Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 May 2023[1]

Case C-201/22

Kopiosto r.y.
v
Telia Finland Oyj

(Request for a preliminary ruling from the Korkein oikeus (Supreme Court, Finland))

(Reference for a preliminary ruling – Intellectual property rights – Directive 2014/26/EU – Collective management of copyright and related rights – Collective management organisation – Directive 2004/48/EC – Measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights – Article 4 – Persons entitled to apply for the application of the measures, procedures and remedies provided for in the directive – Collective management organisations approved to carry out extended collective licensing – Rightholders who have not authorised the organisation to represent them)

Introduction

1. Despite harmonisation on certain specific points,[2] the procedural aspects of the protection of intellectual property rights remain, to a great extent, subject to heterogeneous national legislation. The purpose of the provisions of Directive 2004/48/EC[3] is to limit the resulting disadvantages for the development of the internal market, by specifying, for that purpose, a series of measures that must be provided for in national law to ensure the enforcement of copyright and related rights in the context of judicial proceedings.

2. However, the difficulties which arise in this case concern not the series of measures in question, but rather the persons who should be entitled to have those measures at their disposal before national courts and tribunals. The key question is whether Article 4(c) of Directive 2004/48 obliges Member States to recognise the capacity of intellectual property collective rights management organisations ('CMOs') to bring proceedings in their own name in disputes concerning the application of the measures provided for in that directive.

1 Original language: French.

2 See Article 8 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

3 Directive 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 corrigenda OJ 2004 L 195, p. 16 and OJ 2007 L 204, p. 27).

3. That question arises in the present case in relation to the activities of an organisation with the power to grant collective licences 'with an extended effect'. Introduced in the Scandinavian countries from the 1960s onwards,[4] licences with an extended effect are an original mechanism of intellectual property rights management, which allows certain CMOs to grant rights of exploitation not just in the name of their members, but also in the name of other rightholders who have not opted for the individual management of their rights. That mechanism has proven its worth in those areas in which the multitude of works that can be exploited by licensees and the excessive fragmentation of the market make management on the basis of individual contracts difficult, giving rise to significant legal uncertainty.[5]

4. The broad powers afforded to CMOs in relation to rights management raise the question of what role those organisations should play in the judicial protection of intellectual property. The answer to that question should take into account the profound differences existing between Member States in relation to judicial proceedings. Those differences explain, in my view, the cautious approach of the EU legislature, which has opted not to harmonise national legislation fully within the framework of the provisions of EU law in force.

Legal framework

European Union law

Directive 93/83/EEC

5. Under Article 9 of Directive 93/83/EEC,[6] which is entitled 'Exercise of the cable retransmission right':

'1. Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

4 On the incorporation of collective licences with an extended effect into EU law, see Quaedvlieg, A., 'Les licences collectives étendues. Un oiseau exotique des lacs du Nord fait un atterrissage réussi à Bruxelles', *Revue internationale du droit d'auteur*, No 4, 2020, p. 189.

5 For a general description of the mechanism and detailed mapping of the solutions adopted by the Members States in relation to licences with an extended effect on digital markets, see the study carried on behalf of the European Commission, *Study on Emerging Issues on Collective Licensing Practices in the Digital Environment*, Publications Office of the European Union, Luxembourg, 2021, pp. 131 to 242.

6 Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

3. A Member State may provide that, when a [rightholder] authorises the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.'

Directive 2004/48

6. Recitals 3, 10 and 18 of Directive 2004/48 state:

'(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, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal 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.

…

(18) The persons entitled to request application of [the] measures, procedures and remedies [provided for in this Directive] should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.'

7. Under Article 1 of Directive 2004/48, which is entitled 'Subject matter':

'This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.'

8. Article 2 of that directive, which is entitled 'Scope', provides, in paragraph 1 thereof:

'Without prejudice to the means which are or may be provided for in [Union] 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 [Union] law and/or by the national law of the Member State concerned.'

9. Article 3 of the directive, which is entitled '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. …

2. Those measures, procedures and remedies shall … 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.'

10. Article 4 of Directive 2004/48, which is entitled 'Persons entitled to apply for the application of the measures, procedures and remedies', reads as follows:

'Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Chapter:

(a) the holders of intellectual property rights, in accordance with the provisions of the applicable law,

(b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

(c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law,

(d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.'

