JUDGMENT OF THE COURT (Third Chamber)

21 October 2010 (*)

(Approximation of laws – Copyright and related rights – Directive 2001/29/EC – Reproduction right – Exceptions and limitations – Private copying exception – Definition of 'fair compensation' – Uniform interpretation – Implementation by the Member States – Criteria – Limits – Private copying levy applied to digital reproduction equipment, devices and media)

In Case C-467/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Barcelona (Spain), made by decision of 15 September 2008, received at the Court on 31 October 2008, in the proceedings

Padawan SL

v

Sociedad General de Autores y Editores de España (SGAE),

intervening parties:

Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA),

Asociación de Artistas Intérpretes o Ejecutantes – Sociedad de Gestión de España (AIE),

Asociación de Gestión de Derechos Intelectuales (AGEDI),

Centro Español de Derechos Reprográficos (CEDRO),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2010,

after considering the observations submitted on behalf of:

– Padawan SL, by J. Jover Padró, E. Blanco Aymerich and A. González García, abogados,

– Sociedad General de Autores y Editores (SGAE), by P. Hernández Arroyo, J. Segovia Murúa, R. Allendesalazar Corchó and R. Vallina Hoset, abogados,

– Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), by J.A. Suárez Lozano and M. Benzal Medina, abogados,

– Asociación de Artistas Intérpretes o Ejecutantes – Sociedad de Gestión de España (AIE), by C. López Sánchez, abogado,

– Asociación de Gestión de Derechos Intelectuales (AGEDI), by R. Ros Fernández, procurador, and F. Márquez Martín, abogado,

– Centro Español de Derechos Reprográficos (CEDRO), by M. Malmierca Lorenzo and J. Díaz de Olarte, abogados,

– the Spanish Government, by J. López-Medel Bascones and N. Díaz Abad, acting as Agents,

– the German Government, by M. Lumma and S. Unzeitig, acting as Agents,

– the Greek Government, by E.-M. Mamouna and V. Karra, acting as Agents,

– the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and N. Gonçalves, acting as Agents,

– the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

– the United Kingdom Government, by H. Walker, acting as Agent,

– the European Commission, by L. Lozano Palacios and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the concept of 'fair compensation' in Article 5(2)(b) 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) paid to copyright holders in respect of the 'private copying exception'.

2 The reference has been made in the course of proceedings between Padawan SL ('Padawan') and Sociedad General de Autores y Editores de España ('SGAE') concerning the

'private copying levy' allegedly owed by Padawan in respect of CD-R, CD-RW, DVD-R and MP3 players marketed by it.

Legal context

Directive 2001/29

3 Recitals 9, 10, 31, 32, 35, 38 and 39 in the preamble to Directive 2001/29 are worded as follows:

'(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work …

…

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded …

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

…

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

…

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders …

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.'

4 Under Article 2 of Directive 2001/29:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

5 Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', states in subparagraph 2(b):

'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

…

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'.

6 Article 5(5) of that directive provides:

'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

7 Article 6 of Directive 2001/29, entitled 'Obligations as to technological measures', provides in paragraphs 3 and 4:

‘3. For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

…’

National legislation

8 The applicable rules are contained in Royal Legislative Decree 1/1996 of 12 April 1996, approving the consolidated text of the Law on Intellectual Property (‘the CTLIP’). That royal legislative decree was amended in the context of the transposition of Directive 2001/29 by the Law 23/2006 of 7 July 2006 amending the consolidated text of the Law on Intellectual Property approved by Royal Legislative Decree 1/1996 (BOE No 162 of 8 July 2006, p. 25561).

9 Article 17 of the CTLIP, entitled ‘Exclusive rights of exploitation and implementing rules’, is worded as follows:

‘The author shall have exclusive rights of exploitation of his works regardless of their form and, in particular, reproduction rights … which cannot be exercised without his permission except in circumstances laid down in this Law.’

10 Under the heading ‘Reproduction’, Article 18 of the CTLIP provides:

‘Reproduction means the fixation of the work on a medium which enables communication of the work and copying of the whole or part of the work.’

