Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 9 January 2014[1]

Case C-435/12

ACI Adam BV,
Alpha International BV,
AVC Nederland BV,
BAS Computers & Componenten BV,
Despec BV,
Dexxon Data Media and Storage BV,
Fuji Magnetics Nederland,
Imation Europe BV,
Maxell Benelux BV,
Philips Consumer Electronics BV,
Sony Benelux BV,
Verbatim GmbH
v
Stichting de Thuiskopie,
Stichting Onderhandelingen Thuiskopie vergoeding

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Intellectual property — Copyright and related rights — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights in the information society — Exclusive right of reproduction — Article 5, paragraph 2, point (b) — Article 5, paragraph 5 — Exceptions and limitations — Private copying exception — Scope — Reproductions made from an unlawful source — Private copying levy — Directive 2004/48/EC — Enforcement of intellectual property rights — Article 14 — Legal costs — Scope)

1. In this case, a further series of questions has been referred to the Court for a preliminary ruling concerning, principally, the interpretation 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 and, in particular, Article 5(2)(b) of that directive,[2] which enables the Member States to establish a private copying exception to the exclusive reproduction right of copyright holders and holders of related rights.[3]

1 — Original language: French.

2 — OJ 2001 L 167, p. 10. See, in particular, Case C-467/08 *Padawan* [2010] ECR I-10055, Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-5331, Case C-277/10 *Luksan* [2012] ECR, Case C-510/10 *DR and TV2 Danmark* [2012] ECR and Joined Cases C-457/11 to C-460/11 *VG Wort and Others* [2013] ECR.

3 — Hereafter 'rightholders'.

2. More specifically, the main question referred by the national court is whether the private copying exception may only be applied to reproductions made from lawful sources and, furthermore, whether the private copying levy may be calculated and charged only by reference to reproductions made from lawful sources. [4]

3. This question on the interpretation of Directive 2001/29 [5] is one which a number of national courts have asked themselves. It has been resolved, in certain Member States, either by the national legislature [6] or by the national courts, [7] but it has not yet given rise to any answer from the Court of Justice [8] and continues to be disputed in legal literature. [9] It is, therefore, a question of significant importance.

4. The importance of the question is further heightened by the fact that the private copying exception is presented by certain of the parties to the main proceedings and by some legal theorists as a means of compensating the harm caused to rightholders by the unauthorised dissemination over the Internet of protected works and other subject-matter, at least in the absence of technological measures capable of effectively combating piracy.

4 — I should emphasise here that questions very similar to these have been referred to the Court in two other cases that are currently pending, that is to say, the second question referred for a preliminary ruling in Case C-314/12 *UPC Telekabel Wien* and part (f) of the first question referred in Case C-463/12 *Copydan Båndkopi*. In the first case, in which I delivered my Opinion on 26 November 2013, I concluded that it was not necessary to answer the question in order for the referring court to resolve the dispute in the main proceedings. The hearing in the second case is to be held on 16 January 2014, and I shall deliver my Opinion afterwards.

5 — The question has also arisen outside the European Union. See, for example, the judgment of the Federal Court, Canada, of 31 March 2004 in BMG Canada Inc. v. John Doe (F.C.), 2004 FC 488, [2004] 3 F.C.R. 241, in which the court ruled in favour of the application of the exception relating to private use to exchanges of files over the Internet or, more specifically, to the downloading of works from peer-to-peer sites. The decision was, however, qualified by the Federal Court of Appeal, Canada, by judgment of 19 May 2005 in BMG Canada Inc. v. John Doe (F.C.A.), 2005 FCA 193, [2005] 4 F.C.R. 81, § 50-52.

6 — Indeed, in certain Member States (the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Italian Republic, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden), the laws transposing Directive 2001/29 exclude the application of the private copying exception to reproductions made from unlawful sources. See Westkamp, G., *The Implementation of Directive 2001/29/EC in the Member States*, Part II, February 2007 (http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf) and Commission Staff Working Document, Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, 30 November 2007 (SEC(2007) 1556). In Ireland and the United Kingdom, the private copying exception does not exist. On the situation in the United Kingdom, see Torremans, P. L. C., 'L'exception de copie privée au Royaume-Uni', in Lucas., A. and others, *Les exceptions au droit d'auteur — États des lieux et perspectives dans l'Union européenne*, Dalloz, 2012, p. 95.

7 — In the case of France, see, in particular, the judgment of the Conseil d'État of 11 July 2008 in Syndicat de l'industrie de matériels audiovisuels, No 298779, ECLI:FR:CESSR:2008:298779.20080711, RIDA, July 2008, No 217, p. 279. On the repercussions of that judgment, see Sirinelli, P., *Chronique de jurisprudence*, RIDA, January 2013, No 235, p. 275. For an overview of the case-law in civil jurisdictions, see Thoumyre, L., 'Peer-to-peer: l'exception pour copie privée s'applique bien au téléchargement', *Revue Lam de l'immatériel*, July-August 2005, p. 23.

8 — See, however, point 78 of the Opinion of Advocate-General Trstenjak of 11 May 2010 in *Padawan*.

9 — For a wide-ranging discussion of the positions and arguments, see, in particular, Colin, C., 'Étude de faisabilité de systèmes de licences pour les échanges d'œuvres sur Internet', *Rapport pour la SACD/SCAM — Belgique*, 16 September 2011, CRIDS (http://www.crids.eu/recherche/publications/textes/synthese-sacd-scam.pdf/at_download/file) and More, K., *Les dérogations au droit d'auteur — L'exception de copie privée*, Presses universitaires de Rennes, 2009, p. 101.

I – The legal framework

A – *International law*

5. Three international conventions are relevant to the resolution of the dispute in the main proceedings. The first of these, which is also the principal convention, is the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as last revised by the Paris Act of 24 July 1971 and amended on 28 July 1979 ('the Berne Convention').[10] [11]

6. The two others are, first, the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1C to the Agreement establishing the World Trade Organisation (WTO), which was signed in Marrakech and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)[12] and, secondly, the World Intellectual Property Organisation Copyright Treaty adopted in Geneva on 20 December 1996, which was approved by Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty,[13] the provisions of which refer to the Berne Convention.[14]

B – *EU law*

7. The questions referred by the national court concern the interpretation, first, of the provisions of Article 5(2)(b) and Article 5(5) of Directive 2001/29[15] and, secondly, of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights[16] and, in particular, Article 14 thereof. In so far as is necessary, I shall give the wording of those provisions in the course of my reasoning.

