Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 18 June 2014[1]

Case C-463/12

Copydan Båndkopi
v
Nokia Danmark A/S

(Request for a preliminary ruling from the Østre Landsret (Denmark))

(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(2)(b) — Article 5(5) — Exceptions and limitations — Private copying exception — Fair compensation — Scope — National legislation providing for collection of the private copying levy on removable reproduction media intended to finance fair compensation — Application to mobile telephone memory cards — Exclusion of removable reproduction media — Principle of consistency — Effect of the primary function of memory cards — Effect of minimal prejudice — Effect of the existence of authorisation to reproduce, with or without remuneration — Effect of the application of effective technological protection measures — Effect of the unlawfulness of the source of the reproduction — Person responsible for payment of the levy intended to finance compensation)

1. In the present case a number of questions are referred to the Court for a preliminary ruling concerning 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,[2] which relate to very different aspects of that directive and which, therefore, if they are admissible, provide the Court with an opportunity to develop and refine its case-law substantially.

2. The main question raised in the dispute in the main proceedings is whether the private copying levy introduced by the national legislation at issue, which is intended to finance the fair compensation required by Article 5(2)(b) of Directive 2001/29 as recompense for the exception to the exclusive reproduction right enjoyed by rightholders, may be charged on mobile telephone memory cards. However, it is not so much the collection of the private copying levy per se which causes a problem as the fact that the levy may be charged on such memory cards but not on other media such as MP3 players or iPods, and the 'inconsistent' or even 'arbitrary' nature of the levy in the light of the objectives of Directive 2001/29.

1 — Original language: French.
2 — OJ 2001 L 167, p. 10.

3. The questions referred by the Østre Landsret (court of appeal of the Eastern Region of Denmark), however, go well beyond this central problem and tackle in very general terms some of the thorniest, and sometimes controversial, aspects of implementing the private copying exception introduced by Article 5(2)(b) of Directive 2001/29, touching on some general aspects of the scheme or on the detailed arrangements for collecting the levy.

4. The Court will thus be called upon to examine, inter alia: whether the private copying levy may be charged on reproductions authorised by the rightholders in return for remuneration; whether it may be charged on copying for private use from sources belonging to third parties or from unlawful sources; whether the existence and/or use of effective technological protection measures have any effect in that regard; and whether Member States may collect the private copying levy where the prejudice caused to rightholders is minimal.

I – **Legal context**

A – *EU law*

5. It is essentially the provisions of Article 5(2)(b) of Directive 2001/29 which require an interpretation in the present case. Those provisions read as follows:

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

…

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

…’

6. The main recitals in the preamble to Directive 2001/29 that are relevant for resolving the dispute in the main proceedings will be cited in the course of the following reasoning, as necessary.

B – *Danish law*

7. Introduced into Danish law in 1992, the private copying levy system is governed by Sections 12 and 39 of Decree No 202 of 27 February 2010 on copyright (ophavsretsloven, ‘Decree No 202’).

8. Section 12 of Decree No 202 provides:

‘1. Any person is entitled to make, or have made, for private purposes, single copies of works which have been made public. Such copies must not be used for any other purpose.

2. The provisions of paragraph 1 do not confer the right to:

…

(4) make copies in digital form of other works if the copy is made on the basis of a work produced in digital form; or

(5) make a single copy in digital form of works other than computer programmes and works in digital form unless this is done exclusively for the personal use of the person making the copy or members of that person's household.

3. Notwithstanding the provision in paragraph (2)(5), the production of copies in digital form on the basis of a copy that has been lent or hired shall not be permitted without the consent of the author.

4. The provisions of paragraph 1 do not confer a right to engage another person to make copies of:

(i) musical works;

(ii) cinematographic works;

…'

9. Section 39 of Decree No 202, entitled 'Remuneration for reproduction for private use', reads:

'1. Any person who, for commercial purposes, produces or imports audio tapes or videotapes or other media on which sound or images may be recorded shall pay remuneration to the authors of the works mentioned in paragraph 2.

2. Remuneration shall be paid for tapes, etc., which are suitable for the production of copies for private use, and only for works broadcast on radio or television, or which have been published on phonogram, film, videogram, etc.

…'

10. Section 40 of Decree No 202 reads:

'1. For 2006, the remuneration per minute playing time for analogue audio tapes shall be DKK 0.0603 and for analogue videotapes DKK 0.0839.

2. For 2006, the remuneration for digital sound media shall be DKK 1.88 per unit, for digital image media DKK 3 per unit, and for memory cards DKK 4.28 per unit.

…'

II – **The facts in the main proceedings**

11. Copydan Båndkopi is a body representing holders of rights in audio and audiovisual works, approved by the Danish Ministry of Culture to collect, administer and distribute the private copying levy provided for in Section 39 of Decree No 202.

12. Nokia Danmark A/S ('Nokia Danmark') sells mobile telephones and mobile telephone memory cards to business customers in Denmark, who sell them on to other businesses or individuals.

13. Taking the view that all types of mobile telephone memory cards fall within the scope of the private copying levy scheme, Copydan Båndkopi brought an action against Nokia Danmark before the referring court on 19 April 2010 requesting that that company be ordered to pay Copydan Båndkopi, under Section 39 of Decree No 202, the sum of DKK 14 826 828,99 by way of the private copying levy due in respect of the mobile telephone memory cards which it imported and sold in Denmark between 2004 and 2009.

III – **The questions referred for a preliminary ruling and procedure before the Court of Justice**

14. Nokia Danmark having proposed that a reference should be made to the Court for a preliminary ruling, the Østre Landsret decided to grant its request and, by order of 10 October 2012, received at the Court on 16 October 2012, to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with Directive [2001/29] for a national law to provide that compensation is to be paid to rightholders for reproductions made using the following sources:

(a) files where the rightholder has consented to the use in question and for which the customer has paid a levy (licensed content from online trading sites, for example);

(b) files where the rightholder has consented to the use in question and for which the customer has not paid the levy (licensed content, for example, in connection with commercial offers);

(c) the user's own DVD, CD, MP3 player, computer, etc., where effective technological measures have not been applied;

(d) the user's own DVD, CD, MP3 player, computer, etc., where effective technological measures have been applied;

(e) a third party's DVD, CD, MP3 player, computer, or other device;

(f) works copied unlawfully from the internet or other sources;

(g) files copied lawfully by some other means from, for example, the internet (from lawful sources where no licence has been granted)?