11 Under Article 31(2) of the CTLIP:

‘The reproduction of works which have already been circulated shall not be subject to the author’s permission where the reproduction is by a natural person for his private use with respect to works which he has accessed legally, without prejudice to the fair compensation provided for in Article 25 … provided that the usage of the copy is not collective or for profit’.

12 Article 25 of the CTLIP, entitled ‘Fair compensation for private copying’, provides in subparagraphs 1, 2 and 4:

‘1. Reproduction exclusively for private use, by means of non-typographical devices or technical instruments, of works circulated in the form of books or publications, deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media shall give rise to fair compensation paid at a flat rate for each of the three methods of reproduction mentioned, for the persons cited in subparagraph 4(b) in order to compensate the intellectual property rights which cease to be paid by reason of that reproduction. …

2. That compensation shall be determined for each means of reproduction according to the equipment, devices and media appropriate to create that reproduction, which were manufactured on Spanish territory or acquired elsewhere with a view to their commercial distribution or their use there.

…

4. With respect to the legal obligation mentioned in subparagraph 1,

(a) “Debtors”: means manufacturers established in Spain, where they operate as commercial distributors, and persons who acquire outside Spanish territory, the equipment, devices and media referred to in subparagraph 2 with a view to their commercial distribution or use there.

The distributors, wholesalers and retailers, as subsequent purchasers of the equipment, devices and media, shall pay compensation jointly and severally with the debtors who supplied them for the products concerned, unless they prove that that compensation has in fact been paid for them, without prejudice to subparagraphs 14, 15 and 20.

(b) “Creditors” means the authors of works publicly exploited in one of the forms mentioned in subparagraph 1, together, according to the case and mode of reproduction, with the editors, producers of phonograms and videograms and performers whose performances have been fixed on those phonograms and videograms.’

13 Article 25(6) of the CTLIP sets out the procedure for approving the amount of compensation which each debtor has to pay with respect to digital equipment, devices and media, a procedure which involves the Ministry of Culture, the Ministry of Industry, Tourism and Trade, intellectual property rights management societies, sectoral associations which represent mainly the debtors, Spanish consumer associations and the Ministry of Economy and Finance.

14 Article 25(6) provides that ‘the parties to the process of negotiation and, in every case, the Ministry of Culture and the Ministry of Industry, Tourism and Trade, for the purposes of

the adoption of the inter-ministerial decree referred to in the following provision, shall take into account, inter alia, the following criteria:

– the harm actually caused to the rightholders referred to in subparagraph 1, regard being had to the fact that if the harm caused to the holder is minimal it cannot give rise to an obligation for payment;

– the degree to which the equipment, devices and media was used for the copying referred to in subparagraph 1;

– the storage capacity of the equipment, devices and media;

– the quality of the reproductions;

– the availability, level of application and effectiveness of the technological measures referred to in Article 161;

– how long the reproductions can be preserved;

– the corresponding amounts of compensation applicable to the various equipment or devices concerned must be financially proportionate with respect to the average final retail price of those products.'

15 Article 25(12) of the CTLIP, which concerns the persons who are required to pay compensation, is worded as follows:

'The obligation to pay compensation shall arise in the following circumstances:

(a) With respect to manufacturers, where they operate as distributors, and for the persons who acquire the equipment, devices and media outside Spanish territory with a view to their commercial distribution therein, when the passing of property is effected by the debtor or, as the case may be, when the right to use or to enjoy any of the equipment, devices and media is transferred.

(b) With respect to the persons who acquire equipment, devices and media outside Spanish territory in order to use them therein, at the time they were acquired.'

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

16 SGAE is one of the bodies responsible for the collective management of intellectual property rights in Spain.

17 Padawan markets CD-Rs, CD-RWs, DVD-Rs and MP3 players. SGAE claimed payment from Padawan of the 'private copying levy' provided for in Article 25 of the CTLIP for the years 2002 to 2004. Padawan refused on the ground that the application of that levy to digital media, indiscriminately and regardless of the purpose for which they were intended (private use or other professional or commercial activities), was incompatible with Directive 2001/29. By judgment of 14 June 2007, the Juzgado de lo Mercantil No 4 de Barcelona upheld SGAE's claim in its entirety and Padawan was ordered to pay EUR 16 759.25 together with interest.

