Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 19 January 2016[1]

Case C‑470/14

Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA),
Derechos de Autor de Medios Audiovisuales (DAMA) and
Visual Entidad de Gestión de Artistas Plásticos (VEGAP)
v
Administración del Estado(Request for a preliminary ruling from the

Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Article 5(2)(b) — Reproduction right — Exceptions and limitations — Private copying — Fair compensation — Financing from the State Budget)

Introduction

1. Under Article 27 of the Universal Declaration of Human Rights:[2]

'1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

2. This article of the Declaration reflects what is perhaps the chief dilemma with regard to copyright, namely reconciling the requirement to protect authors', producers' and performers' intellectual property with universal, unrestricted access to culture. It is precisely this balance that the legislature, in imposing certain limitations or exceptions on copyright, seeks to maintain. The exception — or limitation — commonly referred to as 'the private copying exception', which lies at the heart of this case, is one aspect of this balance.[3]

3. Although the need for and the merits of the exception at issue do not, I believe, raise any doubts as far as concerns copyright, the question of remuneration or compensation for the harm to rightholders that results from it, including the detailed arrangements for financing this compensation, is currently giving rise to vigorous debate in several countries, including a number of Member States of the European Union.

1 — Original language: French.

2 — Declaration adopted by United Nations General Assembly Resolution 217 A (III) of 10 December 1948 in Paris.

3 — The consistency between Article 27 of the Declaration and the private copying exception has been noted in Marcinkowska, J., *Dozwolony użytek w prawie autorskim — Podstawowe zagadnienia*, Kraków, 2004. See also, regarding the relationship between the right to culture and copyright law, Matczuk, J., 'Prawo do kultury v. prawo autorskie — nieuchronny konflikt czy nadzieja na koncyliację?', *Prace z prawa własności intelektualnej*, No 127, 2015, pp. 36-51.

4. The private copying exception is also a known concept within the provisions of EU law on copyright and related rights, and therefore it has formed the subject matter of several judgments of the Court over a period of some years. The present case, while it is a continuation of those cases, also marks a possible turning-point in the development of this case-law. The solution given by the Court in this case will affect the freedom of national legislatures and, indirectly, that of the EU legislature to restructure the EU's legal framework for the choice of detailed arrangements for financing the compensation owed on the basis of the private copying exception so as to offer alternatives to the model which is currently the dominant one — in continental European legal systems, at least — namely charging a levy on electronic equipment.

Legal framework

EU law

5. In EU law, copyright and related rights (which, for the sake of brevity, I shall refer to as 'copyright') are primarily governed by the provisions 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.[4] Under Article 2, Article 5(2)(b) and Article 5(5) of that directive:

'*Article 2*

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, of the original and copies of their films;

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

…

Article 5

Exceptions and limitations

…

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

…

4 — OJ 2001 L 167, p. 10.

(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 ...

…

5. 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.'

Spanish law

6. In Spanish law, the private copying exception (according to Spanish law, a limitation) is governed by Article 31(2) of the amended text of the Intellectual Property Law (Ley de Propiedad Intelectual), approved by Royal Legislative Decree 1/1996, approving the amended text of the Intellectual Property Law, which sets out, clarifies and harmonises the legislative provisions in force in that area (Real Decreto Legislativo 1/1996 por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia), of 12 April 1996.

7. Compensation for harm to copyright holders resulting from this exception is governed by Article 25 of the Intellectual Property Law. This compensation was initially financed by a levy on certain media and equipment which allow copying of copyright works. That levy was abolished under the Tenth Additional Provision of Royal Decree-Law 20/2011 of 30 December 2011 concerning urgent budgetary, taxation and financial measures for correcting the public deficit (Real Decreto-ley 20/2011 de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público) and was replaced by compensation financed directly from the State Budget, with the detailed arrangements for calculating and paying compensation to rightholders to be laid down by an implementing decree. [5]

8. This delegation of powers was implemented by Royal Decree 1657/2012 regulating the procedure for paying fair compensation in respect of private copying from the General State Budget (Real Decreto 1657/2012, por el que se regula el procedimiento de pago de la compensación equitativa por copia privada con cargo a los Presupuestos Generales del Estado) of 7 December 2012 ('Royal Decree 1657/2012'). Article 3 of that decree provides:

'The appropriate amount to compensate for the harm to copyright holders resulting from the introduction of the private copying exception defined in Article 31 of the consolidated text of the Intellectual Property Law, approved by Royal Legislative Decree 1/1996 of 12 April 1996, is to be determined, within the budgetary limits established for each financial year, by order of the Minister of Education, Culture and Sport, in accordance with the procedure laid down in Article 4.

The amount of compensation is to be determined on the basis of an estimate of the harm actually caused to intellectual property rightholders when natural persons reproduce, on any medium, works which have already been circulated and which they have accessed legally, as provided for in Article 31 of the consolidated text of the Intellectual Property Law.

…'

5 — On the subject of the replacement, in Spain, of the levy in question by compensation paid from the General State Budget, see, inter alia, Xalabarder, R., 'The abolishment of copyright levies in Spain — A consequence of Padawan?', *Tijdschrift voor auteurs-, media- & informatierecht*, No 6, 2012, pp. 259-262.

