Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

27 April 2023*

(Reference for a preliminary ruling – Intellectual property – Directive 2004/48/EC – Measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights – Right of information – *Locus standi* – Need to establish the existence of an intellectual property right in advance)

In Case C-628/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), made by decision of 21 July 2021, received at the Court on 11 October 2021, in the proceedings

TB

other parties to the proceedings:

Castorama Polska sp. z o.o.,

'Knor' sp. z o.o.,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič (Rapporteur), I. Jarukaitis and Z. Csehi, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Castorama Polska sp. z o.o., by M. Markiewicz, M. Mioduszewski and Z. Ochońska, radcowie prawni,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Austrian Government, by A. Posch and G. Kunnert, acting as Agents,

* Language of the case: Polish.

– the European Commission, by S.L. Kalėda and U. Małecka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8(1) 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 OJ 2004 L 195, p. 16).

2 The request has been made in the context of proceedings brought by TB seeking an order that Castorama Polska sp. z o.o., a company established in Warsaw (Poland), and 'Knor' sp. z o.o., a company established in Gliwice (Poland), provide information concerning the origin and distribution networks of goods or services that allegedly infringe an intellectual property right of which TB claims to be the owner.

Legal context

European Union law

Directive 2004/48

3 Recitals 10, 13, 17 and 19 of Directive 2004/48 state:

'(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.

…

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

…

(17) 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.

…

(19) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention [for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), in the version resulting from the amendment of 28 September 1979], which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his/her name appears on the work. A similar presumption should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.'

4 Article 1 of that directive, entitled 'Subject matter', states:

'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.'

5 In Chapter II of that directive, entitled 'Measures, procedures and remedies', Article 3 thereof, entitled 'General obligation', states, in paragraph 1 and 2:

'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.'

6 Article 4 of that directive, entitled 'Persons entitled to apply for the application of the measures, procedures and remedies', provides:

'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.'

7 Article 6 of Directive 2004/48, entitled 'Evidence', provides, in paragraph 1:

'Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.'

8 Article 7 of that directive, entitled 'Measures for preserving evidence', provides, in paragraph 1:

'Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.'

9 Article 8 of that directive, entitled 'Right of information', provides, in paragraph 1:

'Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.'

10 Article 9 of that directive, entitled 'Provisional and precautionary measures', provides, in paragraphs 1 to 3:

'1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by 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)];

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.'

Polish law

11 Article 479^{89} of the ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 (Dz. U., 1964, No 43, position 296), in the version applicable to the dispute in the main proceedings (Dz. U., 2020, position 1575) ('the Code of Civil Procedure'), provides, in paragraphs 1 and 2:

'1. The provisions of the present section shall apply to cases relating to the protection of copyright and related rights, the protection of industrial property and the protection of other rights concerning intangible assets (intellectual property cases).

2. The following shall also be considered to be intellectual property cases for the purposes of the present section:

(1) the prevention and combating of unfair competition;

…'

12 Article 479[112] of the Code of Civil Procedure is worded as follows:

'The provisions concerning the person required to provide the information shall apply to any person, including the defendant, who has the information referred to in Article 479[113] or who has access to that information.'

13 Under Article 479[113](1) and (2) of the Code of Civil Procedure:

'1. Upon application by the rightholder, where he or she plausibly demonstrates the existence of circumstances characterising an infringement of an intellectual property right, the court may, before the commencement of proceedings relating to that infringement of the intellectual property right, or while such proceedings are pending, up to the close of the hearing at first instance, request the infringer to provide information on the origin and the distribution networks of the goods or services, where that is necessary for the requirements of the holder's action.

2. Where the court's request for information precedes the bringing of proceedings relating to the infringement of the intellectual property right, those proceedings must be brought no later than one month from the date of enforcement of the order relating to the request for information.'