(2) How must a Member States' legislation on fair compensation (see Article 5(6)(b) of Directive 2001/29) take account of effective technological measures (see Article 6 of that directive)?

(3) For the purpose of calculating compensation for private copying (see Article 5(2)(b) of Directive 2001/29), what constitutes "certain situations where the prejudice to the rightholder would be minimal", as referred to in recital 35 in the preamble to the directive, with the result that it would not be compatible with the directive for Member States to enact legislation which provides for compensation to be paid to rightholders for such copying for private use (see, in this connection, the survey referred to in part 2 [of the order for reference])?

4. (a) If it is accepted that the primary or essential function of mobile telephone memory cards is not private copying, is it compatible with Directive [2001/29] for Member States to enact legislation which provides for compensation to be paid to rightholders for copying on mobile telephone memory cards?

(b) If it is accepted that private copying is one of the primary or essential functions of mobile telephone memory cards, is it compatible with Directive [2001/29] for Member States to enact legislation which provides for compensation to be paid to rightholders for copying on mobile telephone memory cards?

5. Is it compatible with the concept of "fair balance" in recital 31 in the preamble to that directive and with the uniform interpretation of the concept of "fair compensation" in Article 5(2)(b) of the directive, which must be based on "prejudice", for Member States to enact legislation under

which a levy is charged on memory cards, whereas no levy is charged in respect of internal memory such as [that of] MP3 players or iPods, which are designed and primarily used for storing copies made for private use?

6. (a) Does Directive [2001/29] preclude Member States from enacting legislation which provides that a producer and/or importer who sells memory cards to business customers, who in turn sell them on to both individuals and business customers, without the producer's and/or importer's having knowledge of whether the memory cards are sold to individuals or business customers, are required to pay a private copying levy?

(b) Is the answer to question 6(a) affected if provisions are laid down in a Member State's legislation under which producers, importers and/or distributors do not have to pay a levy on memory cards used for business purposes, producers, importers and/or distributors who have nevertheless paid the levy are entitled to reimbursement of the levy paid in respect of memory cards used for business purposes, and producers, importers and/or distributors may sell memory cards to other undertakings registered with the organisation responsible for administering the levy scheme, without having to pay the levy?

(c) Is the answer to questions 6(a) and 6(b) affected:

(1) if provisions are laid down in a Member State's legislation under which producers, importers and/or distributors do not have to pay a levy on memory cards used for business purposes, where the concept of "use for business purposes" is interpreted as conferring a right of deduction applicable only to undertakings approved by Copydan, whereas the levy must be paid in respect of memory cards used for business purposes by business customers who are not approved by Copydan;

(2) if provisions are laid down in a Member State's legislation under which, if producers, importers and/or distributors, have nevertheless paid the levy (theoretically), the levy may be reimbursed in respect of memory cards in so far as they are used for business purposes, where:

— in practice, it is only the purchaser of the memory card who may obtain reimbursement, and

— the purchaser of memory cards must submit an application for reimbursement of the levy to Copydan;

(3) if provisions are laid down in a Member State's legislation under which producers, importers and/or distributors may sell memory cards to other undertakings registered with the organisation responsible for administering the levy scheme, without paying the levy, where

— Copydan is the organisation responsible for administering the levy scheme and

— the registered undertakings have no knowledge of whether the memory cards have been sold to individuals or business customers?'

15. Copydan Båndkopi and Nokia Danmark, the French, Italian, Netherlands, Austrian, Finnish and United Kingdom Governments and the European Commission submitted written observations.

16. Copydan Båndkopi and Nokia Danmark, the French, Netherlands, Austrian, and United Kingdom Governments and the Commission also submitted oral observations at the public hearing which took place on 16 January 2014. At the request of the Court, they were given the opportunity to express their views at that hearing on the effect, as regards the answers to be given to the questions raised, of the judgments in *VG Wort*[3] and *Amazon.com International Sales and Others*.[4]

IV – **Preliminary observations**

17. The various questions from the referring court raise three main groups of questions, which need to be prioritised and reorganised, and to some extent simplified.

18. In the first group of questions (questions 4 and 5), which relate specifically to mobile telephone memory cards in direct relation to the facts of the dispute in the main proceedings and which will be examined first of all, the referring court asks the Court essentially about the principle of charging the private copying levy on mobile telephone memory cards.

19. In the main proceedings, Copydan Båndkopi seeks payment from Nokia of the outstanding amount of the private copying levy on the mobile telephone memory cards which the latter imported between 2004 and 2009, and Nokia contests this claim on a number of points. The main issue raised in the main proceedings is therefore whether the private copying levy may be charged on multifunctional equipment such as mobile telephone memory cards, given that, under Danish law, it is usually charged on removable recording media (CD ROMs, DVDs) but not on equipment with integral (non-removable) storage capacity, primarily MP3 players and other iPods.

20. In the second group of questions (questions 1 to 3), which do not refer specifically to mobile telephone memory cards and will be examined secondly, the referring court asks the Court in much more general terms about the effects on the private copying levy scheme of various factors, which it sets out, concerning the source of copies made for private use, the existence and/or use of technological protection measures, and the extent of the harm caused to rightholders.

21. Lastly, in the third group of questions, the referring court asks the Court to give it some guidance with regard to the rules under which the private copying levy may be charged (question 6).

V – **The principle of charging the private copying levy on mobile telephone memory cards (questions 4 and 5)**

22. In questions 4 and 5, the referring court asks the Court, in essence, whether Directive 2001/29 should be interpreted as precluding a Member State from making provision for charging the private copying levy on mobile telephone memory cards, where some storage media, such as MP3 players and iPods, do not attract that levy. It asks whether, from that point of view, it is necessary to take the primary or essential function of such memory cards into consideration.

A – *The principles established by the case-law of the Court*

23. As a preliminary point, it must be noted that under Article 2 of Directive 2001/29 Member States are to grant to the rightholders referred to in that provision the exclusive right to authorise or prohibit direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of their works.

3 — C-457/11 to C-460/11, EU:C:2013:426.

4 — C-521/11, EU:C:2013:515.

24. However, under Article 5(2)(b) of that directive, Member States may provide for an exception or limitation to that exclusive reproduction right, inter alia, in respect of reproduction on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, that is the so-called 'private copying' exception.