Directive 2014/26/EU

11. Recital 12 of Directive 2014/26/EU[7] states:

'This Directive, while applying to all collective management organisations, with the exception of Title III, which applies only to collective management organisations managing authors' rights in musical works for online use on a multi-territorial basis, does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations.'

12. Article 3 of that directive, which is entitled 'Definitions', provides, in point (a) thereof:

'For the purposes of this Directive, the following definitions shall apply:

(a) "collective management organisation" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;

[7] Directive of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).

(ii) it is organised on a not-for-profit basis'.

13. In accordance with Article 35 of the directive, which is entitled 'Dispute resolution':

'1. Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law.

2. Articles 33 and 34 and paragraph 1 of this Article shall be without prejudice to the right of the parties to assert and defend their rights by bringing an action before a court.'

Finnish law

14. Paragraph 26(1) of the tekijänoikeuslaki (404/1961) (Law on copyright), in the version amended by Law 607/2015 ('the Law on copyright'), which is entitled 'Contractual licence', states that the provisions of that law relating to contractual licences are to apply to an agreement concluded between a user and the organisation, approved by the Ministry of Education and Culture, which represents, in a specific sector, a number of authors of works used in Finland, for the use of authors' works falling within that same sector. Under such an agreement, an approved organisation is deemed to be entitled also to represent the authors of other works in the same sector. A licensee who has obtained a collective licence with extended effect pursuant to such an agreement may, under the terms specified in that agreement, use all the works of authors falling within the same sector.

15. Under Paragraph 26(4) of the Law on copyright, the arrangements laid down by the organisation referred to in subparagraph 1 of that Paragraph with respect to the distribution of the remuneration for the reproduction, communication or transmission of works between the authors which it represents directly or to the use of the remuneration for purposes common to the authors are also to apply to the authors in the same sector who are not directly represented by that organisation.

Facts at the origin of the dispute, the main proceedings and the questions referred for a preliminary ruling

Background to the dispute and the procedure in the main proceedings

16. Kopiosto r.y. is a collective management organisation representing copyright holders within the meaning of Article 3(a) of Directive 2014/26, and approved by the Ministry of Education and Culture as an extended licensing organisation. Such licences relate, inter alia, to the rights of retransmission of the works included in a radio or television broadcast. At the same time, Kopiosto manages and grants licences on behalf of a large number of authors, on the basis of the mandates granted to it by those authors.

17. The company Telia Finland Oyj ('Telia') operates a cable television network by which broadcasts of domestic free-to-air television channels are transmitted to the public.

18. On 24 January 2018, Kopiosto brought before the markkinaoikeus (Market Court, Finland) an action for infringement seeking a declaration that Telia had retransmitted television broadcasts without its authorisation. On that basis, Kopiosto sought compensation and damages, relying, primarily, on its capacity as an extended licensing organisation and, in the alternative, on its capacity as the agent of the authors who had entrusted it with the management of their rights.

19. By a judgment of 18 June 2019, the markkinaoikeus (Market Court) rejected Kopiosto's claims, finding that that organisation was not entitled to bring an action for infringement in its own name.

20. Kopiosto lodged an appeal before the Korkein oikeus (Supreme Court, Finland) against that judgment, invoking its direct interest in bringing proceedings in disputes concerning the rights covered by the licences granted by it.

21. In response to Kopiosto's arguments, Telia contends that that organisation's capacity to grant collective licences does not enable it to bring an action for infringement in its own name, as such an action is reserved for the holders of those rights, that is to say either the creators or their assignees.

The questions referred for a preliminary ruling

22. In the absence of national provisions governing the matter at issue in the main proceedings, the referring court considers that the admissibility of the action for infringement brought by Kopiosto turns on the correct interpretation of the relevant provisions of Directive 2004/48, read in the light of Articles 17 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

23. In that context, the referring court asks, first, whether the entitlement of CMOs to seek application of the measures provided for in Directive 2004/48 depends solely on their general capacity to be a party to judicial proceedings, or in fact also on the existence of provisions in the applicable legislation specially adopted in that regard.