C – *Netherlands law*

8. Article 1 of the Law on copyright ('the CRL') acknowledges the exclusive right of creators of literary, scientific or artistic works and of their legal successors to reproduce such works, subject to the limitations provided for by law. The CRL contains provisions establishing a private copying exception and providing for fair compensation by way of consideration, that is to say, a private copying levy.

10 — Of particular importance are the provisions of Article 9(1) and (2) of the convention, which define the exclusive right of reproduction of authors of protected literary and artistic works and the exceptions to that right.

11 — Under Article 5(1)(b) of Protocol 28 on intellectual property to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), the Contracting Parties are to undertake to obtain their adherence to the Berne Convention before 1 January 1995. See also point 1 of the Council Resolution of 14 May 1992 on increased protection for copyright and neighbouring rights (OJ 1992 C 138, p. 1). For a finding by the Court of Justice of a failure to fulfil that obligation to obtain adherence, see Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943.

12 — OJ 1994 L 336, p. 1, 'the TRIPS Agreement'.

13 — OJ 2000 L 89, p. 6, 'the WCT'.

14 — Article 9(1) of the TRIPS Agreement refers to the Berne Convention and Article 13 substantially reproduces the wording of Article 9 of the Berne Convention. Article 1(4) of the WCT also refers to the Berne Convention and Article 10 also substantially reproduces Article 9 of the Berne Convention. See also, in the annexes to the WCT, the Agreed Statements adopted by the Diplomatic Conference on 20 December 1996.

15 — These provisions must be read in light, in particular, of recitals 21, 22, 32, 38, 39, 44 and 52 of the preamble to the directive.

16 — OJ 2004 L 157, p. 45; corrigenda OJ 2004 L 195, p. 16 and OJ 2007 L 204, p. 27.

9. Article 16c(1) of the CRL, which transposes Article 5(2)(b) of Directive 2001/29, provides:

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

10. Article 16c(2) of the CRL provides:

'Payment of fair compensation in respect of reproductions as referred to in [Article 16c(1)] shall be due to the creator of the work or his legal successor. The manufacturer or importer of the media referred to in [Article 16c(1)] shall be liable for payment of the compensation.'

11. Article 1019h of the Netherlands Code of Civil Procedure, which transposes Article 14 of Directive 2004/48 states:

'Insofar as is necessary, by way of derogation from the second paragraph of section twelve of Title Two of Book One and Article 843a(1), the unsuccessful party shall be ordered to pay the reasonable and proportionate legal costs and other expenses incurred by the successful party, unless equity does not allow this.'

II – The facts in the main proceedings

12. The respondents in the main proceedings are the Stichting de Thuiskopie, a foundation responsible for collecting the private copying levy provided for by Article 16c(2) of the CRL and distributing the funds so collected, and the Stichting Onderhandelingen Thuiskopie vergoeding,[17] a foundation responsible for setting the amount of the private copying levy.

13. The appellants in the main proceedings are importers and/or manufacturers of media intended for the reproduction of works within the meaning of Article 16c(1) of the CRL and, as such, they are required to pay the private copying levy.

14. Taking the view that the private copying levy is intended solely to compensate the harm sustained by rightholders as a result of acts of reproduction falling within the scope of Article 16c(1) of the CRL, the appellants in the main proceedings issued proceedings against the Stichting de Thuiskopie and the SONT before the Rechtbank te's-Gravenhage, arguing that no account should be taken in the calculation of the amount of the private copying levy of the harm resulting from the copying of works, in infringement of copyright, from unlawful sources.

15. The Rechtbank te's-Gravenhage dismissed the application brought by the appellants in the main proceedings by judgment of 25 June 2008.[18]

16. By judgment of 15 November 2010,[19] the Gerechtshof te's-Gravenhage, before which an appeal was brought, also dismissed the claim, holding that the fair compensation referred to in Article 16c of the CRL was intended to compensate the harm caused to rightholders by acts of reproduction falling within the scope of that provision.

17 — 'the SONT'.

18 — Case 246698/HA ZA 05-2233, LJN BD5690.

19 — Case 200.018.226/01, LJN BO3982.

17. It must be observed that it is clear from the order for reference that the Gerechtshof te's-Gravenhage held that neither Article 5(2)(b) of Directive 2001/29 nor Article 16c of the CRL made any distinction on the basis of the sources of the reproduction. However, it was clear from the preparatory work for the CRL that Article 16c thereof was to be interpreted as authorising the making of reproductions from unlawful sources so long as the technological measures to combat the making of unauthorised private copies were unavailable. Indeed, the view had been taken that a scheme that did not prohibit the making of reproductions from unlawful sources, whilst at the same time requiring the collection of a private copying levy in respect of such reproductions, would best protect the interests of rightholders without causing them undue harm within the meaning of Article 5(5) of Directive 2001/29.

18. The appellants in the main proceedings brought an appeal on a point of law against the judgment of the Gerechtshof te's-Gravenhage before the Hoge Raad der Nederlanden. The Stichting de Thuiskopie brought a cross-appeal before the Hoge Raad der Nederlanden.

III – The question referred for a preliminary ruling and the procedure before the Court

19. It was in those circumstances that the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following three questions to the Court for a preliminary ruling:

'(1) Should Article 5(2)(b) — whether or not read in conjunction with Article 5(5) — of Directive [2001/29] be interpreted as meaning that the limitation on copyright referred to therein applies to reproductions which satisfy the requirements set out in that provision regardless of whether the copies of the works from which the reproductions were made became available to the natural person concerned lawfully — that is to say, without infringing the copyright of the rightholders — or does that limitation apply only to reproductions made from works which have become available to the person concerned without infringement of copyright?