Facts in the main proceedings, procedure and questions referred for a preliminary ruling

9. The Entidad de Gestión de Derechos de los Productores Audiovisuales (Collecting Society for Audio-Visual Producers, or EGEDA), the Derechos de Autor de Medios Audiovisuales (Collecting Society for Audio-Visual Media Copyright, or DAMA) and the Visual Entidad de Gestión de Artistas Plásticos (Collecting Society for Visual Artists, or VEGAP) are Spanish intellectual property rights collecting societies. On 7 February 2013, they brought an action against Royal Decree 1657/2012 before the Tribunal Supremo (Supreme Court). Other intellectual property rights collecting societies [6] were then given leave to take part in the proceedings.

10. The Administración del Estado (State Administration), defendant in the main proceedings, is supported by the Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (AMETIC), which is an association of undertakings operating in the IT sector.

11. In support of their claims, the applicants in the main proceedings submit inter alia that Royal Decree 1657/2012 is in two respects incompatible with Article 5(2)(b) of Directive 2001/29 as interpreted in the case-law of the Court. First, they submit, in essence, that Article 5(2)(b) requires that the cost of fair compensation granted to rightholders on the basis of the private copying exception should be borne, at least ultimately, by the persons who cause harm to their exclusive reproduction right as a result of this exception, whereas the scheme established by the Tenth Additional Provision of Royal Decree-Law 20/2011 and by Royal Decree 1657/2012 charges it to the State Budget, and therefore to all taxpayers. Secondly, they argue, in the alternative and in essence, that the fairness of this compensation is not guaranteed by Spanish law, inasmuch as Article 3 of Royal Decree 1657/2012 provides that a cap be imposed ex ante on the annual resources allocated to financing compensation, whereas the harm actually caused to rightholders by private copying can be ascertained only ex post.

12. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is a scheme for fair compensation for private copying compatible with Article 5(2)(b) of Directive 2001/29 where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?

(2) If the first question is answered in the affirmative, is the scheme compatible with Article 5(2)(b) of Directive 2001/29 where the total amount allocated by the General State Budget to fair compensation for private copying, although it is calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year?’

13. The order for reference was received at the Registry of the Court of Justice on 14 October 2014. Written observations were lodged by the applicants in the main proceedings, the interveners in the main proceedings, [7] the Spanish, Greek, Finnish and Norwegian Governments [8] and the European Commission. The same parties, with the exception of the Norwegian Government, were represented at the hearing on 1 October 2015, as was the French Government.

6 — The Artistas Intérpretes, Sociedad de Gestión (AISGE), the Centro Español de Derechos Reprográficos (CEDRO), the Sociedad General de Autores y Editores (SGAE), the Asociación de Gestión de Derechos Intelectuales (AGEDI) and the Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE).

7 — The interveners in support of the applicants and the intervener in support of the defendant.

8 — The Kingdom of Norway, as a Member State of the European Economic Area, is bound by Directive 2001/29.

Assessment

14. By its first question, the referring court asks whether, in essence, Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the fair compensation referred to therein may be financed from the General State Budget without it being possible to pass the cost on to the users who make private copies of copyright works. This question requires analysis not only of the provisions of Directive 2001/29 but also of the Court's case-law on compensation for private copying and on the system for financing it. Only if the first question is answered in the affirmative will it be necessary to consider the referring court's second question. I shall begin my assessment with a brief consideration of the role of the private copying exception in the copyright system.

The private copying exception as an institution of copyright law

15. The private copying exception, under various names, is practically as old as the legal protection of copyright in continental Europe. [9] Two reasons are normally given to justify its existence, one axiological and the other practical. First, given the public interest in access to culture, the possibility of copying a work for one's own private use is part of the free enjoyment of culture, which the author cannot prevent without encroaching on the user's rights. [10] Secondly, it is said to be impossible, in practical terms, to control a user's private use of a work and, even if technology has now enabled such control, this would be exercised at the price of unacceptable interference with the fundamental right to private life. Indeed, this second aspect raises doubts about the very nature of the private copying exception: is it really an exception to the author's exclusive right or actually a natural restriction on this right, since copyright in fact relates only to the exploitation of works in the public sphere? [11]

16. It is also commonly accepted that the use of a work in the context of the private copying exception is free of charge. [12] In its initial stages, the private copying exception was not accompanied by any remuneration or compensation for rightholders. The view was taken that it did not harm their substantive rights. The situation changed with the emergence of technical means, available to members of the general public, enabling the automated production of large numbers of copies of copyright works. These technical means — that is, photographic (reprographic), analogue and, recently, digital means — have had an impact on the economic exploitation of works by rightholders. In response to this development, several countries have introduced arrangements into their legal systems for compensation in respect of the private copying exception. [13] Most of these have been based on a levy on recording media and electronic equipment.

9 — To take just the example with which I am most familiar, namely that of Polish law, this exception, now referred to as 'permitted private use' ('*dozwolony użytek prywatny*'), already existed in the copyright legislation which applied in different parts of the Polish State after independence was regained in 1918: the Austrian legislation of 1895, the German laws of 1901 and 1907 and the 1911 Russian legislation. The exception was then included in the Polish copyright legislation of 1926 (Article 18), 1952 (Article 22) and 1994, still in force (Article 23). See Sokołowska, D., 'Dozwolony użytek prywatny utworów — głos w dyskusji na temat zmiany paradygmatu', *Prace z prawa własności intelektualnej*, No 121, 2013, pp. 20-45.