24. Next, the Korkein oikeus (Supreme Court) asks whether the concept of a 'direct interest' used in recital 18 of Directive 2004/48 constitutes an autonomous concept of EU law, such that the uniform interpretation of that concept should entail the recognition of the direct interest of CMOs in seeking, in their own name, application of the measures provided for in that directive.

25. Finally, if CMOs are entitled to seek application of the measures provided for in Directive 2004/48, the referring court asks about the consequences, having regard to the fundamental rights of rightholders who are not members, which are enshrined in Articles 17 and 47 of the Charter, in cases where those organisations are entitled to grant collective licences with an extended effect.

26. It is in that context that the Korkein oikeus (Supreme Court) has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) With regard to contractual licensing organisations which collectively manage intellectual property rights, does the legal standing to defend those rights, which is conferred by Article 4(c) of Directive 2004/48, refer only to the general capacity to be a party to legal proceedings, or does it require a right expressly recognised by national law to bring proceedings in one's own name for the purposes of defending the rights in question?

(2) In an interpretation based on Article 4(c) of Directive 2004/48, must the term "direct interest in the defence of the copyright of the rightholders whom it represents" be interpreted uniformly in all Member States as regards the right of a collective representation body within the meaning of Article 3(a) of [Directive 2014/26] to bring an action for copyright infringement in its own name where:

(i) it concerns uses of works in respect of which an organisation is entitled, as a contractual licensing organisation within the meaning of the Tekijänoikeuslaki (Law on copyright), to grant extended collective licences also allowing the licensee to use works by authors in that sector who have not authorised the organisation to manage their rights;

(ii) it concerns uses of works in respect of which the authors have authorised the organisation to manage their rights by contract or by way of a mandate, without the copyrights having been assigned to the organisation?

(3) If the organisation, in its capacity as a contractual licensing organisation, is presumed to have a direct interest and legal standing to bring an action in its own name: in assessing standing to bring proceedings in the light of, where applicable, Articles 17 and 47 of the [Charter], what significance must be given to the fact that the organisation, as a contractual licensing organisation, also represents authors who have not authorised it to manage their rights, and that the organisation's right to bring an action to defend the rights of such authors is not provided for by law?'

27. The request for a preliminary ruling was received at the Court on 15 March 2022. Written observations were submitted by the parties to the main proceedings, the Finnish and Polish Governments and the Commission. At the end of the written part of the procedure, the Court *considered that it had sufficient* information to proceed to judgment without a hearing.

Analysis

The first question referred for a preliminary ruling

28. By its first question, the referring court asks whether, in the case of contractual licensing organisations which collectively manage intellectual property rights, the legal standing to defend those rights, which is a prerequisite for standing to bring proceedings under Article 4(c) of Directive 2004/48, refers only to the general capacity provided for in national law to be a party to proceedings, or also a right to bring an action in one's own name for the purposes of defending such rights, which must be expressly recognised by national law.

29. For the purposes of readability, and to draw a clear distinction between the *capacity to be a party to judicial proceedings* (which generally stems from a person's legal personality) and the *standing to bring proceedings* (which is assessed having regard to the nature and the subject matter of the dispute), I propose that the Court reword that question to the effect that, by that question, the referring court asks, in essence, whether the entitlement of intellectual property collective rights management organisations to seek application of the measures, procedures and remedies provided for in Chapter II of Directive 2004/48, within the meaning of Article 4(c) of that directive, is conditional merely upon the capacity of those organisations to be a party to judicial proceedings, or also upon the fact that their standing to bring proceedings in defence of the individual rights for which they are responsible is expressly enshrined in national law.

30. To answer that question, it is necessary, at the outset, to determine whether being 'entitled to seek', within the meaning of Article 4(c) of Directive 2004/48, is dependent solely on the capacity of CMOs to be parties to legal proceedings, or also on the fact that those organisations have standing to bring such proceedings. In the latter case, it is also necessary to determine whether that standing to bring proceedings must be explicitly enshrined in the applicable legislation.

The interpretation of 'entitled to seek' within the meaning of Article 4(c) of Directive 2004/48

31. This first question does not appear to me to be particularly complex. In my view, there can be no doubt that the entitlement of CMOs to seek application of the measures provided for in Chapter II of Directive 2004/48 is conditional upon their standing to bring proceedings, and therefore the mere general capacity to be a party to judicial proceedings is insufficient in that regard.