18 Padawan appealed against that judgment to the referring court.

19 After consulting the parties and the Public Prosecutor's office about the expediency of making a reference for a preliminary ruling, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the concept of "fair compensation" in Article 5(2)(b) of Directive 2001/29/EC entail harmonisation, irrespective of the Member States' right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightholders affected by the adoption of the private copying exception or limitation?

2. Regardless of the system used by each Member State to calculate fair compensation, must that system ensure a fair balance between the persons affected, the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other, and is that balance determined by the reason for the fair compensation, which is to mitigate the harm arising from the private copying exception?

3. Where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, must that charge (the fair compensation for private copying) necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, with the result that the application of the charge would be justified where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying, but not otherwise?

4. If a Member State adopts a private copying "levy" system, is the indiscriminate application of that "levy" to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of "fair compensation"?

5. Might the system adopted by the Spanish State of applying the private copying levy indiscriminately to all digital reproduction equipment, devices and media infringe Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of rights justifying the compensation does not exist?'

The questions referred for a preliminary ruling

Admissibility

20 First, the Centro Español de Derechos Reprográficos and the Spanish Government argue essentially that the reference for a preliminary ruling is irrelevant to the outcome of the dispute in the main proceedings since Directive 2001/29 is not applicable to it *ratione temporis*. They submit that the national provisions preceding the entry into force of those implementing Directive 2001/29 are applicable to the present dispute. Consequently, the

interpretation of the notion of 'fair compensation' in Article 5(2)(b) of that directive is unnecessary for the resolution of the dispute.

21 In that connection, it should be recalled that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the 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 European Union law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 32).

22 However, it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct. The Court must take account, under the division of jurisdiction between the courts of the European Union and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 17; and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 48).

23 As far as concerns the present reference for a preliminary ruling, it must be stated, first, that it concerns the interpretation of a provision of European Union law, namely Article 5(2)(b) of Directive 2001/29, which falls within the jurisdiction of the Court in such a reference, and furthermore, it is not inconceivable, having regard to the period for which the levy at issue in the main proceedings is claimed and the expiry date of the transposition period prescribed in the first subparagraph of Article 13(1) of Directive 2001/29 of 22 December 2002, that the referring court may be required to draw conclusions from the interpretation it has requested, in particular with respect to its obligation to interpret national law in the light of European Union law (Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

24 Second, the determination of the applicable national legislation *ratione temporis* is a question of interpretation of national law and thus does not fall within the jurisdiction of the Court in a reference for a preliminary ruling.

25 It follows that the first plea of inadmissibility must be dismissed.

26 Second, SGAE submits that the questions referred by the national court are inadmissible in so far as they concern situations of national law which are not harmonised by Directive 2001/29. It argues that the questions raised are based essentially on aspects which fall within the jurisdiction of the Member States. In the context of a reference for a preliminary ruling the Court of Justice does not have jurisdiction to interpret and apply national law.

27 However, it should be borne in mind that the issue whether the questions submitted by the national court concern a matter unconnected with European Union law, on the ground that Directive 2001/29 provides only for minimal harmonisation in that area, relates to the

substance of the questions submitted by that Court and, not to their admissibility (see Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 28). Therefore, SGAE's plea alleging that that directive is inapplicable to the dispute in the main proceedings does not relate to the admissibility of these proceedings but concerns the substance of those questions (see, to that effect, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 30).

28 Since the second plea of inadmissibility must be dismissed, it follows from all of the foregoing considerations that the reference for a preliminary ruling must be declared admissible.

Substance

The first question

29 By its first question, the national court asks, in essence, whether the concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted in a uniform manner in all Member States, irrespective of the Member States' right to choose the system of collection.

30 It should be borne in mind that under Article 5(2)(b) of Directive 2001/29 Member States which decide to introduce the private copying exception into their national law are required to provide for the payment of 'fair compensation' to rightholders.