25. Article 5(5) of that directive nevertheless makes the introduction of the private copying exception subject to three conditions, that is, first, that the exception applies only in certain special cases, second, that it does not conflict with normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder. [5]

26. The Court has held in that regard that if the Member States decide to introduce the private copying exception into their national law they are not only required to provide, in application of Article 5(2)(b) of Directive 2001/29, for the payment of 'fair compensation' to holders of the exclusive reproduction right, [6] but, in order to ensure that that provision is not deprived of all practical effect, they are also under an obligation to achieve a certain result, that is to say, they must ensure, within the framework of their competences, that fair compensation intended to compensate the authors harmed for the prejudice sustained is actually collected. [7]

27. It is apparent from recitals 35 and 38 in the preamble to Directive 2001/29, as interpreted by the Court, that the purpose of the fair compensation provided for in Article 5(2)(b) is to compensate adequately for the harm suffered by the authors of protected works from the reproduction of those works for private use without their authorisation. [8] That compensation constitutes recompense for the harm suffered by the authors. [9]

28. It is apparent also from recital 31 in the preamble to Directive 2001/29 and from the case-law of the Court that the 'fair balance' which, in so far as concerns rights and interests, must be safeguarded between the different categories of rightholders and users of protected subject-matter, means that fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works as a result of the introduction of the private copying exception. [10]

29. The level of fair compensation must, in particular, take into account — as a valuable criterion — the possible harm to the rightholders resulting from those acts of reproduction, although prejudice which is minimal does not give rise to a payment obligation. [11]

5 — Judgment in *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraph 21).

6 — Judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 30); *Stichting de Thuiskopie* (EU:C:2011:397, paragraph 22); and *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 19).

7 — See judgments in *Stichting de Thuiskopie* (EU:C:2011:397, paragraph 34) and *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 57).

8 — Judgment in *Padawan* (EU:C:2010:620, paragraphs 39 and 40).

9 — Judgments in *Padawan* (EU:C:2010:620, paragraph 40); *VG Wort and Others* (EU:C:2013:426, paragraphs 31, 49 and 75); *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 47); and *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 50).

10 — Judgment in *Padawan* (EU:C:2010:620, paragraphs 42 and 50).

11 — Judgments in *Padawan* (EU:C:2010:620, paragraph 39), and *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 47).

30. The Court has also had occasion to point out that the Member States enjoy broad discretion in determining who must pay the fair compensation and the form, detailed arrangements and possible level of such compensation, [12] taking into account the particular circumstances of each case, [13] provided they remain within the limits imposed by EU law, [14] that is to say, they must satisfy, in addition to the 'triple test' laid down in Article 5(5) of Directive 2001/29, [15] the requirements arising from the principle of equal treatment, established in Article 20 of the Charter of Fundamental Rights of the European Union, [16] and must set the relevant parameters in a consistent manner. [17]

31. In the light of those considerations, I shall approach the various points raised by the referring court in questions 4 and 5 in two stages.

32. I shall examine initially whether the charging of the private copying levy on memory cards is in principle permissible under Directive 2001/29. I shall examine subsequently whether the Danish legislation may, in so far as it provides for the charging of the private copying levy on mobile telephone memory cards but not on certain storage media such as MP3 players and iPods, be considered to comply with EU law and the objectives of Directive 2001/29, that is to say, specifically, whether it is consistent and not arbitrary.

B – *Whether it is permissible in principle to charge the private copying levy on mobile telephone memory cards*

33. It is apparent, in very general terms, from the case-law of the Court cited above that Member States which have opted to adopt the private copying exception provided for in Article 5(2)(b) of Directive 2001/29 enjoy very broad discretion in defining and organising the system for financing the fair compensation which must accompany it, provided that system establishes sufficient correlation between the harm caused to rightholders, as a result of introducing the exception, and the use that is made of their protected works by natural persons acting for private purposes, and ensures effective compensation for such harm.

34. The Court has held, inter alia, that a system for financing fair compensation based on the charging of a private copying levy on reproduction equipment, devices and media is compatible with the requirements of a 'fair balance' only if the latter are liable to be used for private copying and, therefore, are likely to cause harm to the holders of rights in the protected works. [18]

35. Thus, the mere capacity of equipment or a device to make copies is enough in principle to justify application of the private copying levy, provided such equipment or devices have been made available to natural persons as private users, and it is unnecessary to show that they have in fact made private copies with the help of the equipment or devices and have therefore actually caused harm to the rightholders. [19] That approach is based on the idea that natural persons are rightly presumed to benefit fully from and to take full advantage of the copying functions of the equipment and devices. [20] The presumption applies both to reproduction devices and equipment and to reproduction media.

12 — See recital 35 in the preamble to Directive 2001/29 and the judgments in *Stichting de Thuiskopie* (EU:C:2011:397, paragraph 23); and *Amazon.com International Sales and Others* (EU:C:2013:515, paragraphs 20 and 40).

13 — See judgment in *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 22).

14 — Ibid. (paragraph 21).

15 — See, in that regard, judgment in *ACI Adam and Others* (EU:C:2014:254, paragraphs 38 to 40), and my Opinion in that case (C-435/12, EU:C:2014:1).

16 — See judgment in *VG Wort and Others* (EU:C:2013:426, paragraphs 73 and 79).

17 — See recital 32 in the preamble to Directive 2001/29 and judgments in *Padawan* (EU:C:2010:620, paragraph 36) and *ACI Adam and Others* (EU:C:2014:254, paragraph 49).

18 — See judgment in *Padawan* (EU:C:2010:620, paragraph 52).

19 — Ibid. (paragraphs 53 and 54).

20 — Ibid. (paragraphs 55 and 56).

36. Accordingly, since it is not disputed that mobile telephone memory cards are liable to be used by natural persons as media for the reproduction of works or other protected subject-matter, the charging of the private copying levy on such cards cannot be regarded as unlawful, provided it is actually collected from natural persons who are the only persons liable to pay for the use they make of them for private purposes. [21]

37. If follows that the primary or most essential function of mobile telephone memory cards can have no relevance, as such, in this respect. More specifically, the fact that copying for private use is not one of the primary or most essential functions of mobile telephone memory cards — assuming that assertion could be established — does not in itself preclude the charging of fair compensation on such cards, provided they can be used for such purposes.