32. The concept of being 'entitled to seek' application, used in Article 4(c) of Directive 2004/48, appears rather imprecise in that connection. However, that provision must be read in the light of recital 18 of that directive. The content of the recital was interpreted in the judgment in *SNB-REACT*,[8] in which the Court held that 'the Member States are required to recognise a body collectively representing trade mark proprietors … as a person entitled to seek, in its own name, the application of the remedies laid down by that directive, for the purpose of defending the rights of those trade mark proprietors, and to bring legal proceedings, in its own name, for the purpose of enforcing those rights, on condition that the body is regarded by national law as having a direct interest in the defence of those rights *and that that law allows it to bring proceedings to that end*'.[9]

33. It follows clearly, to my mind, that being 'entitled to seek' application, within the meaning of Article 4(c) of Directive 2004/48, depends not only on the general capacity to be a party to judicial proceedings, but also on the fact that CMOs have standing to bring proceedings under the applicable law.

34. I would add that the interpretation to the contrary, which would make being 'entitled to seek' application within the meaning of Article 4(c) of Directive 2004/48 conditional solely on the capacity to be a party to legal proceedings, would deprive that condition of any practical effect.

[8] Judgment of 7 August 2018 (C-521/17, 'the judgment in *SNB-REACT*', EU:C:2018:639).

[9] Judgment in *SNB-REACT* (paragraph 39). Emphasis added.

35. Indeed, as the Finnish Government has observed,[10] the capacity to be a party to judicial proceedings is a standard attribute of the legal personality generally enjoyed by CMOs, notwithstanding the variety of forms that such organisations take under national regulations.[11] In practice, uncertainties arise solely in relation to CMOs' standing to bring, or interest in bringing, legal proceedings.[12]

36. In the light of the foregoing observations, I take the view that the entitlement to seek application for the purposes of Article 4(c) of Directive 2004/48 is conditional upon the standing of CMOs to bring proceedings being enshrined in law. It is therefore necessary to determine whether such standing has to be explicitly so enshrined.

The need for standing to bring proceedings to be expressly enshrined in law

37. In so far as the first question referred for a preliminary ruling concerns the need for the standing of CMOs to bring proceedings to be *expressly* enshrined in national law, the referring court seeks to ascertain whether the basis for enshrinement of that standing must be a provision of written law.

38. In this respect, in the light of the difficulties arising in relation to the potential recognition of CMOs as being entitled to bring proceedings in their own name in the place of rightholders,[13] I consider that the adoption of a legislative provision would be the best means of meeting the needs of legal certainty.

39. However, in practice, in most Member States, there is no legislation that specifically governs the standing of CMOs to bring proceedings.[14] It cannot therefore be ruled out that that question is governed by general procedural rules or even that it is settled by means of case-law,[15] especially in those Member States in which the lower courts are formally required to follow the case-law of the higher courts.[16]

40. In those circumstances, it appears to me that a literal interpretation of Article 4(c) of Directive 2004/48, to the extent that it makes the standing of CMOs to bring proceedings conditional on the '*provisions* of the applicable law' (emphasis added), would risk weakening the *effet utile* of that directive in certain circumstances.

[10] See written observations of the Finnish Government, paragraphs 12 and 14.

[11] It is clear from recital 14 of Directive 2014/26 that that directive does not require CMOs to adopt a specific legal form. In practice, such organisations take the form of companies, associations, unions or foundations.

[12] With regard to the controversies generated on this point in French law, see Vivant, M., Bruguière, J.-M., *Droit d'auteur et droits voisins*, 4 th ed., Dalloz, Paris, 2019, paragraph 1348, pp. 1288 to 1289.

[13] Such difficulties have been raised by the referring court in the context of the third question referred for a preliminary ruling.

[14] Specifically, no provision of that kind has been adopted in Finland (see paragraph 16 et seq. of the request for a preliminary ruling).

[15] As appears to have been in the case in France, where the Cour de cassation (Court of Cassation) put an end to the (earlier) divergences in case-law by refusing to recognise the standing of CMOs to bring proceedings in disputes relating to the defence of the rights of those creators who are not members of such organisations (judgment of 11 September 2013, No 12-17.795, FR:CCASS:2013:C100905).

