



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 March 2015*

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Articles 5(2)(b) and 6 — Reproduction right — Exception — Copying for private use — Reproductions made with the aid of mobile telephone memory cards — Fair compensation — Levy on reproduction media — Equal treatment — Reimbursement of the levy — Minimal prejudice)

In Case C-463/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Denmark), made by decision of 10 October 2012, received at the Court on 16 October 2012, in the proceedings

Copydan Båndkopi

v

Nokia Danmark A/S,

THE COURT (Fourth Chamber),

Composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2014,

after considering the observations submitted on behalf of:

- Copydan Båndkopi, by P. Schønning, advokat,
- Nokia Danmark A/S, by F. Bøggild, advokat,
- the French Government, by D. Colas, F.X. Bréchet and B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,
- the Netherlands Government, by M. Noort, M. Bulterman and C. Wissels, acting as Agents,
- the Austrian Government, by G. Kunnert and A. Posch, acting as Agents,

* Language of the case: Danish.

— the Finnish Government, by J. Leppo, acting as Agent,
— the United Kingdom Government, by S. Brighthouse, acting as Agent, S. Malynicz and J. Holmes,
Barristers,
— the European Commission, by J. Samnadda, H. Støvlbæk and J. Szczodrowski, acting as Agents,
after hearing the Advocate General at the sitting on 18 June 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 5(2)(b) and 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
- 2 The request has been made in proceedings between Copydan Båndkopi ('Copydan') and Nokia Danmark A/S ('Nokia') concerning the payment of the levy intended to finance the fair compensation payable under the exception to the reproduction right provided for in Article 5(2)(b) of that directive ('the private copying levy').

Legal framework

EU law

- 3 Recitals 9, 10, 31, 32, 35, 38 and 39 in the preamble to Directive 2001/29 are worded as follows:
(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...
(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ...
...
(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...
(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

...

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

...

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. ...

(39) When applying the exception or limitation on private copying, Member States should 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. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.'

4 Article 2 of Directive 2001/29 provides as follows:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...'

5 Article 5(2) and (5) of Directive 2001/29 states as follows:

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

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(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;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

6 Article 6(1) and (3) Directive 2001/29 is worded as follows:

‘1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

...

3. For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.’

Danish law

7 Section 12(1) and (3) of the Copyright Act (ophavsretsloven), as consolidated by Decree No 202 of 27 February 2010 (‘the Copyright Act’), provides as follows:

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

...

3. ... [r]eproduction in digital form on the basis of a copy that has been hired or lent shall not be permitted without the author’s consent.’

8 Section 39(1) and (2) of the Copyright Act is worded as follows:

‘1. Any person who, for commercial purposes, produces or imports audio tapes or video tapes 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 ...’

9 Section 40(2) and (3) of the Copyright Act provides as follows:

‘2. For 2006, the remuneration ... shall be DKK 4.28 per unit for memory cards.

3. From 2007, the remuneration specified in paragraphs (1) and (2) above shall be adjusted annually in accordance with the standard rate adjustment index (see the Standard Rate Adjustment Index Act).’

10 Section 75c(1) of the Copyright Act states as follows:

‘No person may, without the rightholder’s consent, circumvent effective technological measures.’

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

- 11 Copydan is a body responsible for the administration of copyright which represents the holders of copyright in audio and audiovisual works. It is authorised by the Kulturministeriet (Ministry of Culture) to collect, administer and distribute among such copyright holders the levy charged for the use of those works.
- 12 Nokia markets mobile telephones in Denmark. It provides those products to business customers, who sell them on both to individuals and to other business customers. All mobile telephones have an internal memory. Moreover, certain models have an additional memory card that is different from the SIM card. If a user has a mobile telephone which has a memory card, he can store on it data, such as telephone numbers, contact details and photographs taken with the telephone. Files containing musical works, films and other protected works may also be stored on the card. Such files may be downloaded from the internet or from DVDs, CDs, MP3 players or the user's computer.
- 13 The parties to the main proceedings agree that if a user stores protected works in a mobile telephone with both an internal memory and a memory card, such works are, as a rule, stored on the memory card. However, if the user alters the settings of the telephone, he may also store those works in the internal memory.
- 14 Copydan takes the view that mobile telephone memory cards should be covered by the fair compensation system established by the Copyright Act in accordance with the exception to the reproduction right ('fair compensation'), except for those with very low storage capacity. For that reason, Copydan brought proceedings against Nokia, claiming that Nokia should be ordered to pay to it a private copying levy in respect of memory cards imported in the period from 2004 to 2009.
- 15 Nokia contends that such a levy is not payable where the reproduction is not lawful or where use of the reproduction following, for example, the downloading of a protected work from an online trading site, is authorised by the copyright holder. It is therefore only lawful reproductions for private use that are not authorised by the rightholder which should be subject to the fair compensation system. Mobile telephone memory cards rarely contain such copies, and no levy in respect of those copies may, therefore, be imposed.
- 16 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following questions to the Court of Justice 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 a 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) unlawfully copied works 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 ... take account of effective technological measures (Article 6 of Directive [2001/29])?
 3. For the purpose of calculating [fair compensation], what constitutes "certain situations where the prejudice to the rightholder would be minimal" (recital 35 in the preamble to Directive 2001/29), with the result that it would not be compatible with Directive [2001/29] for Member States to enact legislation which provides for compensation to be paid to rightholders for such copying for private use ...?
 4. (a) If it is accepted that the primary or most 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 most 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 Directive [2001/29] 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 to 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:
 - (i) 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;

