Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 23 September 2021 [1]

Case C-433/20

Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH

v

Strato AG

(Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria))

(Request for a preliminary reference – Approximation of laws – Copyright and related rights – Directive 2001/29/EC – Article 2 – Reproduction right – Article 5(2)(b) – Private copying exception – Servers owned by third parties made available to natural persons for private use – Provision of a cloud computing service – Interpretation of terms 'on any medium' – Fair compensation)

I. Introduction

1. The advent of the commercial photocopier from the late 1950s onwards was perhaps just the first in a series of technological developments which posed a challenge to traditional understandings of copyright and related rights and, in particular, to the exceptions and limitations thereto. The arrival of the photocopier meant that copyright material could easily be reproduced in a manner which was all but impossible to police or detect. The digital revolution, which has been ongoing since the emergence of the internet and the worldwide web in the early 1990s, has posed ever greater challenges to these traditional understandings.

2. This request for a preliminary reference presents another aspect of this emerging problem. Is a natural person who is lawfully in possession of copyrighted material entitled to make a copy of that material for their own purely private purposes and, on payment of a fee, to store it on a commercial server using cloud computing techniques and, if so, what, if any, payment is then due to the copyright owner? This, in essence, is the issue presented in this reference for a preliminary ruling by the Oberlandesgericht Wien, (Higher Regional Court, Vienna, Austria), which was lodged at the Registry of the Court of Justice of the European Union on 15 September 2020. The reference concerns the interpretation 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. [2]

[1] Original language: English.

[2] OJ 2001 L 167, p. 10.

3. The reference has been made in proceedings between the Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana'), a copyright collecting society, on the one hand, and Strato AG ('Strato'), a company established in Germany which provides a service for the storage of data in the cloud, on the other hand. The proceedings before the referring court concern the issue of whether compensation for the exploitation of the right of reproduction is due by Strato in respect of cloud-based storage capacity provided by it in Austria to natural persons for private use.

4. The present request for a preliminary ruling provides the Court with an opportunity to examine the issue of copying by natural persons for private use in the digital environment and, more specifically, the reproduction or storage in the cloud [3] of copyright-protected content.

5. It is important to stress that where a 'private copying' exception to the exclusive right of reproduction provided in Article 2 of Directive 2001/29 has been adopted by a Member State pursuant to Article 5(2)(b) of that directive, such copying is then lawful *provided* that what is described as fair compensation is paid to the rightholder. In the event, of course, that the Member State in question does not avail of the Article 5(2)(b) exemption, then such reproduction of copyright material without the consent of the rightholder would be plainly unlawful as contrary to Article 2. [4]

6. In the present case, the Court is required first to examine whether and, if so, to what extent the private copying exception also applies in respect of reproductions in the cloud made by natural persons for private use of copyright-protected content. In the event that the Court were to consider that the private copying exception also applies in respect of such reproductions, the Court would then have to examine the question of what (if any) the 'fair compensation' would be in accordance with the provisions of Article 5(2)(b) of Directive 2001/29 which would be due to rightholders in respect of storage in the cloud made available to natural persons for private use by internet services providers.

7. In particular, given that a levy may already have been paid by natural persons when purchasing devices, media or equipment – such as smartphones, tablets or computers [5] – which permit the storage and thus reproduction of copyright-protected content to the cloud and thus provide (fair) compensation to rightholders for the harm suffered as a result of copying, the question then arises whether an (additional) levy should be paid by internet services providers which make available storage in the cloud for that same content by way of the 'fair compensation' required by Article 5(2)(b) of Directive 2001/29.

[3] For a description of cloud computing, Opinion of Advocate General Szpunar in *VCAST* (C-265/16, EU:C:2017:649, points 1 to 3). The essence of the concept of cloud computing was defined by the US National Institute of Standards and Technology (NIST) in September 2011 as 'a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. …' Available at https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf. The authors of that definition noted that 'cloud computing is an evolving paradigm'. There would appear to be no universally accepted *legal* definition of cloud computing or cloud-based services. This is undoubtedly due to the ubiquitous nature and rapid evolution of that technology and related services. I consider, however, that the concept of 'cloud storage' is aptly described by Michael Muchmore & Jill Duffy in their article 'The Best Cloud Storage and File-Sharing Services for 2021', as referring 'to storing your files somewhere other than your computer's hard drive, usually on the provider's servers. As one tech pundit put it: "There is no Cloud. It's just someone else's computer." Having data in the cloud gives you the ability to access those files through the internet'. Available at https://www.pcmag.com/picks/the-best-cloud-storage-and-file-sharing-services.

[4] Unless one of the other exceptions or limitations laid down in Article 5 of Directive 2001/29 is applicable.

[5] In the past, the media of choice were tangible 'blank' storage items such as audio and video cassettes, then CDs and DVDs and more recently USB sticks. Devices such as computers, smartphones and external hard drives are also used today alongside cloud computing storage services.

8. Prior to examining these questions, however, it is first necessary to set out the legal context in which the present case arises.

II. Legal context

A. Directive 2001/29

9. Recitals 2, 5, 9, 10, 31, 32, 35, 38 and 44 of Directive 2001/29 are worded as follows:

'(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

…

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

…

(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 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. …

…

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject matter.'

10. 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.'

11. Article 3 of Directive 2001/29 entitled 'Right of communication to the public of works and right of making available to the public other subject matter, provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

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

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

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

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

12. 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.'

13. 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.'

B. Austrian law

14. Paragraph 42b(1) of the Austrian Urheberrechtsgesetz (Law on Copyright)[6] ('UrhG'), in the version applicable at the time of the main proceedings,[7] provides:

'(1) If a work … is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium …, the author shall be entitled to equitable remuneration … (remuneration for exploitation of the right of reproduction on storage media) in the case where storage media of any kind which are suitable for making such reproductions are, in the course of a commercial activity, placed on the market in national territory.'

III. The facts of the main proceedings and the reference for a preliminary ruling

15. Austro-Mechana is a copyright collecting society which protects, in a fiduciary capacity, the rights of use and the rights to remuneration in respect of works of music (with and without lyrics) in its own name but in the interest of and on behalf of the beneficiaries of those rights. The interests protected by collecting societies such as Austro-Mechana include, in particular, the statutory rights to remuneration provided for in Paragraph 42b(1) of the UrhG, that is, the right to remuneration in respect of the exploitation of the right of reproduction on storage media.

16. Austro-Mechana brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) against Strato, a company established in Germany, which provides a service under the name 'HiDrive'. The service in question is described by its supplier as a 'virtual cloud storage solution which is as quick and simple to use as an (external) hard disk'. Strato claims that its storage solution 'offers enough space to store photos, music and films in one central location'.