14 Article 1 of the ustawa o prawie autorskim i prawach pokrewnych (Law on copyright and related rights) of 4 February 1994 (Dz. U., 1994, No 24, position 83), in the version applicable to the dispute in the main proceedings (Dz. U., 2021, position 1062), provides:

'1. Copyright covers any manifestation of a creative activity of an individual nature, fixed in any form, irrespective of its value, intended purpose and mode of expression (work).

2. Copyright relates in particular to:

…

(2) works of art;

2[1]. Only the mode of expression may be protected; discoveries, ideas, procedures, methods and principles of operation and mathematical concepts are not protected.

…

4. Protection shall be granted to the creator irrespective of any formality.'

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

15 TB is a natural person who, in her online shops, markets decorative articles. As part of her business, she sells reproductions of images A, B and C, which she makes mechanically by herself. Each of those images has simple graphics, consisting of a limited number of colours, geometric figures and short sentences. In that regard, images A, B and C contain, respectively, the following sentences: '*Mój dom moje zasady*' ('My house, my rules'); '*Nie ma ludzi idealnych a jednak jestem*' ('Perfect people don't exist, and yet here I am') and '*W naszym domu rano słychać tupot małych stopek. Zawsze pachnie pysznym ciastem. Mamy dużo obowiązków, mnóstwo zabawy i miłości*'

('In our house, the patter of tiny feet can be heard in the morning. It always smells like delicious cake. We have lots of chores, lots of fun and lots of love'). TB claims to be the creator of those images, which, in her view, are 'works' for the purposes of the legislation on copyright.

16 Reproductions of those images are marketed by Castorama Polska and Knor ('the reproductions at issue in the main proceedings'). Exact copies of images A and B are sold in the online shop and in the bricks-and-mortar shops of Castorama Polska and are provided by Knor. Castorama Polska also sells images provided by Knor, with text identical to that in image C, but displaying certain differences from that image in terms of graphics and font. Neither the reproductions at issue in the main proceedings nor the images themselves, which are the subject of the reproductions, indicate the author or the origin of the product concerned. Furthermore, TB did not consent to those reproductions or to the sale of those reproductions by Castorama Polska and Knor.

17 On 13 October 2020, TB gave notice to Castorama Polska to cease and desist its infringements of the economic and moral copyright in respect of the 'works' created by her.

18 On 15 December 2020, TB brought an action before the referring court, on the basis of Article 479^{113} of the Code of Civil Procedure, seeking an order requiring Castorama Polska and Knor to provide information about the reproductions at issue in the main proceedings, in particular with regard to the distribution networks and the quantity of goods received or ordered by them, and a complete list of their suppliers, the date on which those goods were placed on sale in Castorama Polska's bricks-and-mortar shops and online shop, and the quantity and the proceeds of the sale of those goods, broken down into physical sales and online sales.

19 TB stated that she held an economic and moral copyright in the images that are the subject of the reproductions at issue in the main proceedings and that that information was necessary for the purpose of bringing an action for infringement of that copyright and, in the alternative, an action for damages for unfair competition.

20 Castorama Polska contends before the referring court that that request for information should be refused and, in the alternative, that the scope of the judicial decision to be given should be as narrow as possible, arguing that that decision should be strictly limited to 'works', for the purposes of the legislation on copyright, and disputing the very possibility that the images that are the subject of the reproductions at issue in the main proceedings might be classified as 'works', for the purposes of that legislation. It also seeks protection of business secrets and argues that TB has not proved that she held the economic copyright in those reproductions. In Castorama Polska's submission, the intellectual works to which TB's request refers are not original, since TB has failed to prove that the 'novelty' condition is satisfied. Granting her request would thus amount to affording copyright protection to 'ideas' and 'concepts', because the images that are the subject of those reproductions belong to the current fashion for 'simplified motivational artworks' with 'trite sentences'. Castorama Polska maintains, moreover, that all the graphic elements of those images are trite and repetitive and that they do not in any way show originality, as far as concerns their composition, colours and the font used, with regard to other images available on the market.