- (ii) 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 (a) in practice, it is only the purchaser of the memory card who may obtain reimbursement, and (b) the purchaser of memory cards must submit an application for reimbursement of the levy to Copydan;
- (iii) 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 (a) Copydan is the organisation responsible for administering the levy scheme and (b) the registered undertakings have no knowledge of whether the memory cards have been sold to individuals or business customers?

Consideration of the questions referred

Preliminary observation

- 17 Some of the questions asked by the national court do not refer expressly to Article 5(2)(b) of Directive 2001/29, whereas others mention it. However, it is clear from the order for reference that all the questions submitted are to be understood as relating to that provision and the Court will therefore examine those questions by reference to that provision.

Question 4

- 18 By its fourth question, which it is appropriate to examine first, the national court is asking, in essence, whether Article 5(2)(b) of Directive 2001/29 precludes national legislation which provides for the payment of fair compensation in respect of multifunctional media, such as mobile telephone memory cards, irrespective of whether the principle function of such media is to make copies for private use.
- 19 In that regard, it should be recalled that where Member States decide to introduce the exception, provided for in Article 5(2)(b) of Directive 2001/29, to the right of reproduction for copying for private use ('the private copying exception') into their national law, they are required, in particular, to provide, pursuant to that provision, for the payment of fair compensation to holders of the exclusive right of reproduction (judgments in *Padawan*, C-467/08, EU:C:2010:620, paragraph 30, and *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 19).
- 20 Since Directive 2001/29 does not provide any further details concerning the various elements of the fair compensation system, the Member States enjoy broad discretion in that regard. It is for the Member States to determine, inter alia, who must pay that compensation and to establish the form, detailed arrangements for collection and the level of compensation (see, to that effect, judgments in *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 23, and *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 20).
- 21 That being the case, fair compensation and, therefore, the system on which it is based, as well as the level of compensation, must be linked to the harm resulting for the rightholder from the making of copies for private use (see, to that effect, judgment in *Padawan*, EU:C:2010:620, paragraphs 40 et 42).

- 22 As it is the person reproducing a work, for his own private use, without seeking the prior consent of the rightholder concerned who causes harm to the rightholder, in principle, it is for that person to make good that harm by financing the compensation which will be paid to the rightholder (see, to that effect, judgment in *Padawan*, EU:C:2010:620, paragraph 45, and *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 23).
- 23 The Court has, however, accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction for the harm caused to them, it is open to the Member States to establish a private copying levy for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy (judgments in *Padawan*, EU:C:2010:620, paragraph 46, and *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 24).
- 24 In that regard, it is unnecessary to show that natural persons in fact make copies for private purposes with the aid of such equipment. Those persons are rightly presumed to benefit fully from the making available of that equipment, that is to say, they are deemed to take full advantage of the functions associated with that equipment, including copying (see, to that effect, judgment in *Padawan*, EU:C:2010:620, paragraphs 54 and 55).
- 25 It follows that if digital reproduction equipment, devices and media are made available to natural person as private users, the simple fact that that equipment is able to make copies is sufficient in itself to justify the application of the private copying levy (see, to that effect, judgment in *Padawan*, EU:C:2010:620, paragraph 56).
- 26 Accordingly, it follows from the Court's case-law cited above that it is, in principle, irrelevant whether a medium is unifunctional or multifunctional or whether the copying function is, depending on the circumstances, ancillary to the other functions, as the final users are deemed to take full advantage of all the functions provided by the medium.
- 27 That said, the fact that the copying function is multifunctional and of an ancillary nature may affect the amount of fair compensation payable. In particular, in the light of the considerations set out at paragraph 21 above, that amount must be established by the competent authorities, in principle, by reference to the relative importance of the medium's capacity to reproduce works for private use.
- 28 As a consequence, where it is apparent that, in practice, all the users of a medium rarely use such a function, the making available of that function may not, as stated in recital 35 in the preamble to Directive 2001/29, give rise to an obligation to pay fair compensation, since the prejudice to the rightholder will be regarded as minimal.
- 29 In the light of the foregoing considerations, the answer to Question 4 is that Article 5(2)(b) of Directive 2001/29 does not preclude national legislation which provides that fair compensation is to be paid in respect of multifunctional media, such as mobile telephone memory cards, irrespective of whether the main function of such media is to make copies for private use, provided that one of the functions of the media, be it merely an ancillary function, enables the operator to use them for that purpose. However, the question whether the function is a main or an ancillary one and the relative importance of the medium's capacity to make copies are liable to affect the amount of fair compensation payable. In so far as the prejudice to the rightholder may be regarded as minimal, the making available of such a function need not give rise to an obligation to pay fair compensation.

