)(b) of that directive? Is the award, made at the request of a party, of damages as a pre-determined lump sum corresponding to twice or three times the amount of the appropriate fee permissible pursuant to Article 13 of the directive, regard being had to the fact that recital 26 thereof states that it is not the aim of the directive to introduce punitive damages?'

19. Written observations have been lodged by the Filmmakers' Association, by the Greek, Polish and Austrian Governments and by the European Commission. At the hearing on 14 July 2016, both parties to the main proceedings, together with the Polish Government and the Commission were represented and presented oral argument.

Assessment

Preliminary matter

20. The order for reference was lodged at the Court on 14 July 2015. By judgment of 23 June 2015, the Trybunał Konstytucyjny (Polish Constitutional Court) held that Article 79(1)(3)(b) of the law on copyright was contrary to the constitution of the Republic of Poland in so far as it allowed a copyright holder whose rights had been infringed to claim, where that infringement was culpable, payment of three times the appropriate fee. The provision has therefore been modified to that extent with effect from 1 July 2015.

21. The judgment of the constitutional court having been drawn to its attention, this Court asked the referring court whether it wished to maintain its reference for a preliminary ruling. The referring court replied on 28 August 2015 to the effect that, first, because Article 79(1)(3)(b) continued to provide for the payment of an amount equal to twice the appropriate fee, it was still concerned about the issue of punitive damages and, second, the constitutional court's judgment served to reinforce its concerns regarding the potential absence under national law of a need to establish culpability on the alleged infringer's part. The question referred should accordingly be read in the light of those developments.

Substance

22. Directive 2004/48 is a harmonising measure designed to govern the enforcement of intellectual property rights. The Court has held that it requires that *'there must be effective legal remedies designed to*

prevent, terminate or rectify any infringement of an existing intellectual property right'. (9) To that end, Article 2(1) provides, subject to the proviso I shall address below, (10) for the measures, procedures and remedies laid down by the directive to apply to any intellectual property rights which are subject to the provisions of EU law or of the national law of a Member State.

23. The measures which the Member States must provide for cover all forms of intellectual property rights and include, but are not limited to, damages. (11) However, it is with the question of compensation payable in respect of breach of copyright that this order for reference is concerned. In particular, the Court is asked to rule on the calculation of damages under the directive having regard in particular to the issue of proof and causation of loss by the rightholder and that rightholder's entitlement to recover lump sum damages which may not be related to the loss suffered and which might, on one analysis, be punitive. (12)

24. In that regard, the Austrian and Polish Governments (particularly the former) have placed great emphasis on the statement in Article 2 of Directive 2004/48 that that measure is without prejudice to means provided for in national legislation which may be more favourable for rightholders. If valid, such an argument would eliminate — or at least considerably reduce — the need to consider the remaining provisions of the directive, since it does not appear to be disputed that the provisions of the national law on copyright at issue are intended to be favourable to rightholders. Whilst it is clearly necessary to consider Article 2(1) in answering the question referred to the Court, it is in my view important first to address not what the directive does not seek to do — by leaving matters to the discretion of the Member States — but what it does seek to do in terms of laying down a basis for EU-wide harmonisation.

25. The particular issue with which the referring court is faced concerns a provision of national legislation (Article 79(1) of the law on copyright) which allows a rightholder who claims that his rights have been infringed to claim by way of damages a sum of money from the alleged infringer which is predetermined (13) and which accordingly has no necessary causal link to the actual loss incurred by the rightholder. Such an entitlement would appear to arise automatically. (14) On that basis, the referring court considers that the damages in question may be described as *'punitive'*.

26. That issue raises a number of points, which I would summarise as follows:

- whether a provision in national law which determines (15) the sum payable to a rightholder without leaving any discretion in that regard to the judicial body hearing and giving judgment in the case can satisfy the requirements of Directive 2004/48;
- the nature and extent of the obligations as to damages laid down by Article 13, read in the light of Article 3 of the directive; and
- the extent to which Article 2(1) of the directive permits Member States to go beyond the obligations as to damages laid down by Article 13 and, in particular,

allows them to provide in their national law for the award of punitive damages.

27. I shall address these points in turn below.

Can national legislation fix the sum payable to a rightholder whose rights have been infringed without the intervention of the judicial body hearing and giving judgment in the case?

28. The answer to this question can be derived from the text of Article 13(1) of Directive 2004/48, read in conjunction with recital 17 and Article 3(1).