21 It is apparent from the request for a preliminary ruling that the evidence adduced by TB consists only, first, of printouts of pages from her website displaying articles for sale in her online shops and of invoices drawn up from 2014 onwards and, secondly, of printouts of pages from Castorama Polska's website and of invoices relating to the sale of images in the latter's online shops.

22 For the purposes of examining TB's application in the main proceedings, the referring court is uncertain as to the interpretation to be given to Article 8(1) of Directive 2004/48, in particular whether, in proceedings requesting information initiated on the basis of that provision, the fact that the person concerned is the holder of the intellectual property rights relied on in support of his or her application must be fully established by that person, or whether it is sufficient for that person merely to 'lend credence' to it.

23 In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 8(1) read in conjunction with Article 4(1) of Directive [2004/48] be understood to refer to a measure to protect intellectual property rights only when the rightholder's intellectual property right has been confirmed in these or other proceedings?

If Question 1 is answered in the negative:

(2) Should Article 8(1) …, read in conjunction with Article 4(1) of Directive [2004/48] be interpreted as meaning that it is sufficient to lend credence to the fact that that measure refers to an existing intellectual property right, and not to prove that circumstance, especially in a case where a request for information about the origin and distribution networks of goods or services precedes the assertion of claims for compensation on account of an infringement of intellectual property rights?'

Admissibility of the request for a preliminary ruling

24 The Austrian Government disputes the admissibility of the request for a preliminary ruling on the ground that an interpretation of Article 8 of Directive 2004/48 is not necessary to resolve the dispute in the main proceedings.

25 According to the Court's settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court and the national courts by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgments of 20 June 2013, *Impacto Azul*, C-186/12, EU:C:2013:412, paragraph 26 and the case-law cited, and of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 47 and the case-law cited).

26 In that regard it should be recalled that, in those proceedings, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 3 June 2021, *BalevBio*, C-76/20, EU:C:2021:441, paragraph 46 and the case-law cited).

27 It is also apparent from settled case-law that the need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 1 August 2022, *Roma Multiservizi and Rekeep*, C-332/20, EU:C:2022:610, paragraph 43 and the case-law cited).

28 In the present case, the referring court sets out with sufficient clarity the legal and factual context and the reasons that led it to question the interpretation of certain provisions that it considers necessary in order to be able to give its decision. In particular, it is not obvious that the interpretation sought bears no relation to the main proceedings or that the problem raised is hypothetical.

29 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

30 By its questions, which should be examined together, the referring court asks, in essence, whether Article 8(1) of Directive 2004/48 must be interpreted as meaning that, in proceedings concerning an infringement of an intellectual property right, the applicant must prove, for the purpose of a request for information under Article 8, that he or she is the holder of the intellectual property right concerned or whether it is sufficient that he or she lends credence to the fact that he or she is the holder of that intellectual property right, in particular where the request for information precedes the introduction of a claim for compensation on account of an infringement of that intellectual property right.

31 By that directive, the EU legislature chose to ensure a high level of protection of intellectual property in the internal market (judgment of 18 December 2019, *IT Development*, C-666/18, EU:C:2019:1099, paragraph 38) and to provide for minimum harmonisation concerning the enforcement of intellectual property rights in general (judgment of 9 July 2020, *Constantin Film Verleih*, C-264/19, EU:C:2020:542, paragraph 36).

32 It should be borne in mind that Article 8(1)(a) of that directive provides that Member States are to ensure that, in proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request from the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who was found in possession of the infringing goods on a commercial scale.

33 Thus, as regards the wording of that provision, it must be held that it does not, in itself, require the applicant to prove that he or she is the holder of the intellectual property right concerned.