17. Austro-Mechana sought an order allowing it to invoice for, and subsequently take payment in settlement of, the remuneration owed by Strato under Paragraph 42b(1) of the UrhG for exploitation of the right of reproduction on storage media. It contends that given that the form of words used in Paragraph 42b(1) of the UrhG is itself deliberately framed in general terms, remuneration for exploitation of the right of reproduction on storage media is payable even in the case where storage media of any kind are, in the course of a commercial activity, 'placed on the market' – by whatever means and in whatever form – within national territory, including in situations involving the provision of cloud-based storage space. It says that the descriptive words 'place on the market' do not refer to physical distribution but deliberately leave scope for the inclusion of all processes that have the effect of making storage space available to users in national territory for the purposes of reproduction for (personal or) private use. In addition, Paragraph 42b(3) of the UrhG makes it clear that it is immaterial whether the storage media placed on the market originate in national territory or in other countries.

6 9 April 1936 (BGBI. Nr.111/1936).

7 16 August 2018 (BGBI. I Nr.63/2018). In its request for a preliminary ruling, the referring court stated that in the Urheberrechtsgesetznovelle (Amendment to the Law on Copyright) 1980, BGBl. Nr. 321/1980, the Austrian legislature provided for a right to equitable remuneration enforceable against all those who, in the course of a commercial activity, place on the market within the national territory certain media intended for reproduction and storage. That legislation has since been adapted in order to bring it into line with changes of circumstances and with the requirements of EU law, in the form of the Urheberrechts-Novelle (Amendment to Copyright Legislation) ('Urh-Nov') 2015, BGBl. I Nr. 99/2015, which, in particular, brought computer hard disks within the scope of that legislation inasmuch as they constitute 'storage media of any kind'.

18. Strato contested the application. It claimed that the applicable version of the UrhG does not provide for remuneration for cloud services and that the legislature, being cognisant of the technical possibilities available, made a deliberate choice not to take up that option. According to Strato, cloud services and physical storage media are not comparable. An interpretation that includes cloud services is not possible as storage media is not placed on the market; storage space is simply made available. Strato claimed that it does not sell or lease physical storage media to Austria but merely offers online storage space on its servers hosted in Germany. Strato also stated that it has already indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer). In addition, Austrian users had already paid a copyright fee for the devices without which content cannot even be uploaded to the cloud in the first place. The imposition of an additional charge by way of remuneration for exploitation of the right of reproduction on storage media, for cloud storage, would, according to Strato, have the effect of doubling or even tripling the obligation to pay a fee.

19. The Handelsgericht Wien (Commercial Court, Vienna) dismissed the action. It held essentially, that holders of copyright and related rights ('rightholders') are entitled to equitable remuneration in the case where storage media (from a location in national territory or another country) are, in the course of a commercial activity, placed on the market in the national territory, if an object requiring protection is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium (in a manner permitted in accordance with Paragraph 42(2) to (7) of the UrhG), that is to say, in relation to storage media of any kind that are suitable for making such reproductions.

20. The Handelsgericht Wien (Commercial Court, Vienna) stated that Paragraph 42b(1) of the UrhG, which expressly refers to 'storage media of any kind', includes – internal and external – computer hard disks. It also stated that cloud services exist in the most diverse forms. The core of any such service is the assurance that the user has a certain storage capacity, but this does not include the right for the user to have his or her content stored on a particular server or on particular servers, his or her entitlement being limited to being able to access his or her storage capacity 'somewhere in the [supplier's] cloud'. According to that court, Strato does not therefore provide its customers with storage media but makes storage capacity available – as a service – online. It noted that in the course of the procedure for peer review of the draft of the Urh-Nov,[8] an express call was made for account to be taken of cloud storage and proposed forms of words were put forward for that purpose. However, the legislature deliberately chose not to include such a provision.

21. Austro-Mechana appealed against that judgment before the referring court. The referring court considers that the question whether Article 5(2)(b) of Directive 2001/29 covers the storage of copyright-protected content in the cloud is not entirely clear. In that regard, the referring court notes that in the judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913; 'the *VCAST* judgment'), the Court stated that the storage of protected content in a cloud is to be treated as an exploitation of rights in which the author alone may engage.

[8] Before it was presented to the Austrian Parliament as a draft law.

22. In the light of the above considerations, the Oberlandesgericht Wien, (Higher Regional Court, Vienna) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the expression "on any medium" in Article 5(2)(b) of Directive [2001/29] to be interpreted as meaning that it also includes servers owned by third parties which make available to natural persons (customers) for private use (and for ends that are neither directly nor indirectly commercial) storage space on … those servers which those customers use for reproduction by storage ("cloud computing")?

(2) If so: is the provision cited in Question 1 to be interpreted as meaning that it is applicable to national legislation under which the author is entitled to equitable remuneration (remuneration for exploitation of the right of reproduction on storage media), in the case:

– where a work (which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes) is by its nature likely to be reproduced for personal or private use by being stored "on a storage medium of any kind which is suitable for such reproduction and, in the course of a commercial activity, is placed on the market in national territory",

– and where the storage method used in that context is that described in Question 1?'

IV. Procedure before the Court

23. Written observations were submitted by Austro-Mechana, Strato, the Danish, French, Netherlands and Austrian Governments and the European Commission.

24. At the hearing of the Court on 7 July 2021, they all presented oral observations save for the Danish Government.

V. Analysis

A. First question

25. By its first question, the referring court seeks to ascertain whether the private copy exception contained in Article 5(2)(b) of Directive 2001/29 refers to reproductions made by natural persons for private use on storage space or capacity (in the cloud) made available or provided by a third party who is an internet service provider. That court asks, in essence, whether the terms 'reproductions on any medium' contained in Article 5(2)(b) of Directive 2001/29 includes reproduction based on cloud computing services provided by a third party.

26. It follows from the file before the Court that the first question referred arose due, inter alia, to the use of the terms 'placed on the market in the national territory' in Paragraph 42b(1) of UrhG. Strato has argued both before the referring court and this Court that the Austrian legislature clearly intended by the use of those terms to put in place a model for compensation of rightholders which focuses exclusively on the marketing of physical recording media/substrate

and thus to exclude the use of cloud computing services provided by third parties. [9]

27. It would also appear from the request for a preliminary ruling that the referring court seeks clarification of the *VCAST* judgment and, in particular, the extent to which that judgment may be applied to the facts and the dispute in the main proceedings.