29. Article 13(1) obliges Member States to ensure that the competent judicial authorities will compensate a rightholder by making an award of damages in appropriate cases. In setting the damages, those authorities must award a sum which is appropriate to the actual prejudice suffered by the rightholder as a result of the infringement. This in turn reflects both the statement in recital 17 of the directive that remedies should be determined in each case in a way that takes due account of the specific circumstances of that case and the provision in Article 3(1) of the directive that remedies are to be *'fair and equitable'*. There must, in other words, be an assessment which is tailored to the matter in question and such an assessment can, by definition, be carried out only by a court or a body having judicial decision-making powers equivalent to those vested in a court. It follows, in my view, that a national rule which provides that a rightholder whose rights have been infringed may have an automatic right to a predetermined amount set by the relevant national legislation and without intervention on the part of the competent judicial authorities with regard to that calculation, whether it be based on the amount of the appropriate royalty fee or otherwise, cannot satisfy the requirements of the directive.

30. I am accordingly of the opinion that Directive 2004/48 should be interpreted as precluding a national rule which provides for the automatic payment of a predetermined sum to a rightholder whose rights have been infringed on the application of the rightholder and without any intervention on the part of the competent national judicial authorities in setting the amount of the damages in question.

The application of Articles 3 and 13(1)(b) of Directive 2004/48 to the calculation of damages

31. I referred in point 29 above to the requirement under Article 3(1) of Directive 2004/48 that remedies be fair and equitable. Due account must therefore be taken of the position not only of the rightholder but also of the alleged infringer. Article 3(2) goes on to provide that those remedies must be *'effective, proportionate and dissuasive'*. Those principles will govern the granting of all remedies under the directive, including the award of damages. The emphasis in this case is on the protection of the rightholder.

32. For the specific rules governing the calculation of damages, it is necessary to look to Article 13 of the directive. The case of an infringer who either knowingly or with reasonable grounds to know engages in an infringing activity is dealt with in Article 13(1). That provision lays down further general guidance, by stating

that the damages must be ‘*appropriate to the actual prejudice suffered*’. That requirement must also inform all awards of damages pursuant to the directive.

33. I would pause here to note one point in response to the second of the concerns raised by the referring court in its reply to this Court of 28 August 2015. (16) The application of Article 13(1) is limited to cases of an infringer who acts either knowingly or with reasonable grounds to know that his conduct was culpable. The calculation of damages where the infringer did not know or did not have reasonable grounds to know that the activity constituted an infringement is a matter for Article 13(2). The recoverable amount under that provision is limited to ‘*the recovery of profits or the payment of damages, which may be pre-established*’. It is therefore plain in my view that in cases where Article 13(1) applies it is necessary that fault be established on the infringer’s part.

34. That provision then goes on to indicate the manner in which the judicial authorities concerned are to set the damages in a given case. It lays down two methods for doing so. The first (subparagraph (a)), whilst requiring the judicial authority to take into account all appropriate aspects of the case, takes as its basis the economic consequences of the infringement, with particular reference to any loss of profits on the rightholder’s part and any unfair profits made by the infringer. It also includes a reference to elements other than economic factors, such as the moral prejudice caused to the rightholder.

35. Subparagraph (b) operates as an alternative. It allows the judicial authorities to set the damages as a lump sum on the basis, inter alia, of the amount of the royalties or fees which would have been payable by the infringer had he requested authorisation to use the intellectual property right in question. Since subparagraph (b) lies at the heart of the referring court’s question, it is necessary to examine those parts of it that are relevant to the case in the main proceedings in some detail.

36. In the first place, the provision applies only ‘*in appropriate cases*’. The method of calculation laid down under subparagraph (a) of Article 13(1) should therefore be regarded as the general rule, to which the method under subparagraph (b) is an exception. Some clarification of what is meant by the expression ‘*in appropriate cases*’ is provided by recital 26 of the directive, which gives as an example cases where it would be difficult to determine the amount of the actual prejudice suffered.

37. There is, in my view, an important policy reason which serves to justify the presence of this alternative. It lies in the difficulty that rightholders will face in many cases in calculating the actual loss arising out of a given infringement. Frequently, this is likely to be difficult; on occasion, it may be impossible. Without some mechanism to assist the rightholder in that regard, the remedies provided by the directive risk being ineffective. In providing for a system of recovery based on royalties or fees, the legislature thus intended to enable the rightholder to avoid the potentially large amount of time and expense that he might otherwise

have to incur as a condition of bringing proceedings against an infringer. Were the position to be otherwise, there would be a risk that the requirement under Article 3(1) of Directive 2004/48 that remedies must not be unnecessarily complicated or costly or entail unwarranted delays could not be satisfied. They would not, in other words, be ‘*effective*’ and hence ‘*dissuasive*’ for the purposes of Article 3(2) of the directive.

