

JUDGMENT OF THE COURT (Third Chamber)

16 June 2011 \*

In Case C-462/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 20 November 2009, received at the Court on 25 November 2009, in the proceedings

**Stichting de Thuis kopie**

v

**Opus Supplies Deutschland GmbH,**

**Mijndert van der Lee,**

**Hananja van der Lee,**

\* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2010,

after considering the observations submitted on behalf of:

— the Stichting de ThuisKopie, by T. Cohen Jehoram and V. Rörsch, advocaten,

— Opus Supplies Deutschland GmbH and Mr and Mrs van der Lee, by D. Visser and A. Quaedvlieg, advocaten,

— the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

- the Lithuanian Government, by D. Kriauciūnas and L. Liubertaitė, acting as Agents,
  
- the Austrian Government, by E. Riedl and G. Kunnert, acting as Agents,
  
- the Finnish Government, by J. Heliskoski, acting as Agent,
  
- the European Commission, by A. Nijenhuis and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2011,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 5(2)(b) and (5) 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).

- 2 The reference has been made in proceedings between the Stichting de Thuiskopie ('the Stichting'), on the one hand, and Opus Supplies Deutschland GmbH ('Opus') and Mr and Mrs van der Lee, two managing directors of Opus, on the other hand, concerning payment by Opus of the levy intended to finance the fair compensation paid to copyright holders on the basis of the exception for copying for private use ('private copying levy').

## Legal context

### *Directive 2001/29*

- 3 Recitals 9, 10, 31, 32, 35 and 38 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 right-holders, 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 levy, 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. ...'

4 Under Article 2 of Directive 2001/29, headed 'Reproduction right':

'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.'

*National legislation*

- 7 According to Article 16c(1) to (3) of the Law on copyright (Auteurswet, *Staatsblad* 2008, No 538):

‘1. The reproduction of a literary, scientific or artistic work on an item designed for the reproduction of a work shall not be regarded as an infringement of the copyright in that work if the reproduction is made for ends that are neither directly nor indirectly commercial and serves exclusively for the own practice, study or use of the natural person making the reproduction.

2. Payment of a fair remuneration in respect of the reproduction referred to in paragraph 1 shall be due to the maker of the work or his legal successor. The manufacturer or importer of the items referred to in paragraph 1 shall be liable for payment of the remuneration.

3. The manufacturer’s payment obligation arises when the items manufactured by him are put on the market. The importer’s obligation arises at the time of importation.’

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

- 8 As is apparent from Article 16c(1) of the Law on copyright, the Kingdom of the Netherlands has introduced an exception into its national law for copying for private use. According to Article 16(2) of that law, the manufacturer or importer of the item used for reproduction is responsible for paying the private copying levy.



- 9 The Stichting is the Netherlands body responsible for the recovery of the private copying levy.
- 10 Opus is a company based in Germany which sells, via the internet, blank media. Its operations are focused in particular on the Netherlands by means of Dutch-language websites which target Netherlands consumers.
- 11 The contract of sale established by Opus provides that, where a Netherlands consumer makes an order online, that order is processed in Germany and the goods are delivered from Germany to the Netherlands, on behalf of and in the name of the customer, by a carrier, that carrier however in fact being engaged by Opus.
- 12 Opus does not pay a private copying levy in respect of the media delivered to its customers in the Netherlands, either in that Member State or in Germany. In addition, the referring court states that the cost of the reproduction media thus sold by Opus does not include the private copying levy.
- 13 Arguing that Opus had to be regarded as the 'importer' and, consequently, responsible for paying the private copying levy, the Stichting brought an action against Opus before the Netherlands courts, seeking payment of that levy.
- 14 Referring to the provisions of the sales contract, Opus denied that it could be classified as an importer into the Netherlands of the reproduction media sold by it. It argues that it is the Netherlands purchasers, that is, individual consumers, who must be classified as importers.

- 15 That argument relied upon by Opus in its defence was accepted by the Netherlands courts at first instance and then on appeal, which dismissed the Stichting's action for payment. The Stichting then pursued an appeal in cassation before the referring court.
- 16 The referring court questions whether the solution proposed by those courts to the dispute in the main proceedings is compatible with Directive 2001/29. According to it, to consider the purchaser, that is the individual consumer, to be the importer and, therefore, the person responsible for paying the private copying levy, is tantamount to admitting that that levy cannot in fact be recovered, since the individual purchaser cannot in practice easily be identified. It then raises the question whether the concept of 'importer' should not be defined in a broader manner than that resulting from the purely linguistic meaning of the word, also taking into account the final use of the media, which is also clear to the commercial seller.
- 17 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Directive [2001/29], in particular Article 5(2)(b) and (5) thereof, provide any assistance in determining who should be regarded under national law as owing the "fair compensation" referred to in Article 5(2)(b)? If so, what assistance does it provide?

(2) In a case of distance selling in which the buyer is established in a different Member State to that of the seller, does Article 5(5) of Directive [2001/29] require national law to be interpreted so broadly that a person owing the "fair compensation" referred to in Article 5(2)(b) of the directive who is acting on a commercial basis owes such compensation in at least one of the Member States involved in the distance selling?'