28. It must be noted that unlike the exception contained in Article 5(1) of Directive 2001/29 which is compulsory in nature, the exceptions or limitations contained in Article 5(2) and (3) of that directive in respect of the reproduction right are simply optional on the part of the Member States. [10]

29. In her Opinion in Joined Cases *VG Wort* (C-457/11 to C-460/11, EU:C:2013:34, points 35 to 37), Advocate General Sharpston noted that the optional nature of the exceptions or limitations gives Member States a certain freedom of action in this area. She thus considered that a Member State could introduce a measure which does not go as far as the provisions in question. For example, according to Advocate General Sharpston, a Member State may on the basis of Article 5(2)(b) of Directive 2001/29, lay down an exception for reproductions made by a natural person only when they are made on paper and exclusively for the purpose of private study, since the scope of that exception would be narrower than, but still fully encompassed within, what is authorised.

30. It may be noted, however, that the Court subsequently in its judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 33) stated that Member States cannot lay down detailed fair compensation rules which would discriminate, *without any justification*, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.

31. For my part, I consider that the same approach should apply to services. It may be said more generally that even though Member States do enjoy broad discretion [11] in respect of the manner in which they avail of the Article 5(2)(b) exception in their national laws they nonetheless cannot legislate for this purpose in a manner which would contradict or would be otherwise at variance with the underlying purpose of Directive 2001/29 itself. [12] It would, for example, be important to stress that Member States who elect to avail of the Article 5(2)(b) exception must do so in a technologically neutral [13] fashion.

[9] I would note at the outset that I consider that the storage of copyright-protected content in the cloud constitutes a reproduction of that content. The Danish Government stated that 'cloud storage is achieved by a user sending, from a storage medium with internet access and built-in memory, such as a smartphone or computer, their selected content to be stored on the cloud service server. *By doing so, the user is simultaneously making a digital reproduction of the selected content because the content is now stored on both the user's storage medium and the cloud service server*. Subsequently, the user can either keep the content on their own storage medium or delete it, for example to free up storage space on their own storage medium, so that it only appears in the cloud service. The user can then access the content on the cloud service server from any device that can connect to the cloud service, which is usually from one of the user's own storage media and very often, in all likelihood, from the storage media that the user originally used to set up the cloud storage'. Emphasis added.

[10] In its judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 21), the Court stated that Article 2 of Directive 2001/29 provides that Member States are to grant authors the exclusive right to authorise or to prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of their works, while reserving to those Member States the *option*, under Article 5(2) of that directive, of providing for exceptions and limitations to that right.

[11] Judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 20 and the case-law cited).

[12] See also Article 5(5) of Directive 2001/29.

[13] The principle of technological neutrality requires that the interpretation of the provisions of Directive 2001/29 does not hold back innovation and technological progress. See by analogy, judgment of 15 April 2021, *Eutelsat* (C-515/19, EU:C:2021:273, paragraph 48).

32. Accordingly, what is in question in the present case is the actual *scope* of Article 5(2)(b) of Directive 2001/29 rather than the *extent* to which its scope may be restricted by a Member State when transposing that provision under national law by applying a private copying levy, unjustifiably perhaps, only to certain goods or services. Here the language of Article 5(2)(b) of Directive 2001/29 is quite clear: Member States *may* provide for an exception to the exclusive *reproduction right* provided for under Article 2 of that directive in the case of reproductions *on any medium* made by a natural person [14] for private use and for ends that are neither directly nor indirectly commercial, on the condition that the exclusive rightholders receive fair compensation. [15]

33. According to the settled case-law of the Court, provisions such as Article 5(2)(b) of Directive 2001/29 which derogate from the reproduction right established by Article 2 of that directive must be interpreted restrictively so that it cannot give rise to an interpretation going beyond the cases expressly envisaged. [16] The Court has also held that copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the rightholder concerned, where it is done without seeking prior authorisation from that rightholder. [17] In addition, the Court has held that, while Article 5(2)(b) of Directive 2001/29 must be understood as meaning that the private copying exception prohibits the rightholder from relying on his or her exclusive right to authorise or prohibit reproductions with regard to persons who make private copies of his or her works, that provision must not be understood as requiring, beyond that express limitation, the copyright holder to tolerate infringements of his or her rights which may accompany the making of private copies. [18]

34. The referring court stated in its request for a preliminary ruling that Paragraph 42b(1) of UrhG transposes the private copy exception contained in Article 5(2)(b) of Directive 2001/29. Article 5(2)(b) of Directive 2001/29 does not, however, employ terms equivalent to the terms 'placed on the market in the national territory' which are contained in Paragraph 42b(1) of the UrhG. Nor is there any indication that the EU legislature intended to limit the scope of Article 5(2)(b) of Directive 2001/29 exclusively to physical media or substrate.

[14] Legal persons are excluded from benefiting from that exception and are not entitled to make private copies without receiving prior authorisation from the rightholders of the protected works or subject matter concerned. The Court has thus ruled that it is inconsistent with Article 5(2) of Directive 2001/29 to apply a private copying levy, in particular with regard to digital reproduction equipment, devices and media which are acquired by persons other than natural persons for purposes clearly unrelated to such private copying. Judgment of 9 June 2016, *EGEDA and Others* (C-470/14, EU:C:2016:418, paragraphs 30 and 31). However, in its judgment of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 37), the Court held that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it does not preclude legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in national territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision, where, having regard to the particular circumstances of each national system and the limits imposed by Directive 2001/29, practical difficulties justify such a system of financing fair compensation *and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult.*

[15] Judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, 'the *Padawan* judgment', paragraph 30).

[16] Judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 87 and the case-law cited).

[17] The *Padawan* judgment, paragraph 45.

[18] See to that effect, the *VCAST* judgment, paragraphs 32 to 34 and the case-law cited. See also by analogy, judgment of 10 November 2016, *Vereniging Openbare Bibliotheken* (C-174/15, EU:C:2016:856, paragraph 70).

35. One is instead left with the clear impression that the use of the broad and technologically neutral terms – 'reproductions *on any medium*' [19] – which are contained in Article 5(2)(b) of Directive 2001/29, militate against such an interpretation. [20] A literal interpretation of those terms alone [21] ensures, in my view, that the exception is not restricted to reproductions on physical media or substrate or, indeed, in an analogue or non-digital form. [22] The exception thus covers, inter alia, reproductions in both analogue and digital form [23] and, reproductions on a physical substrate such as paper or CDs/DVDs or in a somewhat more intangible media/substrate such as in the case in the main proceedings storage space or capacity [24] made available in the cloud by an internet service provider. In that regard, the wording of Article 5(2)(b) of Directive 2001/29 must be contrasted with Article 5(2)(a) of that directive, as the latter expressly provides that its scope is limited to 'reproductions *on paper or any similar medium*'. [25]

36. That conclusion is, moreover, supported by one of the principal objectives pursued by Directive 2001/29, namely, to ensure that copyright protection in the EU did not become outdated and obsolete by virtue of the march of technological development and the emergence of new forms of exploitation of copyright-protected content. [26] That objective would, however, be

[19] Emphasis added.

