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Ó Fathaigh, R.

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Court of Justice of the European Union: Enforcement Directive and hypothetical royalties

On 25 January 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in *OTK v. SFP*, concerning the issue of the Enforcement Directive (2004/48/EC) and “hypothetical royalties”. The case arose following a dispute between the Polish broadcaster Oławska Telewizja Kablowa (OTK), and Stowarzyszenie Filmowców Polskich (SFP), an organisation collectively managing copyright in Poland, in particular audiovisual works. As part of the proceedings, the Polish Supreme Court referred a question to the CJEU on whether Article 79(1)(3)(b) of Poland’s copyright law was compatible with EU law. Article 79(1)(3)(b) provides that a rightholder may request a copyright infringer to remedy the loss based on payment of a sum corresponding to two or three times the amount of the fee which would have been due had permission for use been given.

First, the CJEU noted that since the reference had been made, the Supreme Court had found that Article 79(1)(3)(b) was partially unconstitutional insofar as the article allowed a rightholder to claim a sum three times the amount of the appropriate fee. Therefore, the CJEU considered the question before it to be whether the Polish provision providing the possibility of demanding payment of a sum corresponding to twice the appropriate fee (“the hypothetical royalty”) was compatible with Article 13 of the Enforcement Directive.

The CJEU first noted that the Directive lays down a “minimum standard” concerning the enforcement of intellectual property rights, and did not prevent member states from laying down measures that are “more protective”. Thus, the Directive “must be interpreted” as not precluding national legislation allowing a rightholder to claim payment of a sum corresponding to twice the amount of a hypothetical royalty. The Court rejected the argument that compensation calculated on the basis of doubling the amount of the hypothetical royalty would not be “proportional to the loss actually suffered”, finding that such a characteristic “is inherent in any lump-sum compensation”. Moreover, the CJEU held that even though the Directive does not impose an obligation on member states to provide for “punitive” damages, this did not mean that the Directive prohibited introducing such measures.

Finally, the CJEU held it was “not evident” that the Polish provision at issue entailed an obligation to pay punitive damages. This was because “mere payment” of a hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, given that it would not, in itself, ensure reimbursement of costs, compensation for possible moral prejudice, or payment of interest on the sums due. In this regard, the CJEU referred to OTK’s admission 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”. However, the CJEU did admit 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 could constitute an abuse of rights, prohibited by Article 3(2) of Directive 2004/48.

• Judgment of the Court of Justice of the European Union in Case C-367/15 *Stowarzyszenie ‘Oławska Telewizja Kablowa’ v. Stowarzyszenie Filmowców Polskich*, 25 January 2017

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Ronan Ó Fathaigh

Institute for Information Law (IViR), University of Amsterdam

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