10 — It goes without saying that here we are discussing only the legitimate use of a work that has been acquired legally.

11 — On the origin and the theoretical aspects of the private copying exception, see, for example, More, K., *Les dérogations au droit d'auteur — L'exception de copie privée*, Presses Universitaires de Rennes, 2009, p. 33 et seq.; Preussner-Zamorska, J., in: Barta, J. (ed.), *System prawa prywatnego. Prawo autorskie*, 2nd edition, Warsaw, 2007, p. 381 et seq.; Stanisławska-Kloc, S., in: Flisak, D. (ed.), *Prawo autorskie i prawa pokrewne. Komentarz Lex*, Warsaw, 2015, p. 343 et seq.; and Vivant, M., and Bruguière, J.-M., *Droit d'auteur et droits voisins*, 2nd edition, Dalloz, 2013, p. 486 et seq.

12 — Compensation for private copying is usually not part of provisions on the limitations or exceptions to copyright and related rights, but part of the copyright and related rights legislation (see, for example, Articles 25 and 31 of the Spanish Intellectual Property Law, Articles L. 122-5 and L. 311-1 of the French Intellectual Property Code, or Articles 20 and 23 of the Polish Law on copyright and related rights). Therefore, neither payment by the user nor compensation for the rightholder is a requirement for entitlement to this exception. See, to that effect, Preussner-Zamorska, J., op. cit., p. 414.

13 — See, among others, Astier, H., 'La copie privée. Deux ou trois choses que l'on sait d'elle', *Revue internationale du droit d'auteur*, No 128, 1986, pp. 113-145; Machała, W., 'Dozwolony użytek utworów w prawie europejskim i w ustawie o prawie autorskim', *Państwo i prawo*, No 12, 2004, pp. 16-33; Marcinkowska, J., op. cit., p. 219 et seq.; and Vivant, M. and Bruguière, J.-M., op. cit., p. 416.

17. This, then, is the legal context in which Directive 2001/29 seeks to harmonise the Member States' legislation by introducing, inter alia, an optional private copying exception,[14] accompanied by the condition that fair compensation must be guaranteed to rightholders.

The first question

18. The first question, read against the background of the arguments submitted by the applicants in the main proceedings during the proceedings before the referring court and in the light of the observations submitted before the Court, raises an issue of major importance for the financing of compensation in respect of the private copying exception in European law. This is the issue of whether this compensation, not only in the light of the wording of Article 5(2)(b) of Directive 2001/29 — which, all in all, is extremely brief — but also in terms of its underlying logic as developed in the case-law of the Court,[15] may take forms other than that of a levy which is borne — in any event, potentially and ultimately — by the users of equipment which allows private copying.

19. The applicants in the main proceedings, the parties intervening in support of them, the Greek Government and the French Government propose that this question should be answered in the negative. They rely primarily on the case-law of the Court, from which they infer that it is the user who makes private copies who must ultimately finance, as the person responsible for payment, fair compensation in respect of the private copying exception. They argue, therefore, that this principle is incompatible with any compensation scheme financed from the State Budget.

20. I must state from the outset that I do not agree with this analysis for three reasons, which relate, first, to the wording of the provisions of Directive 2001/29, secondly, to the analysis of the relevant case-law of the Court and, thirdly, to considerations of a practical nature concerning the operation of levy-based schemes in the current technological context.

The interpretation of Directive 2001/29

21. As I have stated above, Directive 2001/29 did not arise in a legal vacuum. Rather, copyright legislation in the Member States has a long, rich history. Directive 2001/29 seeks to harmonise this legislation. However, it must be said that this harmonisation is confined to certain general rules. Besides its technical provisions, Directive 2001/29 contains three main substantive provisions, obliging the Member States to acknowledge three types of rights enjoyed by authors: the reproduction right (Article 2), the right of communication and of making available (Article 3) and the distribution right (Article 4). These rights are then accompanied by approximately 20 exceptions and limitations (Article 5) which, apart from the one relating to transient or incidental reproduction in a computer network (Article 5(1)), are optional.

22. The private copying exception is, rightly, one of these optional exceptions and limitations. Its introduction by the Member States is conditional on their introducing fair compensation for rightholders. Directive 2001/29 does not determine the form this compensation should take, the detailed arrangements for calculating it, or how it should be financed.[16] Therefore it is the Member State which must, if it decides to introduce a private copying exception into its national law (or, more

14 — I use the term 'exception' for convenience, but Directive 2001/29 does not alleviate the doubt which I mentioned in point 15 above, since it refers to 'exceptions and limitations' without distinguishing between them.

15 — The relevant case-law of the Court includes, first and foremost, two 'leading' judgments: the judgments in *Padawan* (C-467/08, EU:C:2010:620) and *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397). These have subsequently been supplemented by the judgments in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515); *ACI Adam and Others* (C-435/12, EU:C:2014:254); *Copydan Båndkopi* (C-463/12, EU:C:2015:144); and, finally, *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:750).