(2) (a) If the answer to question 1 is that expressed at the end of the question, can the application of the "three-step test" referred to in Article 5(5) of Directive [2001/29] form the basis for the expansion of the scope of the limitation referred to in Article 5(2), or can its application only lead to the restriction of the scope of the limitation?

(2) (b) If the answer to question 1 is that expressed at the end of the question, is a rule of national law which provides that, in the case of reproductions made by natural persons for private use and without any direct or indirect commercial objective, fair compensation is payable regardless of whether the making of those reproductions is authorised under Article 5(2) of Directive [2001/29], and which does not infringe the prohibition right of the rightholders and their entitlement to damages, contrary to Article 5 of [that directive], or to any other rule of EU law?

In the light of the "three-step test" of Article 5(5) of Directive [2001/29], is it relevant to the answer to that question that technological measures to combat the making of unauthorised private copies are not (yet) available?

(3) Is Directive 2004/48 applicable to proceedings such as these where — after a Member State has, on the basis of Article 5(2)b of Directive [2001/29], passed the obligation to pay the fair compensation referred to in that provision on to producers and importers of media suitable for and intended for the reproduction of works, and has determined that that fair compensation should be paid to an organisation designated by that Member State which has been charged with collecting and distributing the fair compensation — those liable to pay the compensation

bring a action for a declaration by the courts, in respect of certain contested circumstances which have a bearing on the determination of the fair compensation, against the organisation concerned, which defends that action?'

20. The appellants in the main proceedings, the Stichting de Thuiskopie, the Netherlands, Italian, Lithuanian and Austrian Governments and the European Commission have submitted written observations.

21. The appellants in the main proceedings, the Stichting de Thuiskopie, the Netherlands and Spanish Governments and the Commission also made oral submissions at the hearing on 9 October 2013.

IV – Preliminary observations

22. The first and second questions referred by the national court, which are closely connected,[20] in fact disclose several questions that call for a number of preliminary observations and might better be reformulated and reorganised.

23. By its first question, the Hoge Raad der Nederlanden asks the Court for interpretation of Directive 2001/29. It asks, in substance, whether the private copying exception provided for in Article 5(2)(b) of Directive 2001/29 applies to all reproductions, regardless of the lawfulness of their source (the first alternative), or whether, on the contrary, it may only apply to reproductions made from sources which are themselves lawful (the second alternative). It also asks whether Article 5(5) of Directive 2001/29 has any bearing on the interpretation of Article 5(2)(b) of that directive.

24. Next, by its second question, the national court asks two subsidiary questions in the event that the Court should interpret Article 5(2)(b) of Directive 2001/29 as applying only to reproductions made from lawful sources (the second alternative).

25. First, it asks (second question, part (a)) whether Article 5(5) of Directive 2001/29, which defines the 'three-step test', may enable the expansion of the scope of the private copying exception provided for in Article 5(2)(b) of the directive, or whether, on the contrary, it may only lead to its restriction.

26. Next, it asks the Court, in substance (second question, part (b)), about the compatibility with EU law, Directive 2001/29 itself and any other rule of law of a national provision under which, in respect of reproductions made by natural persons for private use and without any direct or indirect commercial objective, fair compensation is payable regardless of whether the making of those reproductions is authorised.

27. However, for reasons which I shall set out below, the first question and part (a) of the second question must necessarily be examined together because the provisions of Article 5(2)(b) and of Article 5 of Directive 2001/29 are themselves formally and inextricably linked and must be read and interpreted together and in dynamic fashion.

28. I shall therefore begin by considering the question whether Article 5 of Directive 2001/29, taken as a whole, may be interpreted as meaning that the private copying levy may be charged in respect of reproductions made from unlawful sources, that is to say, from sources that have not been produced or broadcast or communicated to the public with the consent of the holders of the exclusive right of reproduction (first question and second question, part (a)).

20 — The national court itself presents the answer to the second question as subsidiary to and conditional upon the answer to the first.

29. Since the answer to that question must, in my view, be in the negative, I shall then consider very briefly the question whether Article 5 of Directive 2001/29 may be interpreted as meaning that a Member State may *nevertheless*[21] decide to charge the private copying levy in respect of reproductions made from unlawful sources. The answer to that second question may, indeed, be fairly easily deduced from the indications provided as to how the first question might be answered.

30. Lastly, I shall answer very succinctly the third question raised by the national court, concerning the interpretation of Directive 2004/48.

V – The question whether the private copying levy may be charged in respect of reproductions made from unlawful sources (first question and second question, part (a))

A – *Summary of the observations made*

31. The appellants in the main proceedings, the Spanish, Italian and Lithuanian Governments and the Commission agree that, having regard to the letter, spirit and purpose of Directive 2001/29, the private copying exception provided for in Article 5(2)(b) of the directive cannot apply to reproductions made from unlawful sources.

32. First of all, Article 5(2)(b) makes no provision for such a possibility and, in so far as it constitutes an exception to the exclusive right of reproduction right guaranteed by Article 2 of the directive, it must be interpreted strictly, in conjunction with Article 5(5) of the directive.

33. Secondly, such a restrictive interpretation accords with the purpose of Directive 2001/29, and taking the contrary approach would be likely to upset the fair balance that must be maintained between the various rights and interests concerned. The fair compensation provided for in that provision is intended solely to compensate the harm sustained by rightholders 'as a result of the introduction' of the private copying exception, not the harm caused to rightholders by reproductions made from unlawful sources nor, *a fortiori*, the harm resulting from the upstream dissemination of unlawful copies of their works.

34. Moreover, whilst the Commission recognises that this restrictive interpretation could, paradoxically, work against the interests of rightholders in certain circumstances, it nevertheless considers that that fact cannot call the interpretation into question.

35. The respondents in the main proceedings and the Netherlands and Austrian Governments, on the other hand, submit, in substance, that neither the wording nor the general structure of Directive 2001/29 excludes the possibility of Member States applying the private copying exception to reproductions made from unlawful sources, which, on the contrary, accords with the directive's purpose and helps to maintain a fair balance between the rights and interests of rightholders on the one hand and users of protected works and other subject-matter on the other.