38. The fact remains, however, that the onus will be on the rightholder to establish that the circumstances of the case in question justify the making of an award of damages under the national equivalent of subparagraph (b) of Article 13(1) of the directive and that it is accordingly ‘*appropriate*’ to do so. It must, as a minimum, either be ‘*difficult to determine the amount of the actual prejudice suffered*’ (17) or there must be grounds which establish that the award of damages limited to a sum calculated by reference to subparagraph (a) is manifestly unjust or unreasonable.

39. In the second place, the calculation which subparagraph (b) provides for is one based on an amount which is ‘at least’ the amount of royalties or fees which would have been payable had the infringement not occurred. (18) It is not, therefore, a question of substituting an amount produced by calculating the profits lost by the rightholder and/or those received by the infringer with the amount of the royalties or fees which the infringer ought, in theory to have paid the rightholder. The yardstick is a more flexible one and plainly the sum in question may exceed the royalties or fees in question.

40. Does that mean that subparagraph (b) allows a judicial authority to make an award of ‘*punitive*’ damages on the basis that there need be no necessary connection between the amount awarded and the loss suffered?

41. In that regard, it should be pointed out that the Court accepted in its judgment in *Manfredi and Others* (19) that such damages may be payable under domestic provisions regulating infringements of competition law, provided that the principles of effectiveness and equivalence are observed. (20) Accordingly, it cannot be said that the notion of punitive damages must be regarded as being irreconcilable in all circumstances with the requirements of EU law.

42. However, I do not consider that the broad, general statements set out in that judgment can be carried over to the present case. First, it is clear from the final sentence of recital 26 of Directive 2004/48 that it was not the legislature’s intention to provide for punitive damages to be payable under the directive.

43. Second, the first paragraph of Article 13(1) of the directive provides that damages are to be ‘*appropriate to the actual prejudice suffered by [the rightholder] as a result of the infringement*’. (21) That provision requires, in my view, that the rightholder be able to establish a causal link between the amount claimed and the damage suffered. (22) It then follows that Article 13(1) does not allow for the award of a sum which may bear no necessary relation to the loss that the rightholder has incurred or is likely in the future to incur. (23)

44. Third, Article 3(2) of Directive 2004/48 lays down the overriding principle that remedies must not only be 'effective' and 'dissuasive'; they must also be 'proportionate'.

45. In support of its position that punitive damages may be proportionate, the Polish Government argued at the hearing that the Court should have regard to its judgment in *Arjona Camacho*. (24) That case concerned the interpretation of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, (25) Article 25 of which is entitled '*Penalties*' and provides, inter alia, that penalties applicable to infringements of the national provisions adopted pursuant to that directive, which may comprise the payment of compensation to the victim, are to be '*effective, proportionate and dissuasive*'. The Court held that national measures providing for the payment of punitive damages to a person who has suffered discrimination on grounds of sex satisfied that test and were accordingly proportionate. (26)

46. I can draw no useful guidance from the judgment in question. The provision which it refers to concerns, inter alia, the payment of sums by way of penalties and not as damages. In the former context, it is natural that the calculation concerned may bear no necessary relation to the harm suffered by the victim. The same cannot be said of an award of damages which, by virtue of Article 13(1) of Directive 2004/48, must be appropriate to the actual prejudice suffered by the rightholder. In that context, the test of proportionality presupposes, in my view, that there be some relationship between the loss suffered and the amount claimed. I suggest that an award of punitive damages will not, by definition, satisfy that test.

47. Applying the above observations to the present case, I am therefore of the opinion, first, that a national rule, such as Article 79(1) of the law on copyright, which provides for payment to a rightholder of a predetermined sum which bears no necessary relation to the loss suffered by him cannot meet the requirements of Directive 2004/48. However, it does not seem to me to follow from that that an equivalent rule, according to which a rightholder may claim a sum which is no higher than twice (or even, in appropriate circumstances, three times) the amount of the fee which would have been due if the rightholder had given permission for the work to be used should necessarily also be found to be contrary to the scheme laid down by the directive. What the rightholder must establish is that the loss suffered and the amount claimed are not out of proportion to one another. To that degree, therefore, he must establish a causal link between the two. By the nature of the remedy provided for in subparagraph (b) of Article 13(1), it is not necessary for the rightholder to establish that relationship with mathematical certainty, since the whole point underlying that provision is to cater for circumstances in which it may be difficult or impossible to do so. But it is in my view necessary that he demonstrate some relationship and that he should not be given an entitlement to damages that are in no way commensurate to his actual loss.