[20] It must be noted that Article 5(2)(b) of Directive 2001/29 makes no express reference to the law of the Member States. In that regard, it is settled case-law that the need for uniform application of EU law and the principle of equality require that where provisions of EU law make no express reference to the law of the Member States for the purpose of determining their meaning and scope they must normally be given an autonomous and uniform interpretation throughout the Union. See by analogy, the *Padawan* judgment, paragraphs 31 to 33, concerning the concept of 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29. I therefore consider that the terms 'reproductions on any medium' must be given an autonomous and uniform interpretation throughout the Union.

[21] See by contrast, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraph 37). In that case the Court stated that it was unclear from the wording, inter alia, of Article 4 of Directive 2001/29 or any other provision of that directive whether the supply by downloading, for permanent use, of an e-book constitutes a communication to the public pursuant to Article 3 of that directive, in particular a making available to the public of a work in such a way that members of the public may access it from a place and at a time individually chosen by them, or an act of distribution for the purposes of Article 4 of that directive. After taking account, inter alia, of the objectives pursued by Articles 3 and 4 of Directive 2001/29, the WIPO Copyright Treaty ('the WCT') in Geneva on 20 December 1996, a treaty which was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6) and which entered into force with respect to the European Union on 14 March 2010 (OJ 2010 L 32, p. 1) and the legislative history of Directive 2001/29, the Court held that the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' within the meaning of Article 3(1) of that directive.

[22] While the exception in Article 5(2)(b) of Directive 2001/29 must be interpreted strictly, the terms of that provision nonetheless largely mirror the corresponding broadly defined and technologically neutral exclusive reproduction right in Article 2 of Directive 2001/29. That provision states that Member States must provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction *by any means and in any form*. See also Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979.

[23] In its judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 67), the Court excluded from the scope of Article 5(2)(a) of Directive 2001/29, all non-analogue mediums of reproduction, namely, in particular, digital mediums, as, in order to be similar to paper as a medium for reproduction, a substrate must be capable of bearing a physical representation capable of perception by human senses. See by contrast, judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 25), in which the Court found that making available digital reproduction equipment, devices and media which is able to make copies to natural person as private users is sufficient in itself to justify the application of the private copying levy.

[24] The words 'somewhat more intangible media' are, admittedly, deliberately imprecise. Even in the case of cloud computing and cloud-based or internet storage services, the data in question – which may or may not include copyright-protected content – is ultimately stored in digital format by the cloud computing service provider on physical media/substrates such as servers.

[25] Emphasis added. In its judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraphs 65 and 66), the Court stated that it follows from the wording of Article 5(2)(a) of Directive 2001/29, which specifically refers to paper, that mediums which do not have comparable and equivalent qualities to those of paper do not come within the scope of the exception referred to in that provision. If it were otherwise, the effectiveness of that exception could not be ensured, particularly in the light of the exception referred to in Article 5(2)(b) of Directive 2001/29, which concerns 'reproductions on any medium'. In her Opinion in Joined Cases *VG Wort* (C-457/11 to C-460/11, EU:C:2013:34, point 39), Advocate General Sharpston noted that while the definition in Article 5(2)(a) is circumscribed only in terms of the means of reproduction and the medium used, that in Article 5(2)(b) refers exclusively to the identity of the person making the reproduction and the purposes for which it is made. For an assessment of the difference in scope of Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29, see also, Opinion of Advocate General Cruz Villalón in *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:389, points 35 to 54). See also judgment of 12 November 2015, Hewlett-Packard Belgium (C-572/13, EU:C:2015:750, paragraphs 28 to 43) on the overlap between the respective ambits of Article 5(2)(a) and (b) of Directive 2001/29.

[26] See recital 5 of Directive 2001/29.

undermined if the exceptions and limitations to that protection which were, according to recital 31 of Directive 2001/29, adopted in the light of the new electronic environment were interpreted in such a manner as to have the effect of excluding similar account being taken of such technological developments and the emergence in particular of digital media and cloud computing services. [27]

37. My conclusion on this matter is not altered by the fact that copyright-protected content is reproduced on storage space within the cloud made available or provided by a third party who is an internet service provider. In its *VCAST* judgment, [28] which also concerned cloud computing services – albeit in the different context of facilitating the illegal downloading of copyrighted television material – the Court restated its settled case-law that in order to rely on Article 5(2)(b) of Directive 2001/29 it is not necessary that the natural persons concerned possess reproduction equipment. Devices or *copying services* may thus be provided by a third party, which is the factual precondition for those natural persons to obtain private copies. [29]

38. As I have just indicated, in the case giving rise to the *VCAST* judgment, cloud technology was used by VCAST to provide access on a commercial basis to (copyright protected) television programmes produced by Italian television organisations. In that case, VCAST unlawfully made available to its customers via the internet a video recording system using storage space within the cloud for this purpose. [30] By contrast, the case in the main proceedings simply concerns the making available of storage capacity in the cloud and the *potential* storage by natural persons for private use of lawfully acquired copyrighted material in the computers/servers of the service provider. These modern technological advances should nevertheless not obscure the fact that, viewed from a legal standpoint, this may be equivalent to photocopying the entirety of a book or 'burning' a copy of a CD onto the hard drive of a computer where, in the examples given, the book and the CD have both been purchased by the consumer in question. [31]

39. The copyright infringement disclosed in the *VCAST* judgment was admittedly more egregious and harmful to the rightholder than that potentially disclosed by the facts of the present case, as the communication to the public in that case took the form of an illegal broadcast which had not

[27] Recital 31 of Directive 2001/29 specifically refers to the fact that the existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. In that regard, the Court in its judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 161 to 164) stated in relation to the *mandatory* exception to the reproduction right provided in Article 5(1) of Directive 2001/29 that the interpretation of the conditions laid down in that provision must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 of that directive. The Court further stated that 'in accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other'. See also, judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195, paragraph 24). I see no reason to depart from that approach in the present case despite the optional nature of the exception contained in Article 5(2)(b) of Directive 2001/29 and the requirement to interpret its scope strictly.

[28] See paragraph 35 of the *VCAST* judgment and the case-law cited.

[29] In judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 86), the Court noted that the wording of Article 5(2)(b) of Directive 2001/29 does not specify the characteristics of the devices by or with the aid of which copies for private use are made. In particular, that provision does not contain any reference to the legal nature of the connection, such as the right to property, which may exist between the natural person who makes the reproduction for private use and the device used by that person. The Court further held at paragraph 91 of that judgment that Directive 2001/29 does not preclude national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party.