38. Although recital 38 in the preamble to Directive 2001/29 states that due account should be taken of the differences between digital and analogue private copying, since '[d]igital private copying is likely to be more widespread and have a greater economic impact', it makes no distinction based on the primary or most essential function of reproduction media, be they analogue or digital. Article 5(2)(b) of Directive 2001/29, on the other hand, refers to any medium without distinction.

39. The conclusion may therefore be drawn that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it does not preclude, in principle, legislation of a Member State which provides for the charging of a private copying levy, intended to finance fair compensation, on mobile telephone memory cards, provided the fair balance which must be maintained between the different categories of rightholders and users of protected subject-matter is safeguarded and, hence, there exists a link between such a charge and the presumed use of those cards for private reproduction purposes, the primary or most essential function of those cards being irrelevant in that regard.

C – *Whether Danish legislation is consistent with the objectives of Directive 2001/29*

40. Recital 31 in the preamble to Directive 2001/29 states, in essence, that the differences between the legislation of the Member States concerning exceptions and limitations to rights have direct negative effects on the functioning of the internal market and could well become more pronounced in view of the further development of transborder exploitation of works. Recital 32 in the preamble to Directive 2001/29 states, moreover, that the exhaustive list of exceptions and limitations to the reproduction right contained in the directive takes due account of the different legal traditions in Member States while, at the same time, aiming to ensure a functioning internal market. It also states that 'Member States should arrive at a coherent application of these exceptions and limitations'.

41. The Court has held in that regard that that list of exceptions 'has to ensure a balance between the different legal traditions in Member States and the proper functioning of the internal market'. That means, inter alia, that although the Member States have the option of introducing those exceptions or not, in accordance with their legal traditions, they must, once they have made the choice of introducing a certain exception, apply it consistently, 'so that it cannot undermine the objectives which Directive 2001/29 pursues with the aim of ensuring the proper functioning of the internal market'. [22]

42. It is therefore for the referring court to examine whether the choice made by the Danish legislature, namely to charge the private copying levy on mobile telephone memory cards but not on media such as MP3 players and iPods, may be regarded as consistent, that is to say, as not being likely, in particular, to affect the proper functioning of the internal market. That said, it seems appropriate to give the referring court some guidance on the terms and the extent of the review it should conduct in that regard.

21 — Since the referring court's sixth question specifically concerns that aspect, it will be examined in Section VI below.

22 — See judgment in *ACI Adam and Others* (EU:C:2014:254, paragraphs 33 and 34).

43. In the first place, it is very clear that Member States which decide to introduce a system of fair compensation enjoy, in the absence of any provision of Directive 2001/29 in that regard, considerable latitude in developing the private copying levy intended to finance such compensation, since it may be charged both on devices on which copies can be made and on media intended to store copies, for example.

44. In the present case, the Danish legislature, perfectly legitimately, opted to impose a private copying levy to finance fair compensation on producers and importers in respect of a number of sound and image recording media suitable for making copies of protected works for private use.

45. The considerable latitude afforded to Member States is, however, limited by the obligation imposed on them to ensure that such compensation is adequate, that is to say, the form, detailed arrangements for the charging and the level of such compensation must be determined in the light, inter alia, of the possible harm suffered by rightholders as a result of the reproduction of their protected works or subject-matter. [23]

46. Recital 38 in the preamble to Directive 2001/29, which deals specifically with the exception to the exclusive right to reproduce audio, visual and audio-visual material for private use, provides guidance on some of the factors that may be taken into consideration in the examination that must be conducted in that regard, in particular the need to distinguish between digital and analogue private copying. [24]

47. It is clear from the order for reference and the various written and oral observations submitted to the Court that the fair compensation system introduced in Denmark distinguishes between the various media not according to whether they are analogue or digital, but only, apparently, on the basis of whether they are removable (audio tapes, CD ROMs, DVDs, mobile telephone memory cards) or form an integral part of other equipment or devices (MP3 players, iPods). Moreover, it is not apparent from the documents in the case, and it has not been argued at any point, that that distinction was based on the relative extent, objectively established on statistical bases, of use of the various media for the purposes of reproducing protected works or other subject-matter and their respective economic effects on rightholders.

48. As the Finnish Government submitted, it cannot be excluded that the different treatment of mobile telephone memory cards may be justified by an objective difference relating, inter alia, to the specific features of the medium itself, the particular way in which it is used or the main characteristics of the compensation system put in place.

49. A compensation system that does not charge the private copying levy on computers, which constitute equipment or devices for digital reproduction, might therefore be justified, as the Finnish Government submitted, for two reasons. First, it might be justified by the fact that the media that are likely to be used with computers in order to make copies for private purposes are themselves subject to that levy. Secondly, it might be justified by the fact that it may be argued that it is difficult or even impossible to distinguish private use from business use of computers and therefore to comply with the requirements stemming from the judgment in *Padawan*. [25]

23 — According to recital 35 in the preamble to Directive 2001/29, as interpreted by the Court.

24 — From that point of view, it may be noted that there is a technological convergence to be seen in the bulk memories embedded in the various digital media, the hard discs of the most recent computers (so-called SSD — *Solid State Drives*), for example, being composed of a number of flash memory circuits (EEPROM, Electrically-erasable programmable read-only memory), such as mobile telephone memory cards, as are the main iPod-type digital personal music players.

25 — EU:C:2010:620, paragraph 52. With regard to that aspect of the problem, see the examination of question 6 below.

50. However, a system of fair compensation under which the private copying levy intended to finance it is to be charged only on removable reproduction media, and not on non-removable media forming an integral part of devices or equipment cannot be regarded as compatible with the objectives of Directive 2001/29 or as suitable for the purpose of discharging the Member States' obligation to achieve a certain result.

51. In the main proceedings, the private copying levy is charged on all reproduction media except for media forming an integral part of certain devices and equipment, such as MP3 players and other iPods, which are specifically designed to play audio or video works and which, it may reasonably be presumed, when they are acquired by private persons, are mainly or even exclusively used as reproduction media for private purposes.