16 — This has also been confirmed by the Court. See, inter alia, judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 37).

likely in practice, to retain an existing one), provide for compensation for the harm to rightholders which may result from this exception. Directive 2001/29 also does not specify who will be responsible for paying the compensation; it identifies only those who will receive it. Thus, it merely requires, in Article 5(2)(b), that 'the rightholders receive compensation'.[17]

23. Recital 35 of Directive 2001/29 states, it is true, that the level of compensation in respect of certain cases of exceptions should be calculated taking into account the harm caused to rightholders. However, so far as concerns the private copying exception, this harm takes the form of a prospective loss of profits (*lucrum cessans*), since private copying potentially restricts the number of copies of a work sold.[18] In addition, this harm cannot be established with certainty on an individual level for each rightholder concerned; it is estimated in the aggregate, on the basis of the potential loss of profit for all rightholders. As the Commission rightly points out in its observations, there is not, therefore — and cannot be — a direct link between acts of private copying and compensation for the harm caused to particular rightholders.

24. The compensation provided for by Directive 2001/29 is also not remuneration, since use of a work in the context of private copying is, theoretically, free of charge. In my view, the legislature has quite deliberately used the term 'compensation', rather than 'remuneration' which appeared in Directive 2006/115/EC.[19]

25. In addition, recital 31 of Directive 2001/29 states that 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. This recital explains, in the first place, the reasons which led the EU legislature to seek a certain degree of harmonisation between the exceptions and limitations to copyright which may be provided for in the national law of Member States. Subsequently, at the stage when Directive 2001/29 is transposed into domestic legal systems, it is for the national legislatures to balance the various interests at stake. Thus, national legislatures have the power to determine the amount of compensation, which varies considerably from one Member State to another, how it is to be financed and the detailed arrangements for distributing it between the various rightholders. However, recital 31 of Directive 2001/29 cannot be construed as an additional provision of this directive, with independent legal force.

26. Thus, Directive 2001/29 contains no legally binding requirement that the abovementioned fair balance should necessarily involve the financing of fair compensation in respect of the private copying exception by users who make or may make private copies. Indeed, in my view, it would be illogical to take the view that this Directive, which does not create a duty to introduce or not introduce the private copying exception, regulates the way in which compensation in respect of this exception should be financed. If Directive 2001/29 leaves the more general, more significant decision on introduction of the exception to Member States' discretion, then it must, *a fortiori*, allow them the power to regulate freely the more detailed, technical issue of how to finance compensation. The only requirement imposed by Directive 2001/29 is that a State which has a private copying exception should provide for compensation for rightholders, on the basis of the fair balance referred to in recital 31 of the directive.

17 — See judgment in *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraph 23). See also, to that effect, Karapapa, S., 'Padawan v SGAE: a right to private copy?', *European Intellectual Property Review*, Vol. 33, No 4, 2011, pp. 252-259.

18 — See, to that effect, Vivant, M., and Bruguière, J.-M., op. cit., p. 416.

19 — Directive of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

The case-law of the Court

27. According to the applicants and the parties intervening in support of them in the main proceedings, whose opinion is shared in these proceedings by the Greek Government and the French Government, it follows from the Court's case-law on fair compensation in respect of the private copying exception that a compensation scheme financed from the State Budget is incompatible with Article 5(2)(b) of Directive 2001/29, since that provision, read in the light of the recitals of that directive and as interpreted by the Court, requires that it is the user who makes or may make a private copy, and only that user, who should finance this compensation.

28. These parties base their argument primarily on the passages of the judgment in *Padawan* in which the Court, having held, on the basis of recitals 35 and 38 of Directive 2001/29, that the purpose of fair compensation is to compensate for the possible harm to rightholders resulting from private copying, found, on the basis of recital 31 of the directive, that a fair balance between the various interests at stake requires that the user who may potentially make private copies — that is, in practice, any purchaser of equipment which can be used to make such copies — must finance the compensation.[20] This reasoning was subsequently confirmed in the judgment in *Stichting de Thuiskopie*,[21] and then reiterated by the Court in later judgments.

29. However, I do not consider that this reading of the case-law takes account either of the context of these judgments or of the broad logic of the Court's reasoning in its entirety. If we wish to rely, in order to resolve a point of law, on the Court's previous decisions, we should not resort to finding isolated passages in this case-law which may support one argument or another.[22] Rather, we should identify a coherent, clear line of case-law, taking into account its development, and then establish whether this line can provide a basis for solutions in new cases.

30. In that regard, it should be borne in mind that — as AMETIC, the Spanish, Danish and Norwegian Governments and the Commission have correctly pointed out — the Court's previous judgments in cases concerning compensation in respect of the private copying exception have been delivered in connection with systems for financing this compensation by charging a levy on equipment which can be used to make such copies and have aimed to resolve problems related to the operation of such a system.

31. In the judgment in *Padawan*, in which the Court set out this reasoning for the first time, the question concerned whether a levy can be applied to equipment which, because it is intended solely for professional use, cannot be used for the purpose of private copying.[23] In order to resolve this issue, the referring court in *Padawan* asked a series of questions which led the Court to undertake an exercise in deconstructing the rationale of the system for financing compensation by a levy in respect of electronic equipment. Thus, in *Padawan*, the Court did not simply designate the potential user as being the person responsible for paying compensation, which was assimilated to the levy, but continued its line of reasoning by accepting that, in practice, it is not users who directly discharge the levy/compensation, but the manufacturers or sellers of electronic equipment, who then pass the corresponding charge on to the purchasers/users.[24]

20 — Judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 38 to 45).