36. They argue, in this connection, that technological measures to combat the making of private copies from unlawful sources do not exist and that charging the private copying levy in respect of such reproductions contributes to the normal exploitation of reproduced works, within the meaning of Article 5(5) of Directive 2001/29, and thus constitutes the best way of guaranteeing the protection of the legitimate interests of rightholders, without contravening the three-step test.

21 — My emphasis.

B – *Analysis*

37. Given the very definite positions expressed by the appellants in the main proceedings, the Member States and the Commission regarding the principal issue raised by the first two questions of the national court, it is appropriate to begin by first of all recalling the precise nature of the private copying exception and of the fair compensation that accompanies it, as established by Article 5(2)(b) of Directive 2001/29. The interpretation of that provision is, however, inextricably linked to the interpretation of Article 5(5) of the directive.

1. The private copying exception under Directive 2001/29

38. Article 2 of Directive 2001/29 imposes on the Member States an obligation to provide for holders of copyright and of the related rights designated therein the exclusive right to authorise or prohibit the direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of protected subject-matter, that is to say, their works, phonograms, films and broadcasts.

39. Article 5(2)(b) of the same directive nevertheless allows the Member States the option of providing for exceptions to the exclusive right of reproduction referred to in Article 2.

40. Where it is implemented by a Member State, the private copying exception enables [22] *natural* persons in possession of works or other subject-matter protected by copyright or related rights to make a copy thereof for *private use* and for ends that are *neither directly nor indirectly commercial*. [23] Typically, the private copying exception is to enable the purchaser of an audio compact disc to make a copy of it which he can, for example, listen to on a digital music player.

41. Correlatively, the private copying exception affects the monopoly over making reproductions which rightholders enjoy, causing them harm to which they are deemed to consent in return for fair compensation. That compensation is intended to compensate rightholders adequately for the harm resulting from the reproduction of their protected works and other subject-matter, [24] rather than constitute any form of remuneration.

42. Lastly, the private copying exception, as a 'compensated exception' imposes on Member States an obligation not only to establish a level of fair compensation payable to rightholders, but also to recover that compensation effectively [25] and, most certainly, to ensure its distribution among rightholders.

43. The fair compensation must be financed by the natural person who causes the harm to the holder of the exclusive right of reproduction by making, without requesting prior authorisation, a reproduction of a protected work or other subject-matter for his private use for non-commercial ends. [26] However, for practical reasons, it is open to the Member States to impose a private copying levy on persons, such as the appellants in the main proceedings, which make available to the natural persons who are actually liable the media which they use to make their copies. Nevertheless, the fair

22 — Directive 2001/29 does not use the term 'right' in connection with private copying and thus does not enter into the debate in legal theory about the nature of the private copying exception. See, in particular, Sirinelli, P., *La reconnaissance d'une garantie d'exception privée*, Revue Lamy Droit de l'immatériel, October 2006, p. 21. See also the account given by More, K., op. cit., p. 85 et seq., who suggests that the private copying exception should be considered in terms of a 'legally protected legitimate interest'. I would observe in this connection that, in certain circumstances, Directive 2001/29 requires Member States that have elected to establish a private copying exception to adopt, within a reasonable period of time, measures enabling natural persons to benefit from the exception: see recital 52 of the preamble to and Article 6(4) of Directive 2001/29.

23 — My emphasis.

24 — See recital 32 of the preamble to Directive 2001/29 and *Padawan*, paragraphs 41 and 42.

25 — The obligation to levy the compensation is an obligation to achieve a certain result: see *Stichting de Thuiskopie*, paragraph 34.

26 — See *Padawan*, paragraphs 43 and 44.

balance which must be sought between rightholders and users of protected works and other subject-matter implies, first, that it must be possible to pass the actual burden of the levy on to such users [27] and, secondly, that it is only charged in respect of media that are made available to such users for their private use. [28]

44. In the final analysis, within such a system, the notion of fair compensation is based on the assumption that users of reproduction media will use those media for the purpose of making private copies of protected works and other subject-matter.

2. Preliminary remarks on the provisions of Article 5(2)(b) and Article 5 of Directive 2001/29

45. Before giving any specific answer to the questions raised by this case, it is necessary to examine the relationship between Article 5(2)(b) and Article 5(5) of Directive 2001/29, since the national court expressly asks whether those provisions must be read together.

46. Article 5(5) of the directive [29] makes the introduction of the exceptions referred to in Article 5(1) to (4), which include the private copying exception referred to in Article 5(2)(b), subject to the three conditions that they are only applied in certain special cases, that they do not conflict with a normal exploitation of the work and that they do not unreasonably prejudice the legitimate interest of the rightholder. [30]

47. Those three conditions, which are not otherwise defined in Directive 2001/29, are responsive — as is clear from recital 44 of the preamble to Directive 2001/29 — to the international obligations of the Member States of the Union and, more specifically, to the conditions for any limitation of copyright established by Article 9(2) of the Berne Convention, more commonly known as 'the three-step test', [31] an expression used by the national court in its request for a preliminary ruling, which are reproduced in Article 13 of the TRIPS Agreement and Article 10 of the WCT.

48. Contrary to what the national court seems to suggest with its first question, there is no alternative to the combined interpretation of the provisions of Article 5(2)(b) of Directive 2001/29 and Article 5 thereof. Whenever a national legislature implements the private copying exception it must, in all cases, do so in accordance with the requirements of Article 5(2)(b), but it must also, at the same time, satisfy the requirements laid down by Article 5(5) of Directive 2001/29, in accordance with international obligations. [32] That applies equally to the application by national courts of the private copying exception. Contrary to what the Netherlands Government argues, the provisions of Article 5(5) are not addressed solely to national legislatures.

49. Furthermore, and with reference to part (a) of the second question, the provisions of Article 5(5) of Directive 2001/29 cannot be interpreted as enabling the scope of the private copying exception established by Article 5(2)(b) thereof to be expanded; on the contrary, where they do have an effect, they inevitably contribute to the restriction of its scope and reach.

27 — Ibidem, paragraphs 46 to 49.

28 — Ibidem, paragraphs 51 to 59.

29 — See also Article 10(3) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), as amended by Article 11(1)(b) of Directive 2001/29,

30 — See *Stichting de Thuiskopie*, paragraphs 19 to 21.