34 Under Article 4 of Directive 2004/48, persons entitled to apply for the application of the measures, procedures and remedies provided for in Chapter II of that directive must come within one of the four categories of persons or bodies listed in points (a) to (d) of that article. Those categories include, first, holders of intellectual property rights, in accordance with the provisions of the applicable law; secondly, all the 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;

thirdly, 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; and, fourthly, 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.

35 Since Article 4(a) of that directive refers to the 'holders of intellectual property rights', that provision might be understood as meaning that, when applying Article 8 of that directive, the applicant must show that he or she is actually the holder of the intellectual property right concerned.

36 However, according to settled case-law, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 22 December 2022, *Quadrant Amroq Beverages*, C-332/21, EU:C:2022:1031, paragraph 42).

37 Therefore, for the purpose of interpreting Article 8(1) of Directive 2004/48, it is necessary to examine the context of that provision and the objectives pursued by that directive.

38 As regards the standard of proof required for the application of 'measures, procedures and remedies' provided for in Chapter II of Directive 2004/48, it is apparent, in particular, from Article 6 of that directive that, for the purpose of making a request for the disclosure of evidence by the opposing party, the applicant must present 'reasonably available evidence sufficient to support [his or her] claims'. Article 7 of that directive requires that, for the purpose of making a request for provisional measures for preserving evidence, the applicant is to present 'reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed'. Last, Article 9 of that directive, relating to provisional and precautionary measures, provides, in paragraph 3, that the judicial authorities are to require the applicant to provide 'any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed'.

39 As regards the objective of Directive 2004/48, it is apparent from recitals 10 and 13 thereof, respectively, that that objective is to approximate the laws of the Member States so as to ensure a high, equivalent and homogeneous level of protection of intellectual property. The provisions of that directive are intended to govern the aspects of intellectual property rights related, first, to the enforcement of those rights and, secondly, to their infringement, by requiring that there must be effective legal remedies designed to prevent, terminate or rectify any infringement of an existing intellectual property right (judgment of 18 December 2019, *IT Development*, C-666/18, EU:C:2019:1099, paragraphs 38 and 40).

40 In that regard, it should be emphasised that the procedure for requesting information provided for in Article 8(1) of Directive 2004/48 in favour of the holder of intellectual property rights constitutes a separate procedure (see, to that effect, judgment of 17 June 2021, *M.I.C.M.*, C-597/19, EU:C:2021:492, paragraphs 81 and 82).

41 However, according to the Court's case-law, to ensure a high level of protection of intellectual property, an interpretation recognising the right of information laid down in Article 8(1) of Directive 2004/48 solely in proceedings seeking a finding of an infringement of an intellectual property right must be rejected, since such a level of protection might not be ensured if it were not possible also to exercise that right of information in the context of a separate procedure

brought after the final termination of an action in which a finding was made of a breach of an intellectual property right (judgment of 18 January 2017, *NEW WAVE CZ*, C-427/15, EU:C:2017:18, paragraph 24).

42 The Court has held that it is appropriate to apply the same reasoning in relation to a separate procedure preceding an action for damages in which, under Article 8(1)(c) of Directive 2004/48, an applicant requests information enabling him or her, specifically, to be able usefully to bring legal proceedings against the alleged infringers (judgment of 17 June 2021, *M.I.C.M.*, C-597/19, EU:C:2021:492, paragraph 82).

43 Moreover, the Court has held that the right of information provided for in Article 8(1) of Directive 2004/48 gives concrete expression to the fundamental right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union and thereby ensures the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter of Fundamental Rights. Thus, that right of information enables the holder of an intellectual property right to identify the person who is infringing that right and to take the necessary steps, such as making applications for provisional measures provided for in Article 9(1) and (2) of that directive or for damages provided for in Article 13 of that directive, in order to protect that intellectual property right (see, to that effect, judgment of 17 June 2021, *M.I.C.M.*, C-597/19, EU:C:2021:492, paragraph 83). Without full knowledge of the extent of the infringement of his or her intellectual property right, the holder of that intellectual property right would not be in a position to calculate precisely the amount of damages he or she is entitled to by reason of the infringement.