[16] For instance, this may be the case in Poland, where the extended formations of the Sąd Najwyższy (Supreme Court) have the power to adopt 'resolutions with the force of a legal principle' under Article 87(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court).

41. Accordingly, in my view, the Court could be guided in the present case by its case-law on the detailed rules for the transposition of directives. [17] According to that case-law, 'the transposition of a directive does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of that directive in a sufficiently clear and precise manner'. [18]

42. Such a legal context may result, inter alia, from a well-established judicial practice. [19]

43. I therefore propose that the Court answer the first question referred for a preliminary ruling to the effect that the entitlement of CMOs to seek application of the measures, procedures and remedies provided for in Chapter II of Directive 2004/48, within the meaning of Article 4(c) of that directive, is conditional upon their standing to bring proceedings in defence of the individual rights for which they are responsible being enshrined in law. In the absence of provisions adopted to that effect in the applicable law, that standing may result from the general legal context, provided that its scope and its consequences for the situation of individuals are defined in a sufficiently clear and precise manner.

The second question referred for a preliminary ruling

44. As it is worded, the second question referred for a preliminary ruling calls for consideration of the autonomous nature of the words 'direct interest in the defence of the copyright of rightholders whom it represents'.

45. Those words do not appear anywhere in Directive 2004/48. However, they were used, in a slightly different form, by the Court in the judgment in *SNB-REACT*, [20] in the context of the interpretation of Article 4(c) of Directive 2004/48 in the light of recital 18 thereof, [21] which refers to the concept of a 'direct interest'.

46. Relying on that recital, the Court held that Article 4(c) of Directive 2004/48 had to be understood as meaning that, where a body in charge of the collective management of intellectual property rights was regarded by national law as having a *direct interest* in the defence of those rights, the Member States are required to recognise that body as a person entitled to seek application of the measures, procedures and remedies provided for in that directive. [22]

47. In that context, it appears to me that what the referring court is seeking to establish in asking the Court about the autonomous nature of the concept of a 'direct interest' referred to in the judgment in *SNB-REACT* is whether an obligation exists, and what the scope of any such obligation might be, on the part of the Member States, pursuant to the provisions of Directive

[17] That case-law can be applied in the case at issue in the main proceedings only by way of analogy, and not directly, since the recognition that CMOs have standing to bring proceedings under national law does not follow, in my view, from the requirements laid down in Directive 2004/48. I will set out the reasons that lead me to that conclusion in the part of my analysis devoted to the second question referred for a preliminary ruling.

[18] See judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 33 and the case-law cited).

[19] See judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraphs 34 to 36 and the case-law cited).

[20] Judgment in *SNB-REACT* (paragraph 38).

[21] Judgment in *SNB-REACT* (paragraph 33).

[22] Judgment in *SNB-REACT* (paragraph 34).

2004/48, to recognise the interest of CMOs in bringing proceedings in their own name in disputes concerning the application of the measures referred to in Article 4(c) of that directive, if such an interest does not result from national legislation.

48. I therefore propose that the second question referred for a preliminary ruling be reworded to the effect that, by that question, the referring court asks, in essence, whether the provisions of Article 4(c) of Directive 2004/48 are to be interpreted as meaning that Member States are obliged to recognise the direct interest of collective licensing organisations covered by that provision in seeking, in their own name, application of the measures, procedures and remedies provided for in Chapter II of that directive, such as an action for infringement, if such an interest does not result from national legislation.

49. That question was essentially decided in the negative in the judgment in *SNB-REACT*[23] and I see no reasons capable of prompting the Court to give a different answer in the present case.

50. By way of a reminder, under Article 4(c) of Directive 2004/48, entitlement to seek application, within the meaning of that provision, remains conditional on the 'provisions of the applicable law'. In that context, the Court has stated that, 'while Article 4(a) of Directive 2004/48 provides that Member States are to recognise, in any event, holders of intellectual property rights as persons entitled to seek application of the measures, procedures and remedies referred to in Chapter II of that directive, Article 4(b) to (d) each state that it is only in so far as is permitted by, and in accordance with, the provisions of the applicable law that Member States may recognise other persons, as well as certain specific bodies, as having that same standing'.[24]

51. As regards the words 'applicable law' contained in that provision, the Court has held that they refer not only to national legislation, but also to EU legislation.[25]

52. Therefore, in order to answer the second question referred for a preliminary ruling, it is necessary to establish whether the provisions of EU law currently in force recognise the direct interest of CMOs, such as Kopiosto, in seeking, in their own name, application of the measures provided for in Directive 2004/48.