31 — The conditions were already included in the Commission's proposals: see the Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of 10 December 1997, COM(1997) 628 final (OJ 1998 C 108, p. 6) and the Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 21 May 1999, COM(1999) 250 final (OJ 1999 C 180, p. 6).

32 — The connection between these two provisions is also clear from the second subparagraph of Article 6(4) of Directive 2001/29 and recital 52 of the preamble to the directive.

50. Indeed, the very precise framing of the exceptions to and limitations on the right of reproduction provided for in Article 5 of Directive 2001/29 may, in many respects, be regarded as the very implementation of the three-step test. [33]

51. The precise definition of the exceptions to and limitations on the right of reproduction given in Article 5 of Directive 2001/29, including the private copying exception, is, in any event, an attempt to specify the first condition of the three-step test, which concerns the limitation of their application to special cases. I would observe in this connection that the restriction of the private copying exception to natural persons and to personal, non-commercial ends, which is imposed by Article 5(2)(b) of Directive 2001/29, merely reinforces that condition.

52. In similar vein, recital 38 of the preamble to Directive 2001/29 states that, whilst the Member States should be allowed to apply, in return for compensation, the private copying exception to certain types of reproduction of audio, visual and audio-visual material for private use, due account must nevertheless be taken of the differences between digital private copying and analogue private copying, and a distinction should be drawn in certain respects between them, inasmuch as digital private copying is likely to be more widespread and to have a greater economic impact.

53. The private copying exception, which is certainly one of the 'cases' of exception to the exclusive right of reproduction provided for in Article 2 of Directive 2001/29, must therefore be formulated by the Member States and applied by national courts with account being taken of the implications which flow from the restriction of its scope of application to special cases. [34]

54. Similarly, as the Court has already held, where they decide to introduce the private copying exception into their national law, the Member States are required to provide for the payment of fair compensation to rightholders. The private copying exception cannot be introduced without fair compensation being provided for and effectively collected. The compensation required by Article 5(2)(a) of Directive 2001/29 relates to the third condition of the three-step test, which concerns the need to avoid causing unreasonable harm to the legitimate interests of copyright holders, referred to in Article 5(5) of Directive 2001/29. [35]

55. On the other hand, it must be observed that Directive 2001/29 contains no express reference to the second condition contemplated by Article 5(5) of Directive 2001/29, pursuant to which any exception to or limitations on the exclusive right of reproduction must not conflict with the *normal exploitation* [36] of protected works or other subject-matter. The present case therefore provides the Court with an opportunity to give a ruling on this point, [37] drawing, as far as possible, on international practice. [38]

33 — See, to that effect, More, K., op. cit., p. 48 et seq.; Senftleben, M., 'Ni flexibilité ni sécurité juridique — Les exceptions au regard du triple test', in Lucas., A., and others, *Les exceptions au droit d'auteur — État des lieux et perspectives dans l'Union européenne*, Dalloz, 2012, p. 63.

34 — See, to that effect, Gaubiac, Y., 'La copie privée est-elle un cas spécial?', in *Droit et technique, Études à la mémoire du professeur Xavier Linant de Bellefonds*, Lexis Nexis, 2007, p. 181.

35 — *Stichting de Thuiskopie*, paragraph 22.

36 — My emphasis.

37 — On the controversy surrounding the interpretation of the three-step test and, in particular, the question whether the conditions thereof are to be regarded as cumulative, a point which it is not necessary to consider in this case, see, in particular, Ficsor, M., 'Le test des trois étapes : pourquoi on ne signe pas la Déclaration de Munich', in Lucas, A. and others, *Les exceptions au droit d'auteur — État des lieux et perspectives dans l'Union européenne*, Dalloz, 2012, p. 55.

38 — One might cite, in particular, the WTO report of the Panel on *United States — Section 110(5) of the US Copyright Act of 15 June 2000*, WT/DS160/R. The report states (§ 6.181) that 'exceptions or limitations [are] presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition with non-exempted uses'. In particular, the report mentions the suggestions made by a study group convened to prepare the Conference for the Revision of the Berne Convention held in Stockholm in 1967, according to which 'it was obvious that all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors; exceptions that might restrict the possibilities open to the authors in these respects were unacceptable'.

56. It is in light of those remarks that it is appropriate to give a specific answer to the first question asked by the national court.

3. The limitation of the scope of the private copying exception to reproductions made from lawful sources

57. It must be observed first of all that Article 5 of Directive 2001/29 contains no express indication as to whether the private copying exception may apply to all reproductions irrespective of whether they are made from lawful sources or unlawful sources, or whether, on the contrary, the exception may apply only to reproductions made from lawful sources. Moreover, as the Court has already pointed out, neither Article 2 of the directive nor any other of its provisions defines the concept of 'reproduction' [39] mentioned in Article 2, or indeed the concepts of 'reproduction in part', [40] 'remuneration', [41] 'equitable remuneration' [42] or 'fair compensation' [43] mentioned in Article 5 of the directive, or 'communication to the public' mentioned in Article 3(1) of the directive, [44] or the expression 'by means of their own facilities', which appears in Article 5(2)(d) of the directive. [45]

58. Moreover, since those provisions make no express reference to the laws of the Member States for the purpose of determining their meaning and scope, both the uniform application of EU law and the principle of equality [46] require that the concept be given an autonomous and uniform interpretation throughout the European Union, [47] which must take into account not only the wording of the provisions which employ it, but also the context in which those provisions appear and the purpose of the legislation of which they are a part, [48] and even the provisions of relevant EU law as a whole. [49] The origins of the provisions may also provide information relevant to their interpretation. [50]

59. Moreover, European Union legal acts must, as far as possible, be interpreted in a manner that is consistent with international law, [51] in particular where they are intended specifically to give effect to an international agreement concluded by the Community. [52]

39 — See Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 31, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 154.

40 — See *Infopaq International*, paragraphs 27 to 29 and 31 et seq.

41 — See Case C-271/10 *VEWA* [2011] ECR I-5815, paragraph 25.

42 — See Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 24.

43 — See *Padawan*, paragraphs 29 to 32.