31 It should be noted at the outset that neither Article 5(2)(b) nor any other provision of Directive 2001/29 refers to the national law of the Member States as regards the concept of 'fair compensation'.

32 In such circumstances, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation (see, in particular, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-523/07 *A* [2009] ECR I-2805, paragraph 34).

33 It is clear from that case-law that the concept of 'fair compensation' which appears in a provision of a directive which does not contain any reference to national laws must be regarded as an autonomous concept of European Union law and interpreted uniformly throughout the European Union (see, by analogy, as regards the concept of 'equitable remuneration' in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 24).

34 That conclusion is supported by the objective pursued by the legislation in which the concept of fair compensation appears.

35 The objective of Directive 2001/29, based, in particular, on Article 95 EC and intended to harmonise certain aspects of the law on copyright and related rights in the information society and to ensure competition in the internal market is not distorted as a result of Member States' different legislation (Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraphs 26, 31 to 34) requires the elaboration of autonomous concepts of European Union law. The European Union legislature's aim of achieving the most uniform interpretation possible of Directive 2001/29 is apparent in particular from recital 32 in the preamble thereto, which calls on the Member States to arrive at a coherent application of the exceptions to and limitations on reproduction rights, with the aim of ensuring a functioning internal market.

36 Therefore, although it is open to the Member States, pursuant to Article 5(2)(b) of Directive 2001/29, to introduce a private copying exception to the author's exclusive reproduction right laid down in European Union law, those Member States which make use of that option must provide for the payment of fair compensation to authors affected by the application of that exception. An interpretation according to which Member States which have introduced an identical exception of that kind, provided for by European Union law and including, as set out in recitals 35 and 38 in the preamble thereto the concept of 'fair compensation' as an essential element, are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive, as set out in the preceding paragraph.

37 Having regard to the foregoing considerations, the answer to the first question is that the concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation.

The second question

38 By its second question, the national court asks, in essence, whether the 'fair balance' to be established between the persons concerned requires fair compensation to be calculated on the basis of the criterion of the harm caused to authors as a result of the introduction of the private copying exception. It also asks who, apart from the authors affected, are the persons concerned between whom a 'fair balance' must be established.

39 In the first place, as regards the role played by the criterion of the harm suffered by the author in the calculation of fair compensation, it is apparent from recitals 35 and 38 in the preamble to Directive 2001/29 that the purpose of fair compensation is to compensate authors 'adequately' for the use made of their protected works without their authorisation. In order to determine the level of that compensation, account must be taken – as a 'valuable criterion' – of the 'possible harm' suffered by the author as a result of the act of reproduction concerned, although prejudice which is 'minimal' does not give rise to a payment obligation. The private copying exception must therefore include a system 'to compensate for the prejudice to rightholders'.

40 It is clear from those provisions that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his

protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by the author.

41 Furthermore, the word ‘compensate’ in recitals 35 and 38 in the preamble to Directive 2001/29 expresses the intention of the European Union legislature to establish a specific compensation scheme triggered by the existence of harm to the detriment of the rightholders, which gives rise, in principle, to the obligation to ‘compensate’ them.

42 It follows that fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.

43 In the second place, as regards the question of the persons concerned by the ‘fair balance’, recital 31 in the preamble to Directive 2001/29 provides for the maintenance of a ‘fair balance’ between the rights and interests of the rightholders, who are to receive the fair compensation, on one hand, and those of the users of protected works on the other.

44 Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned.

45 It follows that the person who has caused harm to the holder of the exclusive reproduction right is the person who, for his own private use, reproduces a protected work without seeking prior authorisation from the rightholder. Therefore, in principle, it is for that person to make good the harm related to that copying by financing the compensation which will be paid to the rightholder.

46 However, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment, as stated in the last sentence of recital 35 in the preamble to Directive 2001/29, it is open to the Member States to establish a ‘private copying levy’ for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy.

47 It is true that in such a system it is not the users of the protected subject-matter who are the persons liable to finance fair compensation, contrary to what recital 31 in the preamble to the directive appears to require.