## Consideration of the questions referred

### *The first question*

- 18 By its first question, the referring court asks whether the provisions of Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as containing criteria which make it possible to determine who must be regarded as responsible for paying fair compensation on the basis of the exception of copying for private use.
- 19 As a preliminary point, it must be recalled that, under Article 2 of Directive 2001/29, Member States grant, in principle, to authors 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, of their works.
- 20 However, under Article 5(2)(b) of that directive, Member States may provide for an exception to the author's reproduction right in relation to his work 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 (so-called 'private copying' exception).
- 21 Article 5(5) of Directive 2001/29 nevertheless makes the introduction of the private copying exception subject to three conditions, that is, first, that the exception applies only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.

- 22 Thus, with regard to that last condition, the Member States, if they decide to introduce the private copying exception into their national law, are, in particular, required to provide, in application of Article 5(2)(b) of Directive 2001/29, for the payment of 'fair compensation' to rightholders (see, also, Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 30).
- 23 With regard to the answer to the question of the identification of the person who must be regarded as responsible for paying the fair compensation, the provisions of Directive 2001/29 do not expressly address the issue of who is to pay that compensation, meaning that the Member States enjoy broad discretion when determining who must discharge that obligation.
- 24 That being the case, the Court has already held 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 (*Padawan*, paragraph 40).
- 25 In addition, as is apparent from recital 31 in the preamble to Directive 2001/29 and from paragraph 43 of *Padawan*, a 'fair balance' must be maintained between the rights and interests of the authors, who are to receive the fair compensation, on one hand, and those of the users of protected works, on the other.
- 26 Since the person who has caused the harm to the holder of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm related to that copying by financing the compensation which will be paid to that rightholder (*Padawan*, paragraph 45).

- 27 The Court has however admitted that, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, 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 (*Padawan*, paragraph 46).
- 28 The Court has again pointed out that, since that system enables the persons responsible for payment to pass on the amount of 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, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the 'fair balance' between the interests of authors and those of the users of the protected subject-matter (*Padawan*, paragraphs 48 and 49).
- 29 In the light of the foregoing considerations, the answer to the first question is that Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation provided for in Article 5(2)(b). However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

*The second question*

- 30 By its second question, the referring court asks, in essence, whether, in a case of distance selling between a purchaser and a commercial seller of reproduction equipment, devices and media, who are established in different Member States, Directive 2001/29 requires national law to be interpreted so that fair compensation can be recovered from the person responsible for payment who is acting on a commercial basis.
- 31 In that regard, it must be noted that Article 5(5) of Directive 2001/29, which lays down the cumulative conditions for the application, inter alia, of the private copying exception, does not contain, as such, any specific statement such as to allow a particular interpretation with regard to the person to be regarded as responsible for paying the fair compensation owed to the authors on the basis of the private copying exception in the context of a distance selling arrangement such as that at issue in the main proceedings.
- 32 It should however be recalled that, according to recital 9 in the preamble to Directive 2001/29, the European Union legislature expressed its desire for a high level of protection to be guaranteed for copyright and related rights, since they 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. Thus, according to recital 10 in the preamble to Directive 2001/29, 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.
- 33 In particular, it is apparent from Article 5(2)(b) of and recital 35 in the preamble to Directive 2001/29 that, in those Member States which have introduced the private copying exception, rightholders must receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter without

their permission. Furthermore, in accordance with Article 5(5) of Directive 2001/29, the introduction of the private copying exception may not unreasonably prejudice the legitimate interests of the copyright holder.

34 It follows that, unless they are to be deprived of all practical effect, those provisions impose on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, meaning that it must guarantee, within the framework of its competences, the effective recovery of the fair compensation intended to compensate the authors harmed for the prejudice sustained, in particular if that harm arose on the territory of that Member State.

35 Since, as stated in paragraph 26 of the present judgment, it is in principle for the final users who, for their private use, reproduce a protected work without seeking prior authorisation from the rightholder, thereby causing him harm, to make good that harm, it can be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which those final users reside.

36 It follows from the foregoing that, if a Member State has introduced an exception for private copying into its national law and if the final users who, on a private basis, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the authors on the territory of that State.

37 With regard to the case in the main proceedings, it is agreed that the harm suffered by the authors arose on the territory of the Netherlands, since the purchasers as final users, on a private basis, of the protected works reside there. It is also common ground

that the Kingdom of the Netherlands has chosen to introduce a system of recovery of fair compensation, owed on the basis of the private copying exception, from the manufacturer or importer of the media intended for reproduction of the protected works.

- 38 According to the information contained in the order for reference, in relation to contracts such as those at issue in the main proceedings, it appears to be impossible, in practice, to recover such compensation from the final users as importers of those media in the Netherlands.
- 39 If that is the case, and in the light of the fact that the system of recovery chosen by the Member State concerned cannot relieve that Member State of the obligation to achieve the certain result of ensuring that the authors who have suffered harm actually receive payment of fair compensation for the prejudice which arose on its territory, it is for the authorities, in particular the courts, of that Member State to seek an interpretation of national law which is consistent with that obligation to achieve a certain result and guarantees the recovery of that compensation from the seller who contributed to the importation of those media by making them available to the final users.
- 40 In that regard, in circumstances such as those stated in particular in paragraph 12 of the present judgment, it is of no bearing on that obligation on the said Member State that, in the case of distance selling arrangements such as those at issue in the main proceedings, the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, is established in another Member State.
- 41 In the light of the foregoing considerations, the answer to the second question is that Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that it is for the Member State which has introduced a system of private



copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

## Costs

- <sup>42</sup> 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. 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, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation**

provided for in Article 5(2)(b). However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

2. Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

[Signatures]