44 — See Case C-306/05 *SGAE* [2006] ECR I-11519, paragraphs 31 and 33 et seq.; *Football Association Premier League and Others*, paragraph 184; and Case C-283/10 *Circul Globus București* [2011] ECR I-12031, paragraphs 31 and 32.

45 — See *DR and TV2 Danmark*, paragraph 34.

46 — See Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; *Infopaq International*, paragraph 27; *VEWA*, paragraph 25; and *DR and TV2 Danmark*, paragraph 33.

47 — The Court has already held in this connection that those considerations are of particular importance with respect to Directive 2001/29, in the light of the wording of recitals 6 and 21 in the preamble to the directive; see *Infopaq International*, paragraph 28. Uniform interpretation is also a requirement for the coherent application by the Member States of the exceptions to and limitations on Directive 2001/29 to which recital 32 refers; see *Padawan*, paragraph 35.

48 — See, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12.

49 — See, to that effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 20, and Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2013] ECR, paragraph 50.

50 — See, to that effect, Case C-370/12 *Pringle* [2012] ECR, paragraph 135, and *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, paragraph 50. See also *Circul Globus București*, paragraphs 34 and 35.

51 — See, in particular, *Infopaq International*, paragraph 32, and Case C-128/11 *UsedSoft* [2012] ECR, paragraph 42.

52 — See, in particular Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, paragraph 30; and *SGAE*, paragraph 35.

60. Recital 15 of the preamble to Directive 2001/29 states, in this connection, that the directive is intended to implement the international obligations arising from the European Union's adoption of the WCT, [53] in particular as regards the means to fight piracy worldwide in the digital age. Moreover, the Court has held that, within the scope of Directive 2001/29, the European Union has taken the place of the Member States in the implementation of the provisions of the Berne Convention. [54]

61. In this instance, Directive 2001/29 defines the scope of the acts covered by the right of reproduction [55] and gives an exhaustive list of the exceptions to and limitations on that right. [56] It also states that the Member States should be allowed to provide for an exception to or limitation on the right of reproduction for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation, [57] specifying, as I have already mentioned, that they must take due account both of the differences between digital private copying and analogue private copying, [58] and of technological and economic developments, where effective technological protection measures exist. [59]

62. The directive also states that the fair compensation referred to in Article 5(2)(b) thereof is intended to compensate rightholders 'adequately' for *the use* which is made of their protected works or other subject-matter pursuant to and by application of the private copying exception. [60] In addition, when determining the form, the detailed arrangements for and possible level of the fair compensation, account must be taken of the particular circumstances of each case, which may be evaluated on the basis of the possible harm suffered by rightholders. [61]

63. It may therefore be deduced from the wording of Directive 2001/29 that it is the maintaining or the introduction by the Member States of the private copying exception that gives rise to the harm caused to rightholders which the fair compensation is intended to compensate adequately. [62] By contrast, there is no express indication as to whether the exception may apply only to reproductions made from lawful sources or also to reproductions made from unlawful sources.

64. However, contrary to what the Netherlands Government argues, that lack of precision cannot be interpreted as expressing a deliberate intention [63] on the part of the EU legislature to provide for the levying of fair compensation in respect of reproductions made from unlawful sources. That intention is not borne out by Directive 2001/29 and, more fundamentally, would conflict with the provisions of Article 5(5) of the directive and the conditions of the three-step test laid down in that provision in accordance with the international obligations of the Union and of the Member States.

53 — See Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraph 39.

54 — See *DR and TV2 Danmark*, paragraph 31.

55 — See recital 21 of the preamble to and Article 2 of Directive 2001/29.

56 — See recital 32 of the preamble to and Article 5 of Directive 2001/29.

57 — See recital 38 of the preamble to Directive 2001/29.

58 — Idem.

59 — See recital 39 of the preamble to Directive 2001/29.

60 — See recitals 35 and 38 of the preamble to Directive 2001/29. My emphasis.

61 — It is for that reason that the Court has held that the fair compensation referred to in Article 5(2)(b) of Directive 2001/29 must *necessarily* be calculated on the basis of the harm caused to authors of protected works *by the introduction of the private copying exception*; see *Padawan*, paragraphs 38 to 42. My emphasis.

62 — That is also precisely what the Conseil d'État held, in France, with regard to Articles L. 122-5 and L. 311 of the Intellectual Property Code, which transpose Article 5(2)(b) of Directive 2001/29: 'the sole purpose of the compensation in respect of private copying is to compensate authors, performers and producers for the loss of revenue caused by the use which is made lawfully but without their authorisation of copies of works recorded on sound or image recording media for strictly private purposes'; see the judgment of the Conseil d'État of 11 July 2008 in Syndicat de l'industrie de matériels audiovisuels, No 298779, ECLI:FR:CESSR:2008:298779.20080711, RIDA, July 2008, No 217, p. 279. On the repercussions of that judgment, see Sirinelli, P., *Chronique de jurisprudence*, op. cit., p. 275.

63 — Nor is there any indication of such an intention in the preparatory work for the adoption of Directive 2001/29.

65. In order to establish that deliberate intention on the part of the EU legislature, the Netherlands Government refers to the wording of Article 5(3)(d) of Directive 2001/29, which does mention the lawfulness of the sources of reproductions, and to the wording of Article 5(3)(e) [64] and of the second subparagraph of Article 6(4) of the directive, which do not, and also to Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. [65]

66. Article 5(3)(d) of Directive 2001/29 enables Member States to provide for an exception to the right of reproduction for quotations for purposes such as criticism or review, but only provided that, amongst other things, the protected work or other subject-matter has already been made available to the public lawfully.

67. Article 5(3)(e) of Directive 2001/29, on the other hand, provides for an exception to the exclusive right of reproduction for uses of protected works and other subject-matter for the purposes of public security or to ensure the proper performance of administrative, parliamentary or judicial proceedings, without mentioning the lawfulness of the sources.

68. Article 6(4) of Directive 2001/29 makes general provision for the Member States, in the absence of relevant voluntary measures taken by rightholders, to take appropriate measures to ensure that beneficiaries of the exceptions and limitations provided for in Article 5 may benefit from them. However, the second subparagraph of Article 6(4), which relates solely to the private copying exception, differs from the first subparagraph [66] in that it makes no reference to the lawfulness of the access to the protected work or other subject-matter.