48. In summary, it is my conclusion as regards the application of Articles 3 and 13(1)(b) of Directive 2004/48 to the calculation of damages in the case in the main proceedings, first, that the onus will be on the rightholder to establish that the circumstances of the case in question justify the making of an award of damages under the national equivalent of subparagraph (b) of Article 13(1) of the directive and that it is accordingly 'appropriate' to do so and, second, that they preclude a national rule whereunder a rightholder may claim a fixed sum of two or three times the amount of the fee which would have been payable if the rightholder had given permission for the work to be used. They do not, however, render unlawful a national rule under which the rightholder may claim a sum which is limited to two or three times that amount provided that the rightholder can establish that the sum claimed is proportionate to the damage suffered. The onus is on the rightholder to demonstrate that this is the case.

The applicability of Article 2(1) of Directive 2004/48 to the case in the main proceedings

49. For the reasons indicated in point 24 above, it is necessary to consider the applicability of Article 2(1) of Directive 2004/48 to the case in the main proceedings. It provides for the measures, procedures and remedies provided for by the directive to apply to any infringement of intellectual property rights under EU or national law. Such application is, however, '*without prejudice to the means which are or may be provided for in [EU] or national legislation, in so far as those means may be more favourable to rightholders*'. (27)

50. At EU level, the provision thus makes it clear that Directive 2004/48 is to have no impact on remedies for the infringement of intellectual property rights laid down by other EU legislation which go beyond those specified in the directive itself. (28) An obvious example of such a remedy would be the entitlement given to a trade mark holder to apply for a declaration of invalidity of an EU trade mark under what are now Articles 52 and 53 of Regulation No 207/2009 (29) where he considers that the effect of the registration of another mark is to infringe his rights.

51. As regards the means in place at national level, some guidance as to the EU legislature's intention in enacting the provision can be found in the Proposal of the European Parliament and the Council for a directive on measures and procedures to ensure the enforcement of intellectual property rights, (30) on which Directive 2004/48 was based. The Explanatory Memorandum to that Proposal states as regards Article 2 of the draft directive, which was the equivalent of Article 2 of the directive as adopted, that: '*... The Member States may lay down that the competent authorities may order other measures adapted to the circumstances such as to put an end to the infringement of the intellectual property right or to prevent further infringements, as well as any other appropriate measures. ...*' (31)

52. Article 2(1) thus leaves Member States free to adopt provisions at national level which provide additional remedies in favour of a rightholder. They may therefore adopt rules in terms of which a right may be deemed

forfeited, for example in the event of a serious and continuing infringement, or impose restrictions on the exercise of such a right above and beyond those laid down by the directive where that right infringes an intellectual property right held by another party.

53. But I do not see that Article 2(1) can serve as a basis for an argument which states that Directive 2004/48 introduces only minimal harmonisation in those areas which it does cover. (32) First, such a proposition runs counter to the wording of that provision, which refers not to ‘*measures*’ which are or may be provided for in EU or national legislation but to ‘*means*’. Second, it fails to reflect the general scheme of the directive, which, as indicated in recital 8, is to ensure that intellectual property rights enjoy an equivalent level of protection throughout the European Union. In so far as the directive lays down rules applying to a particular form of remedy, as it does in the case of damages, the rules should in my view be the same throughout the European Union.

54. I therefore conclude that Article 2(1) of Directive 2004/48 does not authorise a Member State to provide a rightholder whose intellectual property rights have been infringed with an entitlement to punitive damages.

Conclusion

55. I therefore suggest that the Court should answer the questions referred by the Sąd Najwyższy (Supreme Court, Poland) as follows:

(1) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights should be interpreted as precluding a national rule which provides for the automatic payment of a predetermined sum to a rightholder whose rights have been infringed on the application of the rightholder and without any intervention on the part of the competent national judicial authorities in setting the amount of the damages in question.

(2) Articles 3 and 13(1)(b) of Directive 2004/48 should be interpreted as meaning, first, that the onus will be on the rightholder to establish that the circumstances of the case in question justify the making of an award of damages under the national equivalent of subparagraph (b) of Article 13(1) of the directive and that it is accordingly ‘appropriate’ to do so and, second, that they preclude a national rule whereunder a rightholder may claim a fixed sum of two or three times the amount of the fee which would have been payable if the rightholder had given permission for the work to be used. They do not, however, render unlawful a national rule under which the rightholder may claim a sum which is limited to two or three times that amount provided that the rightholder can establish that the sum claimed is proportionate to the damage suffered. The onus is on the rightholder to demonstrate that this is the case.