53. That is not the case is my view.

54. In the first place, such an interest cannot be inferred from the provisions of Directive 2004/48.

55. On the contrary – and leaving aside the content of Article 4(c) of Directive 2004/48, which appears clear to me – the course of the *travaux préparatoires* in relation to that provision makes clear that that directive does not oblige the Member States to recognise the ability of CMOs to

[23] See, in particular, judgment in *SNB-REACT* (paragraph 38).

[24] Judgment in *SNB-REACT* (paragraph 28).

[25] Judgment in *SNB-REACT* (paragraph 31).

bring proceedings in disputes concerning the individual rights of rightholders. Indeed, a provision contained in the Commission's initial proposal laying down such an obligation was dropped. [26]

56. In the second place, nor does the interest of CMOs in bringing proceedings appear to me to follow from the provisions of Directive 2014/26. On this point, however, I acknowledge that some hesitation is warranted.

57. Article 35(1) of Directive 2014/26 provides that Member States must ensure 'that *disputes between collective management organisations and users* concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court' (emphasis added). In the light of the wording of that provision, it could be inferred that CMOs are implicitly recognised as having an interest in bringing proceedings in disputes between them and users.

58. However, reading that provision in isolation would run counter to the objectives and the general scheme of Directive 2014/26, which is not intended to govern the contested capacities of CMOs. [27] A reading to that effect would also be difficult to reconcile with the provisions of Article 4(c) of Directive 2004/48, which govern such matters and from which Directive 2014/16 does not have the effect of derogating. I am therefore of the view that Article 35(1) of the latter directive does not enshrine the interest of CMOs in bringing proceedings.

59. Lastly, such an interest likewise does not follow from Article 12 of Directive (EU) 2019/790, [28] which allows Member States to establish an extended collective licensing scheme [29] in certain situations referred to in that provision.

60. I do not agree, on this point, with the analysis of the Commission, [30] which seems to have interpreted the words 'organisation … presumed to represent rightholders' and 'legal presumptions of representation', contained respectively in Article 12(1)(b) of Directive 2019/790 and in recital 12 of Directive 2014/26, as determining the procedural capacities of CMOs. In the

[26] Article 5 of the Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure enforcement of intellectual property rights (COM(2003) 46 final), entitled 'Persons entitled to apply for application of the measures and procedures', provided, in paragraph 2 thereof, that 'Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective *or individual* interests for which they are responsible' (emphasis added).

[27] In the light of recitals 8 and 9 of Directive 2014/26, the aim of that directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by CMOs, the modalities for their governance and their supervisory framework, and to ensure a high standard of governance, financial management, transparency and reporting by those organisations.

[28] Directive of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29 (OJ 2019 L 130, p. 92). As the Commission has observed, that directive has no bearing on the answer that should be given in the present case to the second question referred for a preliminary ruling, since it does not apply to the dispute in the main proceedings *rationae temporis*. It does, however, seem to me to be appropriate to revisit the interpretation of Article 12(1)(b) of that directive adopted by the Commission in its written observations.

[29] Article 12, entitled 'Collective licensing with an extended effect', of Directive 2019/790, provides, in paragraph 1 thereof:
'Member States may provide, as far as the use on their territory is concerned and subject to the safeguards provided for in this Article, that where a collective management organisation that is subject to the national rules implementing Directive [2014/26], in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:
(a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or
(b) with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.'