21 — C-462/09, EU:C:2011:397, paragraphs 23 to 29 and point 1 of the operative part of the judgment.

22 — It would be equally possible to find arguments in the case-law which run counter to the submissions of the applicants in the main proceedings, as in paragraph 37 of the judgment in *Padawan*, according to which, although the concept of fair compensation itself must be interpreted uniformly, Directive 2001/29 acknowledges that all the Member States have 'the power … to determine … the form, *detailed arrangements for financing* and collection, and the level of that fair compensation', or as in paragraph 23 of the judgment in *Stichting de Thuiskopie*, according to which '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*' (emphasis added).

23 — For a description of the main proceedings and for the doubts expressed by the referring court, see the judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 17) and the Opinion of Advocate General Trstenjak in that case (C-467/08, EU:C:2010:264, point 21).

24 — Judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 46 to 49).

32. In my opinion, that section of the judgment is crucial to determining whether the 'user pays' principle is generally applicable to every system for financing fair compensation, or actually only applicable to levy-based schemes.

33. *Prima facie*, the Court's acceptance of a scheme in which a levy is collected from persons who make equipment available to users, that is to say manufacturers, importers or traders, may appear to be a concession made for practical reasons and to the detriment of the legal purity of the system. However, in my view, that is a false impression.

34. As I stated briefly in points 15 and 16 above, in copyright law, the private copying exception is much older than any idea of compensation in respect of this exception, and use of a work in this context is theoretically free of charge. It has been only with the advent of technical means allowing private individuals to make large numbers of copies of copyright works at minimal cost (mainly, reprography and recording, not only of sound but also of images, on magnetic tape) that the problem has arisen of harm to rightholders resulting from private copying on a large scale.

35. This problem cannot be solved by imposing a direct levy on users, not only because effective monitoring of the private use of copyright works is impossible but also because of the protected status of private life on the basis of fundamental rights. Moreover, such a levy would make the private copying exception redundant. If the rightholder could demand a payment, of whatever kind, from the user, this situation would no longer be one involving an exception from the rightholder's monopoly, but would be a case of the normal exploitation of this monopoly.

36. Therefore several States have introduced levy-based schemes in respect of media and equipment which allow copying of copyright works. This is not merely a question of simplification, for practical reasons, of a system for collecting payment from users so that they can benefit from the private copying exception, but of an entirely separate system, designed to remedy the consequences of the large-scale increase in this type of copying, which are harmful to the interests of rightholders.

37. The Court has found that this system is, in principle, consistent with Article 5(2)(b) of Directive 2001/29, provided that the economic burden of the levy can be passed on to the purchaser of the equipment. However, although, in order to arrive at this finding, the Court referred to the principle that it is the user who may make private copies — that is, a natural person who has acquired equipment which allows such copying — who must be regarded as the person responsible for paying compensation, this was only as a theoretical basis for a levy-based scheme in respect of the equipment at issue.

38. This interpretation is supported by the actual wording of the 'user pays' rule as set out and applied by the Court. According to this rule, the user must 'in principle' be regarded as the person responsible for paying compensation.[25] The reservation 'in principle' clearly shows, in my opinion, that this is a theoretical principle which, 'in practice', is always implemented in connection with a levy-based scheme in respect of electronic equipment.

39. This theoretical basis then allowed the Court to lay down certain rules relating to the operation of levy-based schemes. Thus, in the judgment in *Padawan*, the Court ruled out the possibility that this levy could be applied to equipment which cannot be used for private copying. In the judgment in *Stichting de Thuiskopie*, the Court inferred the rule that the levy must be paid in the Member State of residence of the final user of the equipment. In the judgment in *Copydan Båndkopi*, it accepted the collection of the levy in respect of copies made on equipment belonging to a third party.[26]

25 — See, inter alia, the judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 45) and *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, point 1 of the operative part of the judgment).

26 — Judgment in *Copydan Båndkopi* (C-463/12, EU:C:2015:144, point 8 of the operative part).

40. However, given that the principle that the user is the person responsible for paying compensation cannot be applied literally, for the reasons stated in point 35 above, it cannot have inherent legal force. It can operate only in connection with a system for financing compensation in respect of the private copying exception by charging a levy on equipment which can be used to make private copies, under Article 5(2)(b) of Directive 2001/29 as interpreted by the Court. Moreover, reading the relevant case-law of the Court reveals that this principle always appears not as a wholly separate legal finding, but as one element in a line of reasoning which culminates in the use of levy-based schemes being upheld. Any reading of this case-law which attributes more general scope to this principle, thus precluding other systems for financing compensation, would be contrary to the logic of the Court's reasoning and would go beyond the parameters of the questions which were referred for a preliminary ruling.

41. Thus, I do not consider that it may be legitimately inferred from the Court's case-law on the private copying exception that there is a general principle in EU law, and more precisely, under Article 5(2)(b) of Directive 2001/29, that compensation in respect of this exception must necessarily be financed by the users who benefit from it, meaning that, in practice, the only possible system for financing this compensation is to charge a levy on electronic equipment. In any event, in my opinion, establishing this levy as the only system of financing is no longer desirable, for practical reasons related to the current stage of technological development.