[30] At paragraph 15 of the *VCAST* judgment the Court stated that 'in practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service provided by that company. The user can specify either a certain programme or a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. *That storage space is purchased by the user from another provider*'. Emphasis added.

[31] The French Government noted that a private individual may record his or her *legally* acquired music or video library on the cloud, so as have easy access to them, without having to use the physical support of these works.

been authorised by the rightholder. The fact remains that both cases would involve the act of reproduction by a natural person of the copyright-protected content on a 'medium'. It is thus clear from the *VCAST* judgment (and, indeed, the earlier case-law) that the Court has already implicitly accepted that that case-law and Article 5(2)(b) of Directive 2001/29 applies to such reproductions of copyright-protected content in the cloud.[32] Again, one must also not overlook the fact that in those instances where a Member State avails of the Article 5(2)(b) option, then the act of reproduction by a natural person for their own private purposes is not unlawful,[33] save that in that event fair compensation is payable.

40. The provider of such reproduction devices or copying services may not, however, make available copyright-protected content without the authorisation of the rightholder. Article 5(2)(b) of Directive 2001/29 thus implies that the rightholder is not otherwise deprived of his or her right to prohibit or authorise access to the protected content which natural persons may wish to copy for private use in accordance with its provisions.[34] Indeed, in its judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 41), the Court stated that Article 5(2)(b) of Directive 2001/29 must be interpreted as not covering the case of private copies made from an unlawful source.[35]

41. In accordance with Article 5(2)(b) of Directive 2001/29, the exception or limitation provided therein relates exclusively to the reproduction right provided for in Article 2 of that directive.[36] It does *not* extend, inter alia, to the right of communication to the public of works and right of making available to the public other subject matter referred to in Article 3 of that directive.

42. It is clear from the facts in the *VCAST* judgment that in that case the internet service provider had provided two services which consisted of the *reproduction and the making available of the works and the subject matter concerned* which were then saved in a cloud data storage space which *was purchased by the user from another provider*.[37] As I have already indicated, there is no indication in the facts presented by the referring court that Strato provided any services to natural persons for private use other than storage capacity in the cloud.

[32] In his Opinion in *VCAST* (C-265/16, EU:C:2017:649, points 23 to 28), Advocate General Szpunar considered that there was nothing to suggest that Article 5(2)(b) of Directive 2001/29 prevents reproduction under the exception provided for in that provision being made in storage space in the cloud. Advocate General Szpunar acknowledged that making reproductions and storing them in the cloud requires the intervention of third persons. He considered, however, that this form of reproduction should not be excluded from the scope of the private copying exception in Article 5(2)(b) of Directive 2001/29 simply by reason of the intervention of a third party which goes beyond simply making available media or equipment. According to Advocate General Szpunar, as long as it is the user who takes the initiative in respect of the reproduction and defines its object and modalities, there is no decisive difference between such an act and a reproduction made by the same user with the aid of equipment which he or she controls directly.

[33] Provided they have lawful access to the copyright-protected content.

[34] The *VCAST* judgment, paragraph 39.

[35] In its judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 82), the Court confirmed that Article 5(2)(b) of Directive 2001/29 lays down an exception to the exclusive right of a rightholder to authorise or prohibit the reproduction of the work in question. That necessarily presupposes that the subject matter of the reproduction covered by that provision is a protected work, *not a counterfeited or pirated work*.

[36] See recital 32 of Directive 2001/29 which states, inter alia, that 'some exceptions or limitations only apply to the reproduction right, where appropriate'. The private copying exception in Article 5(2)(b) of Directive 2001/29 applies to the reproduction of works, fixations of performances, phonograms, fixations of films and fixations of broadcasts.

[37] VCAST made available to its customers via the internet a video recording system, in storage space within the cloud, for terrestrial programmes of Italian television organisations. The user selected a programme or time slot on the VCAST website. The system operated by VCAST then picked up the television signal and recorded the time slot for the selected programme in the cloud data storage space indicated by the user. *That storage space was purchased by the user from another provider*. The present case is thus novel as VCAST, unlike Strato, did not itself make data storage available.

43. In the light of the foregoing considerations I consider that the terms 'reproductions on any medium' in Article 5(2)(b) of Directive 2001/29 includes reproduction based on cloud computing services provided by a third party.

B. Second question

44. In the light of my conclusion on the first question referred, it is necessary to answer the second question posed by the referring court. By that question, the referring court, in substance, seeks to ascertain whether Article 5(2)(b) of Directive 2001/29 requires national legislation on private copying such as Paragraph 42b(1) of the UrhG to provide for the payment of fair compensation to rightholders in respect of storage capacity in the cloud made available by third parties to natural persons for private use. This question was posed in the light of the fact that Paragraph 42b(1) of the UrhG does not provide for the payment of levies in respect of cloud services. That provision does, however, provide for levies in respect of a range of media.

45. In that regard, it must be recalled that Strato claimed before the referring court that it had 'indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer), and (Austrian) users too have already paid a copyright fee for the devices without which content cannot even be uploaded to the cloud in the first place. The imposition of an additional charge by way of remuneration for exploitation of the right of reproduction on storage media, for cloud storage, would have the effect of doubling or even tripling the obligation to pay a fee'.

1. Arguments

46. Austro-Mechana considers that reproductions in the cloud cause harm to rightholders in a similar manner to the distribution of recording media or reproduction devices or the provision of reproduction services and must thus be subject to fair compensation. It considers therefore that Paragraph 42b(1) of the UrhG must be interpreted in conformity with Article 5(2)(b) of Directive 2001/29 as meaning that the fair compensation provided for therein is due in respect of the provision of services for reproduction in the cloud.

47. Strato considers that cloud computing services were specifically excluded from Paragraph 42b(1) of the UrhG by the Austrian legislature in order to avoid the payment of double or indeed triple levies. In that regard, it notes that in order to avail of cloud computing services, the protected material must be on a storage medium before it can be loaded into the cloud. Under Austrian law, a copyright levy must be paid for the storage medium – mobile phone, computer, tablet – by means of which the private copy is made. In addition, according to Strato, the user pays a royalty in order to access the original. Moreover, Strato claims that the user cannot do much with the simple recording itself of the private copy in the cloud. Rather, the private user uses the cloud to consult the downloaded content on other terminal equipment or to save it on them. However, such equipment have their own storage media which is subject to a levy. Thus, according to Strato, on the user side alone, rightholders have up to three sources of revenue: first, the initial acquisition of the work, secondly, storage on the terminal equipment used for loading, which is subject to a levy, and thirdly, storage on the terminal equipment used for downloading, which is also subject to a levy. Strato also considers, by analogy with the judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 78), that where a chain of devices is used to create a private copy, the requirement of fair compensation may be imposed on one device in the chain.