69. Lastly, Directive 91/250 lays down the principle that the author of a computer program has an exclusive right to authorise or prohibit the reproduction thereof, whilst providing for an exception for the purposes of making a back-up copy, from which only 'the lawful acquirer' may benefit. [67]

70. Nevertheless, the scope and reach of the private copying exception cannot be defined by reference to provisions which apply in entirely different contexts and which pursue ends that are peculiar to them.

71. It is important, in this connection, to recall that, in accordance with settled case-law, Article 5(2)(b) of Directive 2001/29 must, as an exception [68] to the rightholder's exclusive right of reproduction enshrined by Article 2 of the directive, be interpreted strictly. The scope of application of the private copying exception cannot, therefore, be extended to situations that are not expressly provided for in Directive 2001/29. [69]

72. In any event, the interpretation advocated by the Netherlands Government conflicts with the provisions of Article 5(5) of Directive 2001/29, as interpreted in light of the Berne Convention, the WCT and the TRIPS Agreement and, in particular, with the condition that there must be no conflict with the normal exploitation of the protected work or other subject-matter.

64 — Article 5(3)(e) of Directive 2001/29 provides for an exception to the exclusive right of reproduction for uses of protected works and other subject-matter for the purposes of public security or to ensure the proper performance of administrative, parliamentary or judicial proceedings, without mentioning the lawfulness of the sources.

65 — OJ 1991 L 122, p. 42.

66 — The first subparagraph relates to the exceptions referred to in Article 5(2)(a), (c), (d) and (e) and Article 5(3)(a), (b) and (e) of Directive 2001/29.

67 — In other legal acts, reference is also made to the 'lawful user': see recitals 49 and 51 of the preamble to and Article 6 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

68 — See, in particular, *Infopaq International*, paragraph 55 and the case-law cited.

69 — See, on the exceptions to the right of reproduction provided for by Directive 2001/29, *Luksan*, paragraph 101. See also, in other domains, Case C-476/11 *HK Danmark* [2013] ECR, paragraphs 46 and 47, and Case C-546/11 *Dansk Jurist- og Økonomforbund* [2013] ECR, paragraphs 41 and 42.

73. The Stichting de Thuiskopie and the Netherlands and Austrian Governments argue in this regard, in substance, that legislation authorising the collection of a private copying levy in respect of reproductions made from unlawful sources is, in the absence of any reliable technological measures effectively to prevent the publication or dissemination of such unlawful sources and their endless reproduction, particularly in the digital age, the only means of compensating the harm suffered by rightholders. Legislation of that kind contributes far more to the normal exploitation of protected works and other subject-matter than legislation prohibiting the making of reproductions from unlawful sources and ensures a balance between the rights of rightholders and those of the users of protected works and other subject-matter.

74. Even if legislation of that kind could, in absolute terms, constitute a legitimate and adequate response to the infringement of copyright and related rights arising from the unlawful dissemination of copies of protected works and other subject-matter, it is nevertheless beyond dispute that the private copying exception was not introduced with that aim in mind and it cannot be turned to that purpose without calling into question the very basis on which it rests, regardless of the existence or otherwise of technological measures that can effectively combat the making and dissemination of unlawful copies of protected works and other subject-matter.

75. In this connection, it must be observed, first of all, that the root of the Netherlands Government's argument may be found in the fact that Netherlands law tolerates the downloading of protected works and other subject-matter that have been made available on the Internet unlawfully and only punishes the uploading of such works and other subject-matter. By so doing the Kingdom of the Netherlands is indirectly but necessarily facilitating the mass dissemination of material resulting from a type of exploitation of protected works and other subject-matter that can in no way be considered normal and that is in fact the very cause of the harm to rightholders whose effects that Member State is seeking to compensate. Treating as commonplace the downloading of protected works and other subject-matter disseminated unlawfully on the Internet (uploaded) can only be in conflict with the normal exploitation of such works.

76. Furthermore, it is questionable whether the imposition of the private copying levy, in its present form, could compensate to any sufficient degree the loss of earnings caused to rightholders by the mass dissemination on the Internet of their protected works and other subject-matter in breach of their exclusive rights of reproduction, communication to the public [70] and distribution. [71]

77. Without fundamentally redefining the very rationale for the private copying exception and the principals underlying the determination of the fair compensation that must accompany it, with all the consequences that that would entail, the income generated by the private copying levy cannot compensate the loss of revenue which would be caused by the normal exploitation on the Internet of the works of rightholders. It would probably be necessary, among other things, to increase considerably the amount of the levy which every user of media would have to pay, regardless of whether or not he ever made reproductions from unlawful sources, at the risk of jeopardising the balance between the rights of rightholders and those of users of protected works and other subject-matter.

78. The idea advanced by the Netherlands Government that the imposition of the private copying levy in respect of reproductions made from unlawful sources would, furthermore, better protect the right to privacy of users of protected works and other subject-matter than the institution of measures to monitor the private use of the works of rightholders by such users [72] and would ensure a better

70 — See Article 3 of Directive 2001/29.

71 — See Article 4 of that directive.

72 — It may be argued that the private copying exception was introduced for the specific purpose of removing from the scope of the rightholder's monopoly copies made by users which it would be impossible to object to without seriously impinging on the user's right to privacy: see Gaubiac, op. cit., and More, K., op. cit., p. 79 et seq.

balance between respective rights, cannot undermine that interpretation of Article 5 of Directive 2001/29. I would simply observe in this connection that there is no necessary link between excluding the application of the private copying exception to reproductions made from unlawful sources and the possible infringement of the right to privacy of users.[73]

79. Consequently, I propose that the Court answer the first question and part (a) of the second question asked by the national court by holding that Article 5 of Directive 2001/29 is to be interpreted as meaning that the private copying exception provided for therein does not apply to reproductions of works and other subject-matter protected by copyright and other related rights that are made from unlawful sources.