52. When viewed from that perspective, it is difficult to consider, prima facie, that the private copying levy introduced by the Danish legislation is suitable for achieving the objective pursued in Article 5(2)(b) of Directive 2001/29, which is to ensure rightholders receive fair compensation that is adequate and effective in relation to the harm they may suffer as a result of the reproduction of their protected works or subject-matter, whilst limiting the obstacles to the proper functioning of the internal market and promoting the development of the information society in the European Union. As an ancillary point, the fact that non-removable reproduction media are not taken into consideration does not appear to comply with the obligation for Member States to take due account, inter alia, of technological developments, in particular with regard to digital private copying. [26]

53. In conclusion, I propose that the Court should rule that Directive 2001/29 must be interpreted as precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance fair compensation on removable reproduction media, such as mobile telephone memory cards, but not on non-removable media forming an integral part of devices or equipment specifically designed and primarily used as reproduction media for private purposes, unless there is an objective justification for such exclusion. It is for the referring court to assess any objective justification for such exclusion and draw the appropriate conclusions.

VI – **General aspects of the private copying levy system (questions 1 to 3)**

54. The referring court's first three questions raise, as I stated above, various issues of a very general nature relating to the private copying levy system intended to finance fair compensation, that court entertaining doubts, in particular as to the effects on the collection of the private copying levy of the source of reproduction. It distinguishes various situations (question 1), considers the effect of any effective technological protection measures (question 2) and of the extent of the harm suffered (question 3).

55. In question 1, the referring court therefore distinguishes cases in which copies are made from files and the use of the file is authorised on the basis of whether or not the authorisation gives rise to remuneration (question 1(a) and (b)). It then distinguishes between reproductions made from files stored on various media (CD ROMs, DVDs, MP3 players, computers) depending on whether or not they are protected by effective technological measures (questions 1(c), (d) and 2). Lastly, it refers to reproductions made from files stored on media belonging to third parties (question 1(e)), reproductions made from unlawful sources, found, inter alia, on the internet (question 1(f)) and reproductions otherwise made from lawful sources (question 1(g)).

26 — See recitals 5 and 39 in the preamble to Directive 2001/29.

56. It should be pointed out, at this juncture, that the Court has already had occasion to rule on the different situations referred to in question 1(c), (d)[27] and (f)[28] and, at least in part, in question 1(a) and (b).[29]

A – *The effect of authorisation to reproduce, with or without remuneration (question 1(a) and (b))*

57. In question 1(a) and (b), the referring court asks whether Directive 2001/29 must be interpreted as meaning that the legislation of a Member State may provide that the private copying levy intended to finance fair compensation may be charged on reproductions for private use authorised by the rightholders, that is, authorisation coupled, as the case may be, with payment for such use.

58. In *VG Wort and Others*,[30] the Court held, in general terms, that, in the context of an exception or limitation provided for in Article 5(2) or (3) of Directive 2001/29, any act by which a rightholder authorised the reproduction of his protected work or other subject-matter has no bearing on fair compensation.

59. However, in that judgment the Court ruled only on the effect of authorisation on fair compensation, and not on the effect of authorisation coupled, as the case may be, with payment, or, more precisely, of authorisation granted in exchange for remuneration or expressly incorporating fair compensation, within the meaning of Article 5(2)(b) of Directive 2001/29 — the situation expressly envisaged by the referring court in question 1(a). More broadly, it has not yet had occasion to rule on the effect, on the collection of the private copying levy intended to finance fair compensation, of user licensing agreements concluded between rightholders and users for consideration, in particular licences for the use and reproduction of files containing works lawfully acquired in the course of trade from the lawful download platforms specifically referred to in the order for reference.

60. It should be noted in that regard that recital 35 in the preamble to Directive 2001/29 states that, '[i]n 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'.

61. 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. The use of the conditional tense[31] and, above all, the absence of any more precise particulars or any express provision in Directive 2001/29 would militate in favour of recognition not only of the greatest latitude for Member States in that regard, but of total discretion.

27 — Judgment in *VG Wort and Others* (EU:C:2013:426, paragraphs 48 to 58).

28 — Judgment in *ACI Adam and Others* (EU:C:2014:254, paragraphs 20 to 58).

29 — Judgment in *VG Wort and Others* (EU:C:2013:426, paragraphs 30 to 40).

30 — EU:C:2013:426, point 2 of the operative part.

31 — That is, at least, my reading of recital 35 in the preamble to Directive 2001/29, notwithstanding the variations to be found from one language version to another. Compare, for example, the Spanish version ('puede ocurrir que no haya que efectuar un pago específico o por separado'), the German versions ('kann gegebenenfalls keine spezifische oder getrennte Zahlung fällig sein') and the French version ('un paiement spécifique ou séparé pourrait ne pas être dû') with the English ('no specific or separate payment may be due') or Italian versions ('ciò non può comportare un pagamento specifico o a parte').

63. It does not appear to me possible, however, to interpret Directive 2001/29 in that way, since it would conflict with the latter's objectives. Such an interpretation would be at odds, more particularly, with the very principle of fair compensation intended to compensate rightholders adequately for the harm sustained as a result of copying for private use. It would, more generally, conflict with the requirement to safeguard a fair balance between the rights and interests involved, which implies that fair compensation constitutes recompense for that harm and must be calculated and collected accordingly.

64. It should be noted in that regard that recital 45 in the preamble to Directive 2001/29 states that '[t]he exceptions and limitations referred to in Article 5(2), (3) and (4) [of Directive 2001/29] should not … prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law'.

65. Accordingly, in the quite likely case in which it may be established that reproduction of protected works for private purposes is specifically authorised by the rightholders and such authorisation gives rise, as a result, to remuneration or some other equivalent form of fair compensation, such reproduction cannot give rise to the collection of additional fair compensation. [32]

66. It is true that the introduction of a private copying levy system for the purposes of financing the fair compensation referred to in Article 5(2)(b) of Directive 2001/29, which guarantees that it will not be charged on reproductions for private purposes made from files the private copying of which is authorised in return for remuneration equivalent to that of fair compensation, clearly presents considerable and very specific practical difficulties, in particular where that levy is collected in respect of reproduction media from the manufacturers and importers of such media, as in the case in the main proceedings, on the basis of a presumption that those media will be used by natural persons for private purposes. [33]

67. Those practical difficulties cannot, however, in the circumstances described in point 66 above, justify the charging of fair compensation twice. [34] It is, on the contrary, for the Member States to provide, in the exercise of their territorial powers, inter alia for the possibility for any natural person required to pay fair compensation twice in respect of the reproduction for private purposes of a protected work to request and obtain reimbursement of the sums paid.

68. It is clear from the foregoing that Directive 2001/29 must be interpreted as precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance the fair compensation provided for in Article 5(2)(b) thereof on reproductions for private use which have been specifically authorised by the rightholder and have, as a result, given rise to payment of remuneration or some other form of fair compensation.