48. The Austrian Government considers that a server through which cloud computing services are offered to private persons constitutes a recording medium in respect of which the producer or importer is obliged to pay remuneration. This remuneration is passed on to the provider of the cloud computing services. An additional claim for remuneration against the cloud service provider is therefore unnecessary and risks giving rise to overcompensation.

49. The Danish Government considers that cloud computing services cannot be equated with the making available of digital reproduction equipment, devices and media to private persons or the provision of a reproduction service to them. It therefore considers that the the *Padawan* judgment which applies to physical storage media such as CDs and DVDs and which predates cloud computing is not transposable to the facts in the present case. According to the Danish Government, cloud computing is not necessary for natural persons to acquire private copies. A cloud computing service is only a digital storage space for digital content, and the content stored in this way can only be accessed by private persons via the types of storage media that are used to initiate the storage in the first place, namely smartphones or computers. It is therefore these initial storage media – and not the cloud computing service – that are the necessary precondition for individuals to come into possession of a private copy. A system in which cloud computing services are subject to a levy therefore does not seem to be in line with the 'fair balance' requirement in recital 31 of Directive 2001/29. The Danish Government considers that there may be a non-negligible risk of overcompensation, consisting of paying several times for the same private copy. This may occur in particular in cases where two levies are paid for the storage medium on which the copy is made and for the subsequent service consisting of its storage (for example, a cloud computing service).

50. The French Government notes that servers used by service providers, even if subject to the payment of a private copying levy, are not necessarily put into circulation and acquired in the territory of the Member State concerned by the private copying. Therefore, the fact that double compensation cannot be ruled out should not lead to the exclusion of the possibility for Member States to make cloud storage service providers who provide services to users residing on their territory subject to levies. Otherwise effective compensation for the loss resulting from private copies made in this context could be inexistent. [38] In any event, private copying levies paid in the Member State concerned on the devices necessary to upload content from a cloud service do not constitute a double payment in relation to the remuneration that should be paid by the operator of that service. Reproductions made on these devices which give rise to the private copy levy constitute acts of private copying that are distinct from those made on the cloud service. Each of these acts of reproduction gives rise to a distinct harm in the Member State concerned and requires the payment of fair compensation.

2. The Padawan *judgment*

51. As this entire issue of private copying and fair compensation was first considered by the Court in the *Padawan* judgment, it may be convenient to consider this decision in a little detail.

[38] The French Government cited the judgment 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 64 and 65), which referred to the possibility for a person who has previously paid that levy in a Member State which does not have territorial competence to request its repayment in accordance with its national law.

52. In this case a Spanish copyright collection agency sought to recover what was described as a private copying levy provided for by Spanish law from an entity which marketed CD, DVD and MP3 players. This was objected to on the ground that the application of that levy to digital media, indiscriminately and regardless of the purpose for which they were intended was incompatible with Directive 2001/29.

53. The Court first observed that 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'. [39] While it recognised that it was in principle for that person to make good 'the harm related to that copying by financing the compensation which will be paid to the rightholder', [40] it also drew attention to the considerable practical difficulties in identifying the infringements of private users, together with the fact that the harm caused by such individual infringements might simply be *de minimis* and thus not give rise to a payment obligation.

54. The Court then stated that '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. 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. 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 borne 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'. [41]

55. The Court then concluded that since the levy system enables the person liable to pay compensation to the collecting societies acting on behalf of the rightholders to recoup that cost from private users upon the purchase of, for example, recording equipment, such a system must be regarded as being in principle consistent with the fair balance required as between the interests of rightholders and others. [42]

[39] The *Padawan* judgment, paragraph 44.

[40] The *Padawan* judgment, paragraph 45.

[41] The *Padawan* judgment, paragraph 46-48.

[42] The *Padawan* judgment, paragraph 49. The quest for a fair balance in the copyright context may also bring to the fore the need to reconcile intellectual property rights guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), the freedom of expression and information guaranteed by Article 11 of the Charter and indeed the public interest. See judgment of 9 March 2021, *VG Bild-Kunst* (C-392/19, EU:C:2021:181, paragraph 54 and the case-law cited). See also for a general discussion of the nature and complexities of the exceptions and limitations contained in Article 5(2) and (3) of Directive 2001/29, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraphs 34 to 54). In addition, the Court has noted that the exceptions provided for in Article 5 of Directive 2001/29 must be applied in a manner consistent with the principle of equal treatment, affirmed in Article 20 of the Charter, which, according to the Court's established case-law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. Judgment of 22 September 2016, *Microsoft Mobile Sales International and Others* (C-110/15, EU:C:2016:717, paragraph 44).

56. The Court also held that there was a necessary link between the application of the levy to private consumers and the possible harm which might be caused to rightholders by private copying. As those consumers are presumed to benefit from and to take 'full advantage of the functions associated with that equipment, including copying', it followed that the fact that such 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'. [43]

3. Analysis

57. As we have seen, Article 5(2)(b) of Directive 2001/29 provides that Member States who elect to establish a 'private use' exception are obliged to ensure, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders. [44] Given that Article 5(2)(b) of Directive 2001/29 is optional and does not provide any further details concerning the various parameters of the fair compensation scheme that it requires to be established, it is clear that the Member States necessarily enjoy broad discretion in regard to the parameters of their national law. [45] Member States may accordingly determine the persons who have to pay that fair compensation, [46] and to determine the form, detailed arrangements and level thereof, in compliance with Directive 2001/29 and, more generally, with EU law, even if, as this Court has already held, the issue of fair compensation is itself an autonomous EU law term. [47] As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) thereof reflects the EU legislature's intention to establish a specific compensation scheme which is triggered by a rebuttable presumption in certain circumstances of the existence of harm caused to rightholders, and which gives rise, in principle, to the obligation by users to compensate them. [48]

58. Given that the potential for copying – particularly in the digital environment – is ubiquitous and, all-pervasive, the EU legislature introduced the private copying exception in Article 5(2)(b) of Directive 2001/29 as a means of ensuring that rightholders do not unduly suffer from the harm [49]

[43] The *Padawan* judgment, paragraphs 55 and 56.

[44] Judgment of 9 June 2016, *EGEDA and Others* (C-470/14, EU:C:2016:418, paragraph 21).

[45] The scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of the provision in question, the degree of the harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29. Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 40).

[46] Provided that compensation is *ultimately borne by the private users*. Given the practical difficulties of collecting fair compensation from private users, the Court has held that Member States are free to finance that fair compensation by means of a levy imposed on persons making reproduction equipment, devices and media available to natural persons. As the private copying levy can be passed on to the private user by including it in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied, such a system is acceptable as the burden of the levy is ultimately to be borne by the private user. By contrast, Article 5(2)(b) of Directive 2001/29 precludes a scheme for fair compensation for private copying which is financed from the General State Budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies. See to that effect, judgment of 9 June 2016, *EGEDA and Others* (C-470/14, EU:C:2016:418, paragraphs 33 to 42).