The operation of levy-based schemes and the challenge posed by the digital environment

42. The introduction of levy-based schemes was founded on the premiss that users who had acquired recording media and electronic equipment were actually making use of them for copying in connection with private use of the works concerned. In the analogue age, this premiss was close to the truth.[27] The burden of the levy intended to finance compensation in respect of the private copying exception was in fact more or less borne by those who benefited from the exception.

43. The emergence of digital technology has changed the landscape dramatically. First, digital technology means that formats have converged. Everything — text, sound, images — is now presented in the same digital format and can therefore be recorded using the same equipment and on the same medium. Thus, a computer and a CD-ROM can be used to record not only private documents, family photos or a database containing personal information, but also a book in digital format, recorded music or a cinematographic work. Secondly, miniaturisation and lower prices for electronic equipment, coupled with the development of the Internet, have led to significant growth in the production of private content, which is not within the scope of copyright, and to such content being very widely distributed.

44. Thus, at a time when every item of electronic equipment is in point of fact a computer, equipped with functions for creating and recording audio-visual and textual content, as well as many other functions, the premiss that the purchaser of such equipment is likely to reproduce copyright works is seriously called into question. It is true that levy-based schemes are justified on the basis of the legal fiction that someone who acquires electronic equipment is deemed to be making use of all the functions of that equipment, including those for copying content which may be copyright. The Court itself has said as much.[28] However, anyone who makes use of modern electronic equipment knows how far this presumption fails to reflect the real situation and is indeed a fiction.

27 — For example, studies conducted in France in 1982 and 1983, before the introduction of the private copying levy, showed that 90% of blank audio and video cassettes were used to record copies of copyright works (see Astier, H., op. cit., p. 114).

28 — Judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 55).

45. In point of fact, having acquired a piece of equipment encumbered with the private copying levy, the user may equally well make a large number of private copies or never make a single one, instead using the equipment either to produce, record and disseminate content which is not within the scope of copyright or for purposes completely unrelated to any form of intellectual creation. So it is impossible to forecast the actual use that a real user will make of a given piece of equipment. What is more, we should question whether we are capable of assessing the likelihood that some equipment of a given type will be used for private copying and of apportioning the levy across the whole of this category of equipment on the basis of that assessment. Thus, a levy-based compensation scheme is more akin to a mutualisation scheme, in which all purchasers of such equipment bear the burden of a relatively small levy which is then used to finance compensation for harm caused by only some of these purchasers.[29] This mutualisation is also equally apparent on the rightholders' side. Revenue from all the levies is paid in centrally, at the level of the collecting societies, and then distributed between all those entitled, according to a formula defined by the societies (or, in some States, by legislation). This scheme is therefore far removed from a classic civil-law system of compensation by the person who has caused the harm.

46. Furthermore, levy-based schemes do not guarantee perfect consistency within the internal market. First, as the private copying exception is merely optional, some Member States do not provide for one in their legal systems, while others have not introduced a compensation scheme.[30] Secondly, even where a levy is provided for, it is not collected in a harmonised manner across all the Member States concerned. As to the rate of the levy, this can vary by a factor of 50 for equipment of a similar type.[31] The same is true of the assessment basis for this levy, since it is charged on different categories of equipment in different Member States.

47. Increasingly rapid technological development means that levy-based schemes in respect of the private copying exception are faced with new challenges.[32] A levy on equipment which can be used to copy copyright works, which is intended to finance compensation for the harm to rightholders resulting from this copying, is a specific solution corresponding to a certain stage of technological development.[33] Since this stage has now been passed, the legitimacy and the effectiveness of levy-based schemes have been called into question in many Member States, and thought is being given to finding alternatives.[34] I do not believe it is desirable to restrict this thought process, or even go so far as to prevent it, on the basis of the 'user pays' principle — which, in any event, as I have shown above, is, given the current state of technological development, purely a legal fiction.

29 — See, to that effect, Marino, L., 'La (discutable) logique de la redevance pour copie privée', *La Semaine Juridique Edition Générale*, No 50, 2010, pp. 2346-2349. According to Lucas, A., 'Les dits et les non-dits de la copie privée', *Propriétés intellectuelles*, No 43, 2012, pp. 232-239, the principle of mutualisation was called into question by the Court when, in its judgment in *Padawan*, it ruled out application of the levy to equipment intended for professional purposes. However, even private use of this equipment does not automatically mean that every user is making private copies. Therefore, in my opinion, it is still appropriate to think in terms of a mutualisation scheme.

30 — According to my information, these are the Republic of Bulgaria, Ireland, the Republic of Cyprus, the Grand Duchy of Luxembourg and the Republic of Malta. The United Kingdom of Great Britain and Northern Ireland introduced a private copying exception in 2014 [The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014] with no provision for compensation. The view was taken that the harm caused to rightholders is minimal and so does not give rise to an obligation for compensation under recital 35 of Directive 2001/29. Indeed, these regulations were seen as a matter of legitimising a practice, widespread among consumers, which rightholders have already integrated into the price of published works (see Cameron, A., 'Copyright exceptions for the digital age: new rights of private copying, parody and quotation', *Journal of Intellectual Property Law & Practice*, Vol. 9, No 12, 2014, pp. 1002-1007).