44 As the Advocate General observed in point 41 of his Opinion, it follows clearly from that body of case-law that it is necessary to distinguish the function of a request for information pursuant to Article 8 of Directive 2004/48 from that of legal proceedings seeking a finding that there has been an infringement of an intellectual property right.

45 The request for information provided for in Article 8 of Directive 2004/48 has a different purpose from that of an action seeking a finding that there has been an infringement of an intellectual property right. If that request were subject to the same standards of proof as legal proceedings seeking a finding that there has been an infringement of an intellectual property right, the separate procedure established by Article 8, which is a specific feature of EU law, would lose much of its practical use.

46 In addition, in order to specify whether the evidence produced in the context of the procedure for requesting information provided for in Article 8 of that directive is sufficient, it is necessary to take into consideration the nature of the intellectual property right relied on and any special formalities governing the ownership of that right.

47 That is also apparent from recital 17 of that directive, which states that the measures, procedures and remedies provided for in that 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.

48 In the present case, the referring court states that the copyright relied on by TB is at issue in the main proceedings.

49 In that regard, recital 19 of Directive 2004/48 further emphasises that 'copyright exists from the creation of a work and does not require formal registration'.

50 With respect to copyright, it follows from the Court's case-law relating to Directive 2001/29 that the concept of 'work' has two conditions. First, that concept requires an original subject matter which is the author's own intellectual creation and, secondly, it requires the expression of that creation. As regards the first of those conditions, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his or her free and creative choices. As regards the second condition, the concept of 'work' that is the subject of Directive 2001/29 necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity (see, to that effect, judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraphs 22 to 25).

51 It will be for the referring court to assess whether TB has adduced sufficient evidence, establishing that she is the holder of the intellectual property right concerned.

52 In a similar vein, Article 3(1) of Directive 2004/48 provides that the measures, procedures and remedies laid down in Chapter II of that directive are to be, inter alia, fair and equitable and are not to be unnecessarily costly. Furthermore, under Article 3(2) of that directive, those measures, procedures and remedies are to be effective, proportionate and dissuasive and are to be applied in such a manner as to provide for safeguards against their abuse. Article 3 therefore requires the Member States and, ultimately, the national courts to offer guarantees that, inter alia, the requests for information referred to in Article 8 of that directive are not to be abused (judgment of 28 April 2022, *Phoenix Contact*, C-44/21, EU:C:2022:309, paragraph 43).

53 Consequently, it will be for the referring court to assess the justification for and proportionality of the request for information before it and to ascertain that the applicant in the main proceedings has not abused that request. To that end, the referring court will have to take due account of all the objective circumstances in the main proceedings (see, to that effect, judgment of 12 September 2019, *Bayer Pharma*, C-688/17, EU:C:2019:722, paragraph 70).

54 As the Advocate General observed in point 48 of his Opinion, if the referring court were to find that there was an abuse of rights, it would have to refuse to grant the right of information provided for in Article 8 of Directive 2004/48.

55 In the light of all the foregoing considerations, the answer to the questions referred is that Article 8(1) of Directive 2004/48 must be interpreted as meaning that, in proceedings concerning an infringement of an intellectual property right under that provision, the applicant must, for the purpose of a request for information under Article 8, provide any reasonably available evidence enabling the court seised of that request to satisfy itself with a sufficient degree of certainty that the applicant is the rightholder, by submitting evidence appropriate to the nature of that right and any special applicable formalities.

Costs

56 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 8(1) 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 meaning that, in proceedings concerning an infringement of an intellectual property right under that provision, the applicant must, for the purpose of a request for information under Article 8, provide any reasonably available evidence enabling the court seised of that request to satisfy itself with a sufficient degree of certainty that the applicant is the rightholder, by submitting evidence appropriate to the nature of that right and any special applicable formalities.

[Signatures]