32 — It may be observed that, at the invitation of the Commission, which had announced in its communication of 24 May 2011, entitled *A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe* [COM(2011) 287 final, paragraph 3.3.4), its intention to appoint a high level independent mediator tasked with bringing the main players to an agreement on certain aspects of the private copying levy, Mr António Vitorino put forward recommendations, including one specifically on this point. The first of his recommendations proposes clear acceptance that reproduction for private purposes of works acquired in the context of on-line services, and therefore under rightholders' licences, do not cause any harm to the rightholders and therefore do not require any compensation in the form of a private copying levy (see, in particular, pp. 6 to 8). See the document entitled 'Recommendations resulting from the Mediation on Private Copying and Reprography Levies' on the website http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

33 — Question examined in more detail in section VI below.

34 — It should be noted that the Court has already given substance to the notion that Directive 2001/29 precludes any double payment of fair compensation, and may impose an obligation to make reimbursement, inter alia in its judgment in *Amazon.com International Sales and Others* (EU:C:2013:515, paragraph 65). In that judgment, it held that a person who is required to pay the private copying levy on a reproduction medium used in one Member State but bought on the Internet in another Member State must be able to request and obtain reimbursement of any levy paid in the second Member State.

B – *The effect of technological protection measures (question 1(c) and (d) and question 2)*

69. In question 1(c) and (d), the referring court asks whether Directive 2001/29 must be interpreted as precluding national legislation which provides for the charging of the private copying levy intended to finance the fair compensation provided for in Article 5(2)(b) thereof on reproductions for private use of files containing protected works on the basis of whether or not those files are protected by effective technological measures. In its second question, it also asks how the legislation of a Member State on the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 must take into account the effective technological measures referred to in Article 6 of that directive.

70. In its judgment in *VG Wort and Others*,[35] the Court stated, first, that the technological measures to which Article 5(2)(b) of Directive 2001/29 refers are intended to restrict acts which are not authorised by the rightholders, that is to say to ensure the proper application of that provision and thus to prevent acts which do not comply with the strict conditions imposed by that provision.

71. It went on as to state, in essence, that neither the fact that a Member State has failed to ensure the correct application of the private copying exception which it has introduced, by limiting acts not authorised by rightholders,[36] nor the fact that those rightholders have failed to apply the technological protection measures which they may use voluntarily,[37] could render inapplicable the fair compensation requirement laid down in Article 5(2)(b) of that directive.

72. It is therefore clear from that judgment that Directive 2001/29 must be interpreted as authorising the charging of the private copying levy irrespective of whether effective technological protection measures are used by rightholders, which provides an answer, at the very least, to question 1(c) and (d).

73. It follows, more specifically, that whether or not, in order to prevent any unauthorised use of their protected works, rightholders have used available effective technological protection measures has no effect on the obligation to ensure, in pursuance of Article 5(2)(b) of Directive 2001/29, that they receive fair compensation for reproductions of their works made for private purposes. Fair compensation and effective technological protection measures may therefore coexist perfectly well, since the use of such measure will affect, where relevant, only the level of the fair compensation, that is to say, the calculation and amount of compensation.[38]

74. It is, however, precisely to that effect that the referring court's second question relates.

75. It must be stated in that regard that Directive 2001/29 requires Member States, when applying the private copying exception, to take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available.[39]

76. However, although Directive 2001/29 refers to the need to take technological measures into account in applying fair compensation[40] or to take account of fair compensation in connection with the use of technological measures,[41] it does not provide any guidance as to what that means in specific terms in either of those cases.

35 — EU:C:2013:426, paragraph 51. See also *ACI Adam and Others* (EU:C:2014:254, paragraph 43).

36 — See judgments in *VG Wort and Others* (EU:C:2013:426, paragraphs 52 to 54) and *ACI Adam and Others* EU:C:2014:254, paragraph 44).

37 — See judgment in *VG Wort and Others* (EU:C:2013:426, paragraphs 55 to 57).

38 — See, to that effect also, Opinion of Advocate General Sharpston in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:34, point 95).

39 — See recitals 5 and 39 in the preamble to Directive 2001/29.

40 — See recitals 35 and 39.

41 — See recital 52.

77. It follows, as Advocate General Sharpston stated in her Opinion in *VG Wort and Others*,[42] that Member States enjoy broad discretion in determining how fair compensation should be organised and the extent to which it should be taken into account, whilst complying with both the objectives of Directive 2001/29 and, more broadly, with EU law.

78. From that perspective, it is not for the Court to give guidance to the referring court, as the latter's second question suggests, on how that provision must be specifically implemented by the Member States. The most it can do is to provide it with some guidance enabling it, where appropriate, to determine whether the detailed arrangements for transposing into national law, and actually implementing, the principle of taking into account fair compensation are compatible with Directive 2001/29, which only the referring court can do.

79. Accordingly, I consider that it is not necessary to give, beyond the conclusion set out in point 72 above, a specific answer to the referring court's second question.

80. I therefore propose that the Court should rule that Directive 2001/29 must be interpreted as meaning that neither the use nor the non-use of effective technological measures to protect files containing protected works have any effect on the charging of the private copying levy intended to finance the fair compensation referred to in Article 5(2)(b) of that directive.

C – *The effect of the source of the private copying (question 1(e) to (g))*

81. By question 1(e) to (g), the referring court asks whether Directive 2001/29 must be interpreted as precluding national legislation which provides for charging of the private copying levy on reproductions for private use made from sources belonging to third parties (question 1(e)), unlawful sources (question 1(f)) and lawful sources (question 1(g)).

82. In *ACI Adam and Others*,[43] the Court held that national legislation which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful is not compatible with Article 5(2)(b) of Directive 2001/29. Question 1(f) may therefore be answered by reference to that judgment, in particular point 1 of the operative part thereof.

83. However, as the referring court does not provide any information as to the situations it is referring to in question 1(g), it is difficult for the Court to provide it with a useful and detailed answer.

84. The referring court does not provide any details as to what 'files copied lawfully', 'from lawful sources' or 'where no licence has been granted' refer to. In particular, it does not explain in what circumstances or under what conditions such files may be acquired, used and, where relevant, copied. It is therefore not possible to determine whether reproduction of such files for private purposes is likely to cause harm to the rightholders and therefore justify the charging of fair compensation in accordance with the principles, set out above, established by the Court in *Padawan*[44] and *Stichting de Thuiskopie*,[45] inter alia.