VI – The question whether a Member State may decide to charge the private copying levy in respect of reproductions made from unlawful sources (second question, part (b))

80. In part (b) of its second question the national court asks, in substance, whether the adoption by a Member State of a provision of national law which requires fair compensation to be levied in respect of private copying regardless of whether the reproductions so made are lawful or not is consistent with EU law.

81. It follows from the foregoing reasoning that that option is not available.

82. First of all, independently of the question whether Directive 2001/29 brought about full harmonisation of the private copying exception,[74] that possibility would have an appreciable effect on one of the objectives pursued by Directive 2001/29, which relates to the coherent application of the exceptions to and limitations on the exclusive right of reproduction which it exhaustively enumerates.[75] The Court has already held, in this regard, that it would undermine that objective if the Member States were free to determine the limits of the fair compensation in an inconsistent and un-harmonised manner.[76] Any such measure would, as the Commission observes, amount to the introduction of a sui generis form of compensation in respect of reproductions made from unlawful sources.

83. Secondly, and more importantly, admitting that possibility would contravene the requirements of Article 5(5) in two respects. First, it would extend the scope of the private copying exception far beyond the special cases defined by the directive, and thus breach the first condition laid down by that provision. Secondly, it would indirectly legitimise the grave interference with the normal exploitation of protected works and other subject-matter, in complete disregard of the second condition laid down in the provision, and thus upset the fair balance which that provision establishes between the exclusive right of reproduction of rightholders and the beneficiaries of the private copying exception.

84. Consequently, I propose that the Court should answer part (b) of the second question asked by the national court by holding that, with regard to the private copying exception which the Member States are authorised to provide for pursuant to Article 5 of Directive 2001/29, a Member State may not charge the levy which must accompany that exception in respect of reproductions or works and other subject-matter protected by copyright or related rights that are made from unlawful sources.

73 — Furthermore, the Court has already held that Directive 2001/29 does not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings; see Case C-275/06 *Promusicae* [2008] ECR I-271.

74 — See, on this point, the divergent views of Advocate-General Trstenjak (points 102 to 106 of his Opinion in *Padawan*) and Advocate-General Jääskinen (point 44 of his Opinion in *Stichting de Thuiskopie*).

75 — See recital 32 of the preamble to Directive 2001/29.

76 — See *Padawan*, paragraph 36.

VII – The question whether Directive 2004/48 applies in the case in the main proceedings (third question)

85. By its third question the national court asks, in substance, whether Directive 2004/48, and in particular Article 14 thereof,[77] applies in the case in the main proceedings.

86. In its order for reference, the national court states that, in its cross-appeal on a point of law, the Stichting de Thuiskopie has applied for the whole of its costs to be paid on the basis of Article 1019h of the Code of Civil Procedure, which is itself based on the provisions of Article 14 of Directive 2004/48. Whilst, admittedly, the claims which the Stichting de Thuiskopie makes do not appear to arise from the infringement of intellectual property rights within the meaning of Article 2(1) of that directive, the fact remains that, by extension of the idea that Article 5 of Directive 2001/29 applies to reproductions made from unlawful sources, it is in some way seeking to defend those rights.

87. With the exception of the Stichting de Thuiskopie, all the parties which have submitted observations take the view that Directive 2004/48 does not apply in the case in the main proceedings.

88. It must be recalled in this connection that, given its subject-matter[78] and scope,[79] the general aim of Directive 2004/48 is to approximate the legislative systems of the Member States so as to ensure a high, equivalent and homogeneous level of protection in the internal market.[80] It is not, however, intended to govern all aspects of intellectual property rights, but only those related to, first, the enforcement of those rights and, secondly, to infringement of them, by requiring that there must be effective legal remedies designed to prevent, terminate or rectify any infringement of an existing intellectual property right.[81]

89. To this end, Article 14 of Directive 2004/48 aims to strengthen the level of protection of intellectual property, by avoiding the situation in which an injured party is deterred from bringing legal proceedings in order to protect his rights,[82] which implies that the author of the infringement of the intellectual property rights must generally bear all the financial consequences of his conduct.[83]

90. Whilst the dispute in the main proceedings admittedly concerns, in the most general terms, the defence of the interests of proprietors of rights, in the sense that it concerns the scope of the private copying exception provided for by Article 5(2)(b) of Directive 2001/29, the claim which is at the origin of that dispute nevertheless falls entirely outside the scope of Directive 2004/48. Indeed, the application at the origin of the present dispute was brought not by proprietors of rights[84] seeking to defend those rights,[85] but by economic operators called upon to pay the levy established by a Member State to constitute fair compensation for the private copying exception which it has introduced.

91. Consequently, I propose that the Court should answer the third question asked by the national court by holding that Article 14 of Directive 2004/48 is to be interpreted as not applying to a dispute such as that in the main proceedings which does not concern the defence, as such, of rights by the proprietors of those rights.

77 — Article 14, entitled 'Legal costs' provides that 'Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this'.

78 — Article 1 of Directive 2004/48 states that it 'concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights'.

79 — Article 2(1) of Directive 2004/48 states that it applies 'to any infringement of intellectual property rights', whether the infringement is provided for by EU law or by the national law of a Member State.

80 — See Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 47.

81 — Case C-180/11 *Bericap Záródástechnikai* [2012] ECR, paragraph 75.

82 — See *Realchemie Nederland*, paragraph 48.

83 — Idem, paragraph 49.

84 — See *Bericap Záródástechnikai*, paragraph 78.

85 — Idem, paragraph 79.

VIII – Conclusion

92. In light of the foregoing analysis, I propose that the Court should answer the questions referred by the Hoge Raad der Nederlanden for a preliminary ruling in the following manner:

(1) Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society is to be interpreted as meaning that the private copying exception provided for therein does not apply to reproductions of works and other subject-matter protected by copyright and other related rights that are made from unlawful sources.

(2) Article 5 of Directive 2001/29 is to be interpreted as meaning that, with regard to the private copying exception which the Member States are authorised to provide for pursuant to that provision, a Member State may not charge the levy which must accompany that exception in respect of reproductions or works and other subject-matter protected by copyright or related rights that are made from unlawful sources.

(3) Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights is to be interpreted as not applying to a dispute such as that in the main proceedings which does not concern the defence, as such, of rights by the proprietors of those rights.