[30] Paragraphs 24 and 26 of the Commission's written observations.

context in which they were used, those expressions describe one of the *modes of issuing licences* with an extended effect, which differs from the 'traditional' model by virtue of the greater freedom that it affords to the rightholders. [31]

61. I would add that enshrining in law the capacity to manage rights does not presuppose recognition of the standing to bring, or the interest in bringing, related proceedings. Some collective management mechanisms, such as the legal presumption of representation scheme, do not necessarily entail an assignment of rights to CMOs, and therefore the capacity to grant a licence with an extended effect does not mean that standing to bring proceedings in place of the rightholder is implicitly enshrined in law. [32] That may follow, where appropriate, from provisions specially adopted to that end. [33]

62. In the light of the foregoing observations, I take the view that the provisions of EU law in force do not oblige the Member States to recognise the interest of CMOs in bringing proceedings in their own name in disputes concerning the application of the measures provided for in Directive 2004/48.

63. I therefore propose that the Court answer the second question referred for a preliminary ruling to the effect that the provisions of Article 4(c) of Directive 2004/48 are to be interpreted as meaning that the Member States are not obliged to recognise the direct interest of the collective licensing organisations referred to in those provisions, to seek, in their own name, application of the measures, procedures and remedies provided for in Chapter II of that directive, such as an action for infringement, if such an interest does not result from the applicable national legislation.

The third question referred for a preliminary ruling

64. The third question referred for a preliminary ruling is submitted in the event that, in the absence of any relevant rules in national law, the view were taken that the provisions of Directive 2004/48 require Member States to recognise CMOs as being entitled to bring proceedings in their own name in disputes concerning the rights covered by licences with an extended effect. The referring court asks whether such an obligation is consistent with the rights enshrined in Articles 17 and 47 of the Charter.

65. In view of the answer that I propose be given to the second question referred for a preliminary ruling, there is, in my view, no need to answer the third question. The problem raised by the referring court can arise and can be analysed only in the context of national legislation which enshrines CMOs' standing to bring, or interest in bringing, proceedings, which does not exist in the present case. [34]

[31] For a typology of licensing mechanisms with an extended effect and their features, see the study conducted on behalf of the Commission, *Study on Emerging Issues on Collective Licensing Practices in the Digital Environment*, Publications Office of the European Union, Luxembourg, 2021, p. 132.

[32] For the same reason, I consider that Kopiosto's standing to bring proceedings in the main proceedings cannot be inferred from the provisions of Directive 93/83, since Article 9 of that directive provides for a mandatory collective management mechanism in relation to cable retransmission.

[33] By way of example, this is the case in Poland, where the standing of CMOs enjoying a legal presumption of representation to bring proceedings has been enshrined in Article 5(1) of the ustawa o zbiorowym zarządzaniu prawami autorskimi i prawami pokrewnymi (Law on the collective management of copyright and related rights), of 15 June 2018.

[34] See paragraphs 16 to 19 of the request for a preliminary ruling.

66. I would add that CMOs can usefully be recognised as having standing to bring proceedings only if the interests and the fundamental rights of the creators are appropriately secured, which depends on a series of substantive and procedural rules of national law, which have been harmonised in part by the provisions of Directive 2014/26.

67. Those rules cover matters such as the existence of an 'opt-out' mechanism in relation to rights management, the rightholder's right of intervention or opposition, the consequences of a possible withdrawal by a CMO, the scope and the effects of the alternative dispute resolution procedures or even the possibility of the manager incurring liability for damages in the context of a quasi-contractual relationship, such as in the case of *negotiorum gestio*. Such matters are, however, purely hypothetical in the circumstances of this case.

Conclusion

68. In the light of all the foregoing observations, I propose that the Court answer the questions referred by the Korkein oikeus (Supreme Court, Finland) for a preliminary ruling as follows:

(1) The entitlement of intellectual property collective rights management organisations to seek application of the measures, procedures and remedies provided for in Chapter II of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, within the meaning of Article 4(c) of that directive, is conditional upon their standing to bring proceedings in defence of the individual rights for which they are responsible being enshrined in law. In the absence of provisions adopted to that effect in the applicable law, that standing may result from the general legal context, provided that its scope and its consequences for the situation of individuals are defined in a sufficiently clear and precise manner.

(2) The provisions of Article 4(c) of Directive 2004/48 are to be interpreted as meaning that the Member States are not obliged to recognise the direct interest of the collective licensing organisations referred to in those provisions, to seek, in their own name, application of the measures, procedures and remedies provided for in Chapter II of that directive, such as an action for infringement, if such an interest does not result from the applicable national legislation.