42 — EU:C:2013:34, point 104.
43 — EU:C:2014:254.
44 — EU:C:2010:620.
45 — EU:C:2011:397.

85. In those circumstances and for the same reasons, it is not possible to answer that question by an interpretation *a contrario* of the judgment in *ACI Adam and Others*.[46] The mere fact that the files reproduced for private purposes are not unlawful, within the meaning of that judgment, is not sufficient to support the conclusion that that may give rise to the charging of fair compensation.

86. There remains to be examined question 1(e), concerning reproductions for private use made from sources belonging to third parties.

87. First of all, contrary to what the Commission contends, that question does not refer to the situation in which a person delegates to third parties the task of reproducing protected works for private purposes on his account.[47] It is clear from the wording of the question that, on the contrary, it refers to situations in which a person makes reproductions of protected works or subject-matter from sources 'belonging' to a third party, that is to say, primarily CD ROMs or DVDs which are and remain the property of a third party or files containing protected works the user licences for which are the property of a person who is not the person making the reproduction for private use.

88. In that case, the answer to question 1(e) might be the same as that to question 1(f) if, and in so far as, it were accepted that both parts of question 1 refer to similar situations.

89. Thus, it may be concluded that reproductions made from files on DVDs, CD ROMs, MP3 players or computers belonging to third parties, to use the referring court's list, are, in principle, similar in every respect to reproductions made from works unlawfully distributed via the internet.[48]

90. In those situations, the persons making the reproductions are not the owners (in the case of physical objects such as CD ROMs and DVDs) or user licence holders (in the case of non-physical objects such as files lawfully downloaded from on-line sales sites) of the sources of such reproductions, so that reproductions made in such circumstances cannot in any event be regarded as reproductions for private use.

91. It is not wholly self-evident that the two types of reproduction are equivalent.

92. First, it cannot be denied that making protected works available on the internet (uploading) — without the rightholders' authorisation — and freely accessible to an indeterminate and unlimited number of persons is not equivalent to the loan of one or more CD ROMs or DVDs within a private circle of family or friends, which will always be a small circle. Nor can it be denied that reproductions made from files freely available on the internet (*downloading*) are not equivalent to reproductions made from one or even several CD ROMs or DVDs lent by a relative, friend or mere acquaintance.

93. Secondly, the fact cannot be overlooked that the loan of a device or equipment with mass storage capacity (computers, hard discs, MP3 players or other iPods, or even high-capacity memory cards) containing files of protected works and the reproduction of those files by third parties, that is to say, persons who do not hold licences to use the files which they contain, constitute intermediate situations which are not equivalent either to one (uploading or downloading on the internet) or other (loans and copies of physical media in the private sphere) of the two situations outlined above.

94. In other words, it does not appear possible to provide a single, uniform answer to the referring court's question and a number of points need to be clarified and distinctions made with reference, inter alia, to the sources of the reproductions and the situations in which they are made.

46 — EU:C:2014:254.

47 — Although Section 12(1) of Decree No 202 states that it is permissible 'to have [copies] made', Section 12(4) limits that option considerably by excluding the right to engage another person to make copies, inter alia, of musical, cinematographic or literary works.

48 — To quote the Court's judgment in *ACI Adam and Others* (EU:C:2014:254, paragraph 35).

95. That said, it seems that the Danish legislation contains some possible answers in that regard. Section 12(1) of Decree No 202, for example, authorises only 'single' copies of works for private use, which must not be used for any other purpose. In referring only to single copies, the Danish legislation appears to distinguish between one-off reproductions of limited works, which count as private copying, and mass reproductions of multiple works, which do not. Furthermore, Section 12(3) of Decree No 202 expressly provides that 'the production of copies in digital form on the basis of a copy that has been lent or hired shall not be permitted without the consent of the author'. The Danish legislation thus appears to exclude reproductions made from original copies belonging to third parties, but does not specify whether it means third parties acting in a professional and business capacity or all third parties, including relatives, friends or even acquaintances acting in a private capacity.

96. In any event, it is for the referring court, which alone has jurisdiction to interpret national law, to determine what is to be meant by 'single copies' and 'a copy that has been lent', bearing in mind that it must interpret national law in the light of Directive 2001/29, and to examine the various situations identified on the basis of the principles set out above, established by the Court in *Padawan*[49] and *Stichting de Thuiskopie*,[50] and taking into account the provisions of Article 5(5) of Directive 2001/29.

D – *The effect of the minimal nature of the prejudice (question 3)*

97. In question 3, the referring court asks, in essence, whether Directive 2001/29 must be interpreted as preluding legislation of a Member State which provides for the charging of the private copying levy intended to finance fair compensation on reproductions for private use which cause only minimal prejudice to rightholders. In particular, it asks in that regard what is meant by the remark made in recital 35 in the preamble to Directive 2001/29.

98. Recital 35 in the preamble to Directive 2001/29 mentions the option for the Member States to provide that in certain situations, where the prejudice to the rightholder would be minimal, fair compensation will not be charged, although it does not define either the situations referred to or the criteria for establishing whether such prejudice is minimal.[51]

99. The conclusion to be drawn from this is that Member States which opt to introduce the private copying exception have the greatest latitude to adopt provisions derogating from the charging of fair compensation where the prejudice is minimal, since it is in any event merely an option and not an obligation. In those circumstances a Member State cannot be criticised for failing to provide for such derogation.

100. Consequently, the fact that private copying on to mobile telephone memory cards represents only minimal prejudice for rightholders, assuming it is established, is not, in principle, such that it will, by itself, preclude the charging by a Member State of the private copying levy on such cards.

101. Consequently, I propose that the Court should rule that Directive 2001/29 must be interpreted as not precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance fair compensation on reproductions for private use which cause only minimal prejudice to rightholders.

49 — EU:C:2010:620.

50 — EU:C:2011:397.

51 — The preparatory work for Directive 2001/29 provides no more guidance. The Court has so far not actually had occasion to give a ruling in that regard, even though it refers to 'minimal prejudice' in paragraphs 39 and 46 of its judgment in *Padawan* (EU:C:2010:620).