[47] The *Padawan* judgment, paragraph 37.

[48] See, judgments of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 40), and of 22 September 2016, *Microsoft Mobile Sales International and Others* (C-110/15, EU:C:2016:717, paragraph 26).

[49] Article 5(2)(b) of Directive 2001/29 imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, within the framework of its powers, that the fair compensation intended to compensate the holders of the exclusive right of reproduction harmed for the prejudice sustained is actually recovered, especially if that harm arose on the territory of that Member State. In that regard, it is assumed that the harm to the rightholder due to private copying arises in the Member State in which the final user resides. Judgment of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 57 and 58 and the case-law cited).

caused by such copying.[50] When Member States opt to implement the private copying exception provided for under Article 5(2)(b) of Directive 2001/29 in their national law, they are required, in particular, to provide for the payment of *fair* compensation to the rightholder.

59. Fair compensation is compensation which does not *over or under compensate*[51] the rightholders for the harm caused by private copying. It must be noted in that regard, that the requirement of fair compensation in respect of such copying laid down in Article 5(2)(b) of Directive 2001/29 is by its very nature a proxy for or an approximation of the harm caused to rightholders. Given the private nature of such copying, it is difficult – indeed, virtually impossible – to police or detect, the Court has thus allowed the Member States to adopt within their margin of discretion certain rebuttable presumptions as regards private copying.[52]

60. As the Court noted at paragraph 51 of the judgment of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515), remuneration systems for private copying are at present *necessarily imprecise* with regard to most recording media, in that it is impossible in practice to determine which work was reproduced by which user and on which medium.[53] The Court has stated with regard to digital reproduction equipment, devices and media that it is understood that the amount of a levy of that kind which is fixed in advance cannot be fixed on the basis of the criterion of actual harm suffered, as the extent of that harm remains unknown at the moment at which the devices concerned are put into circulation on national territory. Accordingly, that levy must necessarily be set as a lump sum.[54]

61. Recital 35 of Directive 2001/29 also makes it clear that in those 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.[55] There may thus be instances, as recital 35 of Directive 2001/29 makes clear, where the 'prejudice to the rightholder would be minimal, no obligation for payment may arise'. I would note also that in accordance with Article 6 of Directive 2001/29, as interpreted by the Court in its judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 72), the Member State concerned may make the actual level of compensation owed to rightholders dependent on whether or not technological measures are applied, so that rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception.

[50] It must be recalled that a private copying exception is only applicable where reproduction for private use is made from a *lawful source*. A private levy system which does not distinguish between reproductions which are made from a lawful source and those made from an unlawful source was held by the Court in its judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254) not to respect the fair balance between the rightholder and users.

[51] Such situations do not respect the 'fair balance' required by recital 31 of Directive 2001/29. Judgments of 12 November 2015, *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:750, paragraph 86), and of 22 September 2016, *Microsoft Mobile Sales International and Others* (C-110/15, EU:C:2016:717, paragraph 51).

[52] Judgment of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 41 to 45 and the case-law cited).

[53] See also judgment of 22 September 2016, *Microsoft Mobile Sales International and Others* (C-110/15, EU:C:2016:717, paragraph 35). It is true therefore that from a purely theoretical standpoint the fact that such a levy is paid is no substitute for an individualised assessment of the harm to the rightholders in each case.

[54] Judgment of 12 November 2015, *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:750, paragraphs 70 and 71).

[55] In his Opinion in *Copydan Båndkopi* (C-463/12, EU:C:2014:2001, points 60 and 61), Advocate General Cruz Villalón noted that recital 35 of Directive 2001/29 states that, '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'. He considered that it 'may be inferred from that recital that Directive 2001/29 gives Member States the responsibility for deciding whether it is appropriate to avoid any overcompensation, that is to say, to ensure that users are not placed in a situation of having to pay the private copying levy intended to finance fair compensation twice, the first time on the occasion of the lawful acquisition in the course of trade of the files containing the works and the second time on the occasion of the acquisition of the reproduction media, as it appears might be the case in the main proceedings'.

62. Moreover, at paragraph 78 of the judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426), the Court stated that 'where the reproductions at issue have been made by means of a single process, with the use of a chain of devices, it is likewise open to the Member States to go back to the stages before the copying stage and put in place, where appropriate, a system in which fair compensation is paid by the persons in possession of a device forming part of that chain which contributes to that process in a non-autonomous manner, in so far as those persons have the possibility of passing on the cost of the levy to their customers. Nevertheless, the overall amount of fair compensation owed as recompense for the harm suffered by the rightholders at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device'.

63. In passing, I cannot help thinking that the EU legislature might with advantage reconsider this aspect of Article 5(2)(b) of Directive 2001/29.[56] The term 'fair compensation' is so broad and open-ended that some degree of subjective assessment is inevitable. Aside from the guidance provided by Article 5(5) of Directive 2001/29 and certain recitals of that directive, in particular, recitals 31 and 35 thereof, there are few other legal standards which can usefully guide either national courts or this Court as to what compensation (if, indeed, any) might be considered 'fair' in the present context.[57]

64. In that regard, Article 5(5) of Directive 2001/29 provides in substance that the exception or limitation in Article 5(2)(b) of that directive may not conflict with a *normal exploitation*[58] of the work or other subject matter and do not unreasonably prejudice the *legitimate interests*[59] of the rightholder.

4. The application of these principles to the present case

65. Turning now to the present case, it is necessary to assess the extent to which (if at all) rightholders have a right to receive (additional) compensation in respect of storage capacity in the cloud made available to natural persons for private use[60] given that, as in this case, national legislation would appear to already provide for the payment of levies in respect of a very wide range of specified media.

66. Each step in the process of uploading and downloading copyright-protected content to the cloud from devices or media such as smartphones constitutes a reproduction of that content which is, in principle, in breach of Article 2 of Directive 2001/29 unless such reproduction is justified by virtue of an exception or limitation pursuant to Article 5 of that directive. Given that Article 5(2)(b) and Article 5(5) of Directive 2001/29 equally strive to avoid both under and over compensation of the rightholder and thus to achieve a fair balance between the private user and

[56] Moreover, the guidelines laid down in the *Padawan* judgment, must nonetheless be read in context and in the light of the technology and user habits existing in 2010 when it was decided even though the ruling in that judgment has been consistently refined by the Court in subsequent cases.