31 — See, inter alia, Latreille, A., 'La copie privée dans la jurisprudence de la CJUE', *Propriétés intellectuelles*, No 55, 2015, pp. 156-176, which gives the example of the amount of the levy charged on a blank DVD in various Member States.

32 — It is not my intention to undertake a critique of levy-based schemes, since they are not at issue before the Court in this case. Therefore I shall not go into detail on this topic. The Commission has indicated some of the issues in its observations. There is a large body of literature discussing the many questions raised by levy-based schemes in the digital age. By way of example, see Latreille, A., op. cit.; Majdan, J., and Wikariak, S. (eds), 'Czy można sprawiedliwie obliczyć opłatę za kopiowanie utworów?', *Gazeta prawna*, 16 September 2015; Sikorski, R., 'Jeśli nie opłata reprograficzna to co?', Gazeta prawna, 30 September 2015; Still, V., 'Is the copyright levy system becoming obsolete? The Finnish experience', *Tijdschrift voor auteurs-, media- & informatierecht*, No 6, 2012, pp. 250-258; Troianiello, A., 'La rémunération de la copie privée à l'épreuve de la révolution numérique', *Revue Lamy Droit de l'immatériel*, No 73, 2011, pp. 9-14; and, by the same author, '*Fluctuat nec mergitur*? Réflexions sur les vicissitudes du dispositif de rémunération de la copie privée', *Petites affiches*, No 228, 2011, p. 5. See also Françoise Castex's Report on Private Copying Levies of 17 February 2014, produced for the European Parliament's Committee on Legal Affairs (2013/2114(INI)).

33 — See points 16 and 41 above.

34 — Still, V., op. cit., gives an account of thinking on this topic in Finland.

Financing compensation from the State Budget

48. Another solution which may be contemplated is to finance compensation in respect of the private copying exception directly from the State Budget. According to information given by the Commission in its observations, this method of financing has been adopted not only in Spain, but also in Estonia, Finland and Norway.

49. Any assessment of whether such a system complies with Article 5(2)(b) of Directive 2001/29, as interpreted by the Court, should not regard it as a variation on levy-based schemes, in which the levy chargeable only to persons who may make private copies is simply replaced by a contribution from all taxpayers, including from legal persons, who do not benefit from the private copying exception, and from persons who have never acquired any equipment covered by this levy.

50. State budget revenues, it is true, come largely from direct and indirect taxes paid by all taxpayers. These taxes are collected by the State on the basis of an entitlement which has always been one of the principal powers of public authorities. Under the same entitlement, deriving from its sovereignty, the State then decides how to allocate the funds it has collected. Therefore it is true to say that all taxpayers contribute to financing all State expenditure. However, there is no direct link between the tax paid by a particular taxpayer and a given budgetary expenditure, since it is precisely the existence of the budget as an intermediate stage which breaks the link. There is simply tax collection on the one hand and budgetary expenditure on the other. The various budgetary revenues are not apportioned to specific expenditures and, in the same way, a taxpayer cannot object to 'his' money being allocated to financing one specific expenditure.

51. As regards this case in particular, there is therefore no link between the taxes paid by taxpayers — including by those, like legal entities, who cannot benefit from the private copying exception — and the financing of compensation in respect of the exception from the General State Budget. The situation would be different only if a specific tax or duty were introduced for the purpose of this financing; but that is not the case with the Spanish system at issue in the main proceedings.

52. In my opinion, financing the compensation from the General State Budget is therefore not contrary to the principles laid down by the Court in the judgment in *Padawan*,[35] since this is not a matter of extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale. Similarly, I do not see in what respect this system could be at odds with the wording of Directive 2001/29. The directive does not regulate the way in which compensation in respect of the private copying exception is financed, provided only that this compensation is fair. I shall deal with this last point in my assessment of the second question referred for a preliminary ruling.

Answer to the first question

53. In the light of the foregoing, I propose that the answer to the first question should be that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding financing of the fair compensation referred to therein from the General State Budget.

35 — C-467/08, EU:C:2010:620.

The second question

54. By its second question, the referring court asks whether, in essence, Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation. The national legal and factual context of this question is as follows.

55. First, as regards the legal context, Royal Decree-Law 20/2011 [36] and Royal Decree 1657/2012 [37] provide that compensation in respect of the private copying exception is to be calculated on the basis of an estimate of the harm caused to rightholders. However, also according to Royal Decree 1657/2012, [38] is to be determined, within the budgetary limits established for each financial year, by order of the Minister the amount of compensation is to be determined by ministerial order 'within the budgetary limits established for each financial year'. It should be remembered that it is specifically Royal Decree 1657/2012 which is the subject of the action for annulment in the main proceedings. Therefore I do not share the doubt which the Commission seems to harbour regarding the relevance of the second question to the outcome of the main proceedings. Although the referring court must assess the validity of Royal Decree 1657/2012, it must do so not only in the light of national law — an issue which is not within the scope of this Opinion — but also in the light of EU law.