48 However, it should be observed, first, that the activity of the persons liable to finance the fair compensation, namely the making available to private users of reproduction equipment, devices and media, or their supply of copying services, is the factual precondition for natural persons to obtain private copies. Second, nothing prevents those liable to pay the compensation from passing on the private copying levy in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied. Thus, the burden of the levy will ultimately be born by the private user who pays that price. In those circumstances, the private user for whom the reproduction equipment,

devices or media are made available or who benefit from a copying service must be regarded in fact as the person indirectly liable to pay fair compensation.

49 Accordingly, since that system enables the persons liable to pay compensation to pass on the cost of the levy to private users and that, therefore, the latter assume the burden of the private copying levy, it must be regarded as consistent with a 'fair balance' between the interests of authors and those of the users of the protected subject-matter.

50 Having regard to all of the foregoing considerations, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the 'fair balance' between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. It is consistent with the requirements of that 'fair balance' to provide that persons who have digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it.

The third and fourth questions

51 By its third and fourth questions, which it is appropriate to examine together, the national court asks essentially whether, under Article 5(2)(b) of Directive 2001/29, there is a necessary link between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media, and the deemed use of the latter for the purposes of private copying. It also asks whether the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media clearly intended for uses other than the production of private copies, complies with Directive 2001/29.

52 It must be held from the outset that a system for financing fair compensation such as that described in paragraphs 46 and 48 of this judgment is compatible with the requirements of a 'fair balance' only if the digital reproduction equipment, devices and media concerned are liable to be used for private copying and, therefore, are likely to cause harm to the author of the protected work. There is therefore, having regard to those requirements, a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for private copying.

53 Consequently, the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case expressly mentioned by the national court in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2)(b) of Directive 2001/29.

54 On the other hand, where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work.

55 Those natural persons are rightly presumed to benefit fully from the making available of that equipment, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying.

56 It follows that the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.

57 Such an interpretation is supported by the wording of recital 35 in the preamble to Directive 2001/29. That recital mentions, as a valuable criterion for the determination of the level of fair compensation, not only the 'harm' as such but also the 'possible' harm. The 'possibility' of causing harm to the author of the protected work depends on the fulfilment of the necessary pre-condition that equipment or devices which allow copying have been made available to natural persons, which need not necessarily be followed by the actual production of private copies.

58 Furthermore, the Court has already held that, from the copyright point of view, account must be taken of the mere possibility for the ultimate user, in that case customers of a hotel, to watch programmes broadcast by means of a television set and a television signal made available to them by that establishment, and not the actual access of the customers to those works (Case C-306/05 *SGAE* [2006] ECR I-11519, paragraphs 43 and 44).

59 Having regard to all of the foregoing considerations, the answer to questions 3 and 4 is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29.

The fifth question

60 By its fifth question, the national court asks, in essence, whether the system adopted by the Kingdom of Spain, which consists in indiscriminately applying the private copying levy to all types of digital reproduction equipment, devices and media, however the equipment, devices or media are used, is compatible with Directive 2001/29.

61 In that connection, the Court has consistently held that, except in an action for a declaration of a failure to fulfil obligations, it is not for the Court to rule on the compatibility of a national provision with European Union law. That competence belongs to the national courts, if necessary, after obtaining from the Court, by way of a reference for a preliminary ruling, such clarification as may be necessary on the scope and interpretation of that law (see Case C-347/87 *Triveneta Zuccheri and Others* v *Commission* [1990] ECR I-1083, paragraph 16).

62 Therefore, it is for the national court to determine, in the light of the answers provided to the first four questions, the compatibility of the Spanish private copying levy with Directive 2001/29.

63 Therefore, there is no need for the Court to answer that question.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

1. **The concept of 'fair compensation', within the meaning of Article 5(2)(b) 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, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on the Member States to determine, within the limits imposed by European Union law in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation.**

2. **Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the 'fair balance' between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. It is consistent with the requirements of that 'fair balance' to provide that persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it.**

3. **Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29.**

[Signatures]

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* Language of the case: Spanish.