(3) Article 2(1) of Directive 2004/48 does not authorise a Member State to provide a rightholder whose intellectual property rights have been infringed with an entitlement to punitive damages.

2 – Directive of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 157, p. 45).

3 – The facts narrated are as described in the order for reference. It is unclear what took place in the period between 1998 and 2008.

4 – Equivalent at the time of writing to approximately EUR 8 000. This implies that the total monthly net income during that period was PLN 2 144 543.12.

5 – Equivalent at the time of writing to approximately EUR 91 000.

6 – Equivalent at the time of writing to approximately EUR 19 600.

7 – Equivalent at the time of writing to approximately EUR 39 450. It is not entirely clear how this figure was arrived at: 2.8% of PLN 2 144 543.12 is PLN 60 047.20; and if the award was to be ‘three times the appropriate fee’, that would generate a total of PLN 180 141.62.

8 – Equivalent at the time of writing to approximately EUR 34 000.

9 – See judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 61 and the case-law cited.

10 – See points 24 and 49 et seq. below.

11 – The directive also lays down rules providing for: a right of access to evidence and measures for preserving evidence (Section 2); a right of information (Section 3); provisional and precautionary measures (Section 4); and corrective measures, injunctions and alternative measures (Section 5).

12 – The concept of punitive damages was addressed by Advocate General Mengozzi in his Opinion in *Arjona Camacho*, C-407/14, EU:C:2015:534, where he described punitive damages as follows: ‘With punitive damages, the system of liability also takes on a moral function which is truly punitive. Punitive damages have their theoretical basis in private sanctions: the objective is no longer simply to compensate, but also to award damages which go beyond full compensation, in the hope that the deterrent effect which is in the nature of such damages will deter the person who has caused the damage from engaging ... in further [infringing] conduct, while also deterring others from engaging in like conduct’ (point 49).

13 – Or at least sets the damages payable by reference to a multiplier of the fee payable by the infringer to the rightholder had the latter given permission for the property right in copyright in question to be used.

14 – For the sake of good order, I should mention that in response to a question put at the hearing, the Polish Government indicated that such an entitlement would not arise if there had been an abuse of the law or if it was not possible to calculate the amount of the fee which would have been payable to the rightholder.

15 – See footnote 13 above.

16 – See point 21 above.

17 – See recital 26 of the directive.

18 – Although subparagraph (b) of Article 13(1) uses the expression ‘in the alternative’, the Court has made it clear in its recent judgment of 17 March 2016, *Liffers*, C-99/15, EU:C:2016:173, that a rightholder whose claim is based on that subparagraph may also claim

1 – Original language: English.

compensation for moral prejudice, the words ‘at least’ being intended to make it clear that the basis of calculation specified is not exhaustive.

19 – Judgment of 13 July 2006, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 99 and 100. The case involved the interpretation of Article 81 EC (now Article 101 TFEU).

20 – It should be pointed out that that judgment preceded the entry into force of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1). Member States must transpose that directive into national law no later than 27 December 2016. Article 3(3) of that directive provides that ‘full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages’.

21 – Emphasis added.

22 – For my further observations on the nature of the causal link which must be established, see point 47 below.

23 – See, to similar effect, in the context of plant variety rights, judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419, paragraphs 33 to 40.

24 – Judgment of 17 December 2015, C-407/14, EU:C:2015:831.

25 – Directive of the European Parliament and of the Council of 5 July 2006 (OJ 2006 L 204, p. 23).

26 – See, to that effect, paragraph 40 of the judgment.

27 – Emphasis added.

28 – For a note of the remedies laid down by Directive 2004/48 apart from damages, see footnote 11 above.

29 – Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1). That regulation superseded Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), the equivalent provisions of which were Articles 51 and 52.

30 – COM(2003) 46 final.

31 – The text of the French-language equivalent is rather better (and certainly more elegantly) worded. It states: ‘Les États membres peuvent prévoir que les autorités compétentes peuvent ordonner d’autres mesures adaptées aux circonstances et propres à faire cesser l’atteinte au droit de propriété intellectuelle ou à prévenir de nouvelles atteintes, ainsi que toutes autres mesures appropriées’.

32 – See, in that regard, point 24 above.