[57] The discretion enjoyed by the Member States in implementing the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 is thus considerable, although it cannot be used so as to compromise the objectives of that directive that consist in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market. Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 50 and the case-law cited). In addition, the Court has stated that it is apparent from recital 44 of Directive 2001/29 that the EU legislature envisaged that the scope of exceptions or limitations could be limited even more when it comes to certain new uses of copyright works and other subject matter. See judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 27).

[58] These terms are also undefined.

[59] These terms are also undefined.

[60] And for ends that are neither directly nor indirectly commercial.

the rightholder, the question which arises is whether a separate levy must be paid in respect of each step in this sequence of copies, including the reproduction/storage in the cloud, given that an adequate levy *may* have already been paid by the user on devices and media used by it in the sequence.[61]

67. At the hearing on 7 July 2021, both Austro-Mechana and the Austrian Government stated that a private copy levy is not payable in Austria on *devices but only in respect of media*. It would appear, subject to verification by the referring court, that this statement is confirmed by the Private Copying Global Study 2020.[62] It must be noted however[63] that according to that study, levies are payable in respect of a very wide range of media.[64] Thus a levy would appear to be payable, inter alia, on integrated memory in mobile phones with music and/or video playback, integrated memory in a range of computers and tablets, smartwatches with integrated memory, DVDs, USB sticks, etc. No levy is payable in respect of the provision of storage capacity in the cloud.[65] It was also stated in that study in respect of Austria in the section entitled 'Explanation on Developments' that 'there is, however, a significant decrease in sales of physical media with the exception of mobile phones. People are more and more relying on the cloud for private copying and/or streaming services. A levy for cloud private copying is therefore the immediate strategic aim of Austro-Mechana'.

68. It would thus appear from the file before the Court, subject to verification by the referring court, that the private copying behaviour of natural persons[66] is evolving, with greater reliance being placed on a limited number of devices and media such as smartphones and tablets in conjunction with cloud computing services rather than on a wide range of devices and media alone. In addition, it would appear, subject to verification by the referring court, that devices and media are the target of levies rather than cloud computing services.

69. The right to fair compensation pursuant to Article 5(2)(b) of Directive 2001/29 is triggered by the rebuttable presumption in certain circumstances of the existence of harm caused to rightholders and gives rise, in principle, to the obligation by users to compensate them. In that regard, when assessing the harm to rightholders there is, in particular, a rebuttable presumption

[61] The existence of such levies seems to vary considerably as between the Member States since it is possible that a particular device (such as a personal computer or smartphone) may be subject to a levy in one Member State and to none in another. The same may be true of the amounts of any such levy which may vary from one Member State to another. See in that regard, Private Copying Global Study 2020. Available at https://www.irma.asso.fr/IMG/pdf/sg20-1067_private_copying_global_study_2020_2020-11-23_en.pdf. It would appear for example from that study that Ireland has an exception for private copying pursuant to Article 101 of the Copyright and Related Rights Act, 2000 but that no private copying levy is provided for.

[62] See pages 286 to 296 of the study.

[63] See pages 286 to 296 of the study.

[64] In that regard, Strato also annexed to its observations a list of Austro-Mechana's tariffs for storage media put on the market from 1 January 2018. See Annex 12.

[65] Strato notes that no Member State currently provides for a private copying levy in respect of cloud-based services. The French Government indicated at the hearing on 7 July 2021, that France provides for a levy in respect of Network Based Personal Video Recorder services.

[66] At least in Austria, but I suspect across all Member States.

that natural persons take full advantage of the reproduction and storage capacity of electronic devices or media made available to them.[67] Moreover, it is assumed that the harm to the rightholder due to private copying arises in the Member State in which the final user resides.[68]

70. In my view, given the *necessarily imprecise* nature of lump sum levies on devices or media, caution must be exercised before combining such lump sum levies with other remuneration systems or grafting on to them other levies in respect of cloud services without conducting in advance an empirical study on the matter – and, in particular, without determining whether additional harm is caused to rightholders by the combined use of such devices/media and services – as this may give rise to overcompensation and upset the fair balance between rightholders and users referred to in recital 31 of Directive 2001/29.

71. If reproduction/storage in the cloud is not taken into account, there may be a risk of undercompensating the rightholder for harm. Nonetheless, as the uploading and downloading copyright-protected content to the cloud using devices or media could be classified as a *single process for the purposes of private copying*, it is open to the Member States in the light of the broad discretion which they enjoy to put in place, where appropriate, a system in which fair compensation is paid solely in respect of devices or media which form a necessary part of that process provided that this reflects the harm caused to the rightholder from the process in question.

72. In summary, therefore, a separate levy or fee is not payable in respect of the reproduction by a natural person for their own personal purposes based on cloud computing services provided by a third party provided that the levies paid in respect of devices/media in the Member State in question also reflects the harm caused to the rightholder by such reproduction. If a Member State has, in fact, elected to provide for a levy system in respect of devices/media, the referring court is in principle entitled to assume that this in itself constitutes 'fair compensation' in the sense of Article 5(2)(b) of Directive 2001/29, unless the rightholder (or their representative) can clearly demonstrate that such payment would in the circumstances of the case at hand be inadequate.

73. This assessment – which requires considerable economic expertise and a knowledge of a range of industries – is one which must be carried out at national level by the referring court.

[67] I have some difficulty with such presumptions given that the emergence of online services which license copyright-protected content such as books, music, films may considerably reduce the recourse by natural persons users to copying protected content in breach of Article 2 of Directive 2001/29. I consider that levies must be set to take account of this phenomenon and the fact that devices and media may be increasingly used to store content which simply does not infringe the right to reproduction such as private photos taken by the owner of a device.

[68] As regards this latter point, the fact that Strato may have paid levies as it claims on its servers in Germany is largely irrelevant in the context of the present proceedings. If any levies are due in respect of the provision of cloud computing services provided to natural persons residing in Austria, they are due in Austria. In accordance with the judgment of 11 July 2013, *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 37), Strato may however be able to seek reimbursement of (part of) the levies paid in Germany.

VI. Conclusion

74. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Oberlandesgericht Wien, (Higher Regional Court, Vienna, Austria) as follows:

The terms 'reproductions on any medium' 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 includes reproduction based on cloud computing services provided by a third party.

A separate levy or fee is not payable in respect of the reproduction by a natural person for their own personal purposes based on cloud computing services provided by a third party provided that the levies paid in respect of devices/media in the Member State in question also reflects the harm caused to the rightholder by such reproduction. If a Member State has, in fact, elected to provide for a levy system in respect of devices/media, the referring court is in principle entitled to assume that this in itself constitutes 'fair compensation' in the sense of Article 5(2)(b) of Directive 2001/29, unless the rightholder (or their representative) can clearly demonstrate that such payment would in the circumstances of the case at hand be inadequate.