VII – **The detailed arrangements for the charging of the private copying levy (question 6)**

102. The referring court's sixth question comprises several closely linked sub-questions, which concern all the detailed arrangements for charging the private copying levy intended to finance the fair compensation provided for in Article 5(2)(b) of Directive 2001/29.

103. The referring court raises first of all the question of principle (question 6(a)) as to whether, in essence, Directive 2001/29 must be interpreted as precluding legislation of a Member State which lays down an unconditional obligation for producers and/or importers of mobile telephone memory cards to pay the private copying levy on those cards, that is to say, without such producers and/or importers, who sell the cards to business customers, being in a position to know whether the latter will sell the cards on to individuals or business customers.

104. The referring court then asks, in essence, whether and to what extent the answer to that question of principle would be different if such an obligation was not, in certain situations, unconditional (question 6(b) and (c)). It envisages various situations in which the producer, importer and/or distributor either may not have to pay the private copying levy, or may obtain a refund of the private copying levy paid when memory cards are sold for business use, in certain circumstances, under certain conditions and in accordance with certain detailed arrangements which it sets out.

105. It is clear from the case-law of the Court, as cited in points 23 to 32 above, in particular the judgment in *Padawan*,[52] that national legislation which provides for the charging of the private copying levy intended to finance the fair compensation referred to in Article 5(2)(b) of Directive 2001/29 on reproduction media is compatible with the requirement to achieve a fair balance only if the media concerned are liable to be used for private copying and if there is an essential link between the application of that levy to such media and their use for private copying.

106. It follows that a private copying levy which, like the levy at issue in in the main proceedings, is collected from producers and importers of reproduction media, irrespective of the type of person who ultimately acquires them or of the use to which they are put and, more specifically, without any distinction being made between cases where media are acquired by natural persons for private copying purposes and cases where they are acquired by other persons for purposes clearly unrelated to private copying, does not comply with Article 5(2)(b) of Directive 2001/29.

107. It is true that in *Padawan*[53] the Court recognised that it was open to the Member States, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them by reproduction of their work for private use, to establish a private copying levy, for the purposes of financing fair compensation, payable by persons other than private users, provided those persons are able to pass on the cost of the levy to the private users.

108. It cannot be totally excluded, in those circumstances, that national legislation which, like the legislation at issue in the main proceedings, provides that the private copying levy intended to finance fair compensation is to be charged on reproduction media and collected from the producers and importers of the media, may be consistent with the fair balance that is to be struck between the interests of the rightholders and those of the users of the protected subject-matter, provided those producers and importers are actually able to pass the charge on to users acquiring the media and using them for the purposes of private copying or are able to obtain a reimbursement of the levy where the media are acquired for purposes clearly unrelated to private copying.

52 — EU:C:2010:620, paragraphs 52 and 53.

53 — EU:C:2010:620, paragraphs 46 to 50. See also *Stichting de Thuiskopie* (EU:C:2011:397, paragraphs 27 and 28).

109. However, the referring court has not provided the Court with any information enabling it to determine specifically and in detail whether the national legislation applicable to the dispute in the main proceedings ensures that the private copying levy which it introduces is, ultimately, actually paid by the persons on whom it is incumbent, in principle, to finance the fair compensation required by Article 5(2)(b) of Directive 2001/29, that is to say, in the present case, the natural persons acquiring reproduction media in order to make reproductions of protected works for their private use.

110. The order for reference merely cites Section 39 of Decree No 202, which provides that any person who, for commercial purposes, produces or imports audio tapes or videotapes or other media on to which sound or images may be recorded is to pay remuneration. Apart from the various situations envisaged in question 6 itself, the order for reference does not contain any specific concrete information regarding either the circumstances in which it may be possible for producers, importers or distributers to be exempt from payment of the levy, or the specific rules which might enable them to obtain a reimbursement of the levy.

111. However, and in any event, it is for the referring court alone to assess, in the light of the guidance on the interpretation of Directive 2001/29 provided by the Court, whether the national legislation is compatible with the requirements of Directive 2001/29.

112. I therefore propose that the Court should answer the referring court's sixth question by ruling that Directive 2001/29 must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, which provides that the private copying levy intended to finance fair compensation is to be charged on reproduction media and collected from producers and importers of such media, provided those producers and importers are actually able to pass the levy on to users acquiring such media for private copying purposes or obtain reimbursement of the levy where the media are acquired for purposes clearly unrelated to private copying. It is for the referring court to assess the circumstances and draw the appropriate conclusions.

VIII – **Conclusions**

113. In the light of the above arguments, I suggest that the Court answer the questions referred by the Østre Landsret as follows:

(1) Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as not precluding, in principle, legislation of a Member State which provides for the charging of a private copying levy, intended to finance fair compensation, on mobile telephone memory cards, provided the fair balance which must be maintained between the different categories of rightholders and users of protected subject-matter is safeguarded and, hence, there exists a link between such a charge and the presumed use of those cards for private reproduction purposes, the primary or most essential function of those cards being irrelevant in that regard.

However, Directive 2001/29 must be interpreted as precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance fair compensation on removable reproduction media, such as mobile telephone memory cards, but not on non-removable media forming an integral part of devices or equipment specifically designed and primarily used as reproduction media for private purposes, unless there is an objective justification for such exclusion.

It is for the referring court to assess any objective justification for such exclusion and draw the appropriate conclusions.

(2) Directive 2001/29 must be interpreted as precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance the fair compensation provided for in Article 5(2)(b) thereof on reproductions for private use made from an unlawful source and reproductions for private use which have been specifically authorised by the rightholder and have, as a result, given rise to payment of remuneration or some other form of fair compensation.

(3) Directive 2001/29 must be interpreted as meaning that neither the use nor the non-use of effective technological measures to protect files containing protected works have any effect on the charging of the private copying levy intended to finance the fair compensation referred to in Article 5(2)(b) of that directive.

(4) Directive 2001/29 must be interpreted as not precluding legislation of a Member State which provides for the charging of the private copying levy intended to finance fair compensation on reproductions for private use which cause only minimal prejudice to rightholders.

(5) Directive 2001/29 must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, which provides that the private copying levy intended to finance fair compensation is to be charged on reproduction media and collected from producers and importers of such media, provided those producers and importers are actually able to pass the levy on to users acquiring such media for private copying purposes or obtain reimbursement of the levy where the media are acquired for purposes clearly unrelated to private copying.

It is for the referring court to assess the circumstances and draw the appropriate conclusions.