56. Secondly, as far as the factual context is concerned, the applicants in the main proceedings have stated that, in the years following the introduction of compensation financed from the State Budget, the amounts allocated for this compensation were a little over EUR 8.6 million for the financial year 2013 and EUR 5 million for the financial year 2014, while the harm to rightholders was estimated at EUR 18.7 million and EUR 15.2 million respectively.

57. Therefore it is appropriate to assess whether, under Directive 2001/29, a Member State which decides to introduce the private copying exception and to finance compensation in respect of that exception from the State Budget is entitled to limit the amount of that compensation with the result that it does not cover the whole, nor even most, of the estimated harm to rightholders resulting from the exception.

58. In answering this question, I shall not hesitate to refer to the Court's case-law on the private copying exception. [39] It is true — in my view, which I set out in connection with my assessment of the first question — that this case-law, in so far as it concerns the method of financing compensation in respect of the private copying exception, is relevant only where the method is a levy-based one. However, the case-law principles relating to the outcome — that is, to the effect the legislature intends to achieve through compensation — are unconnected with the way in which the compensation is financed and therefore can be transposed to compensation financed by other means.

59. It is apparent from that case-law, first, that the concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of EU law. [40] Therefore the two words which make up this concept must both be interpreted consistently in all the Member States. In particular, as far as concerns the word 'fair', a Member State is not entitled to regard compensation as fair if it does not satisfy certain criteria laid down, inter alia, in the case-law of the Court on the interpretation of the abovementioned provision of Directive 2001/29.

36 — Tenth Additional Provision, paragraph 3.

37 — Article 3, second paragraph. See point 8 above.

38 — Article 3, first paragraph. See point 8 above.

39 — See the case-law cited, inter alia, in footnote 15 above.

40 — Judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 37).

60. Secondly, the Court has held that the private copying exception must include a system 'to compensate for the prejudice to rightholders' resulting from this exception.[41] Therefore, fair compensation must be regarded as recompense for the harm suffered by rightholders and must be calculated on the basis of the criterion of the harm caused.[42]

61. Finally, thirdly, the obligation to provide compensation for the prejudice sustained as a result of the private copying exception is an obligation to achieve a certain result, imposed on the Member State which has introduced that exception.[43]

62. Therefore, such a Member State does not fulfil its obligation arising from Article 5(2)(b) of Directive 2001/29 unless it provides for a scheme which actually compensates the harm to rightholders resulting from private copying, in the full amount estimated according to the relevant rules in force in the Member State. So this compensation must necessarily be calculated on the basis of the estimated harm and cannot be capped a priori at a lower level.

63. Where there is a levy-based scheme in respect of equipment which can be used for private copying, the view may be taken that the harm to rightholders is, at least in part, a function of the number of pieces of such equipment sold. Variations in the amount collected through the levy therefore do not call into question the fairness, as provided for in Directive 2001/29, of the compensation, since they reflect variations in the amount of harm caused.

64. In a scheme where compensation is financed directly from the State Budget, this automatic variation does not operate. The amount of compensation paid to rightholders should therefore, in principle, correspond to the estimated amount of the harm caused to rightholders resulting from the private copying exception.

65. In this regard, I am not convinced by the Spanish Government's arguments that the limitation of funds provided for paying compensation for private copying to less than the estimated amount of harm to rightholders is inherent in the system of budget planning.

66. First, in a modern State, most budget expenditures result from statutory obligations, and so the exact amount of these expenditures cannot be foreseen at the time of adoption of the annual budget legislation. However, as a matter of law, it is impossible not to make such payments, and a budget system includes techniques which allow these obligations to be met.

67. Secondly, although budget expenditure must be provided for in advance, the forecasts involved must be made on the basis of reliable, precise data. For that purpose, it is possible, inter alia, to take the amount of similar expenditure in the previous budget year as a basis.[44]

68. Next, so far as concerns the Spanish Government's argument relating to the principle of sound budgetary policy, it is sufficient to note that this very principle requires a budget and economic impact study for any new legislation. If such a study had been carried out before amendment of the system for financing compensation for private copying, the Spanish authorities would have known the amounts necessary to guarantee fair compensation.

41 — Ibid. (paragraph 39).

42 — Ibid. (paragraphs 40 and 42).

43 — Judgment in *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraphs 34 and 39).

44 — To take the simplest example, if the sum intended to finance compensation for private copying in the Spanish State Budget for 2014 had been calculated on the basis of the estimated harm in 2013 (as we have seen, this was EUR 18.7 million), it would not only have covered the estimated harm in 2014 (EUR 15.2 million), but would even have generated a surplus.

69. Therefore it is, in my opinion, perfectly possible to guarantee fair compensation, within the meaning of Article 5(2)(b) of Directive 2001/29, as interpreted by the Court, where this compensation is financed from the General State Budget. However, this compensation cannot be rigidly capped a priori at a level which does not take sufficient account of the amount of harm to rightholders, as estimated according to the relevant applicable rules in the national law of the Member State concerned.

70. Therefore, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation.

Conclusion

71. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunal Supremo (Supreme Court) for a preliminary ruling as follows:

(1) 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 must be interpreted as not precluding financing of the fair compensation referred to therein from the General State Budget.

(2) Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the fair compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation.