

# Kluwer Copyright Blog

## CJEU rules on moral damages for copyright infringement

Patricia Mariscal (Elzaburu) · Thursday, April 21st, 2016

**IN CASES OF INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, COMPENSATION FOR MORAL DAMAGES IS COMPATIBLE WITH PECUNIARY DAMAGES CALCULATED ON THE BASIS OF “HYPOTHETICAL ROYALTIES”.**

**Judgment of the CJEU of 17 March 2016 in *Liffers*, C-99/15**

### BACKGROUND

This CJEU decision stems from legal proceedings brought in Spain by Mr. Liffers, the director, screenwriter and producer of the audiovisual work entitled *Dos patrias, Cuba y la noche*, against a production company and a television channel which had respectively produced and aired a documentary on child prostitution in Cuba that included passages of the original audiovisual work.

The Spanish courts considered, both at [first instance](#) and on [appeal](#), that Mr. Liffers’ intellectual property rights in his audiovisual work had been infringed, causing damage that had to be redressed. At first instance, the defendants were ordered to pay 3,370 Euros (the amount that the court deemed the defendants should have paid had they requested a licence) plus 10,000 Euros for moral damages. Madrid Court of Appeal upheld the material damages award (although it reduced the amount), but it set aside, in its entirety, the moral damages award on the grounds that the method chosen by the plaintiff for calculating material damages ruled out the possibility of requesting additional compensation for moral damages. Mr. Liffers lodged an appeal with the Spanish Supreme Court on the grounds that the Appeal Court had erred in making this interpretation of the functioning of the compensatory criteria established in the law.

### THE UNDERLYING PROBLEM. THE DEFICIENT ENACTMENT OF DIRECTIVE 2004/48 IN SPANISH LAW

It suffices to read [Art. 140.2 of the Spanish Copyright Act](#) just once to see where the problem lies. This provision, in an inadequate enactment of [Art. 13 of Directive 2004/48](#), establishes a system for calculating damages using wording which suggests that compensation for moral damages is only appropriate where the material damages have been calculated in accordance with the second method offered:

*Compensation for damages shall be established pursuant to one of the following criteria, to be chosen by the injured party:*

*a) The negative economic consequences, including lost profits which the injured party has suffered*

*and any profits made by the infringer due to the unlawful use. Moral prejudice shall afford entitlement to indemnification even where there is no evidence of economic prejudice. The amount of the indemnification shall be determined according to the circumstances of the infringement, the seriousness of the harm done and the extent of unlawful dissemination of the work.*

*b) 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.*

The wording of the provision, considered separately, would appear to leave no room for doubt: there shall be no compensation for moral damages where the injured party has opted for the hypothetical royalty criterion (paragraph 2) to calculate material damages. In that regard, the Spanish legislature has been on the receiving end of a great deal of criticism for its work on transposing EU laws. Nevertheless, Art. 13 of the aforementioned Directive does not exactly stand out due to its clarity either; the second part of paragraph 1 establishes the following:

*“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.”*

In those circumstances, the Spanish Supreme Court made a [reference for a preliminary ruling](#) to the CJEU concerning whether Art. 13.1 of Directive 2004/48 should be interpreted as meaning that the party injured by an intellectual property infringement who claims damages for pecuniary loss calculated pursuant to Art. 13.2, paragraph 2, b) cannot also claim moral damages, as provided in Art. 13.1, paragraph 2, a).

## INTERPRETATION OF THE LAW USING A SYSTEMATIC AND TELEOLOGICAL APPROACH

The CJEU’s solution to this issue is, let it be said, dictated by common sense. EU law cannot solely be interpreted in light of its wording; it is also necessary to consider the context and objectives pursued by the rules of which it is part. In that regard, an interpretation of Art. 13 in light of the Directive and CJEU case-law precludes the mere acceptance of the damages incompatibility hypothesis where the hypothetical royalty method is selected.

The spirit and objective of the Directive in question, as described in its recitals 10, 17 and 26, is to attain a high and uniform level of protection in all the Member States. It expressly establishes that *“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.”* (recital 26)

Furthermore, Art. 13.1 of the Directive begins by stating that the damages must be appropriate to

the “actual prejudice suffered”, and so if the injured party has sustained moral damages, they must also be redressed, regardless of the method chosen for calculating material damages.

In light of all this, the CJEU considered that Art. 13.1 of Directive 2004/48/EC must be interpreted as permitting an injured party who claims compensation for material damage calculated in accordance with paragraph b) of that provision (the hypothetical royalty criterion) to also claim compensation for moral damages.

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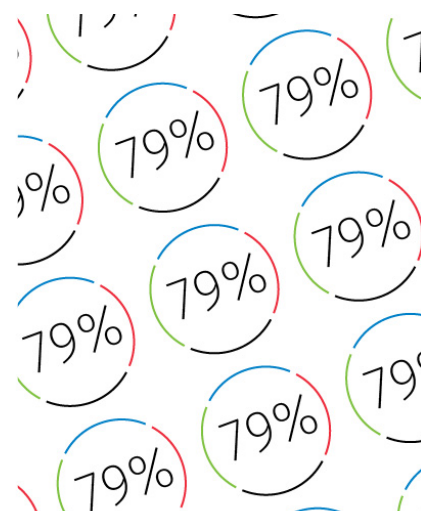
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