Question 5

- 30 By its fifth question, which is it appropriate to answer in the second place, the national court is asking, in essence, whether Article 5(2)(b) of Directive 2001/29 precludes national legislation which makes the provision of media that may be used for making copies for private use, such as mobile telephone memory cards, subject to the private copying levy but does not make the provision of components whose primary purpose is to store copies for private use, such as the internal memories of MP3 players, subject to that levy.
- 31 It should be noted in that regard that the exceptions provided for in Article 5 of Directive 2001/29 are to be applied in a manner that is consistent with the principle of equal treatment, which is a general principle of EU law, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union (see, with regard to the latter point, judgment in *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43).
- 32 According to the Court's established case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgments in *Soukupová*, C-401/11, EU:C:2013:223, paragraph 29, and *Sky Italia*, C-234/12, EU:C:2013:496, paragraph 15).
- 33 It follows that the Member States cannot lay down detailed fair compensation rules which would discriminate, without any justification, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.
- 34 In the main proceedings, it is common ground that the effect of the national legislation in issue is to make a distinction between media that are detachable from devices with a digital reproduction function and components that cannot be detached from such devices. Indeed, while the supply of such media is subject to the private copying levy, the supply of such components is not.
- 35 It should be noted in that regard that multifunctional media, such as mobile telephone memory cards, on the one hand, and integral components, such as the internal memories of MP3 players, on the other, may be used to reproduce protected works for private purposes and thus harm the interests of copyright holders.
- 36 That analysis is also applicable to mobile telephone memory cards and the internal memories of such telephones. Even though, as is apparent from paragraph 13 above, the latter have, within the same telephone device, the same copying function as memory cards, it is not apparent from the information before the Court that their supply is subject to the private copying levy.
- 37 However, it is for the national court to determine whether there may exist other circumstances which would justify the conclusion that, notwithstanding the fact that the integral components in question have the same copying function as mobile telephone memory cards, those components are not comparable from the point of view of the requirements relating to fair compensation.
- 38 The national court may consider, inter alia, the effect, if any, of the fact that such components are not detachable from the devices which contain them, whereas media used for the very same copying purposes, such as memory cards, are detachable, a feature which might facilitate the making of further copies of the same works using other media.
- 39 If the national court concludes that such components and media are comparable from the point of view of the requirements relating to fair compensation, it will then have to verify whether the different treatment arising under the national fair compensation system is justified.

40 Such different treatment could be justified if, inter alia, for integral components which may be used for copying purposes, unlike the detachable media at issue in the main proceedings, rightholders receive fair compensation in another form.

41 In the light of the foregoing considerations, the answer to Question 5 is that Article 5(2)(b) of Directive 2001/29 does not preclude national legislation which makes the supply of media that may be used for copying for private use, such as mobile telephone memory cards, subject to the private copying levy but does not make the supply of components whose main purpose is to store copies for private use, such as the internal memories of MP3 players, subject to that levy, provided that those different categories of media and components are not comparable or the different treatment they receive is justified, which is a matter for the national court to determine.

Question 6

42 By its sixth question, which it is appropriate to examine in the third place, the national court is asking, in essence, whether Article 5(2)(b) of Directive 2001/29 is to be interpreted as precluding national legislation which requires payment of the private copying levy by producers and importers who sell mobile telephone memory cards to business customers and are aware that those cards will be sold on by those customers but do not know whether the final purchasers of the cards are individuals or business customers. The national court also asks whether the answer to that question is affected by the fact that such producers and importers:

- are exempt from the requirement to pay the levy if they sell memory cards to business customers registered with the organisation responsible for administering the levy, and
- may obtain reimbursement of the levy if the mobile telephone memory cards are used for business purposes, given that, in practice, only the final purchaser of such a memory card may obtain reimbursement of the private copying levy, provided that an application is submitted to the organisation responsible for administering the levy.

43 As observed at paragraph 23 above, it is open to Member States to establish a private copying levy for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them.

44 It is also the Court's case-law that Member States may, under certain conditions, apply the private copying levy indiscriminately with regard to recording media suitable for reproduction, including where the final use of such media does not meet the criteria set out in Article 5(2)(b) of Regulation No 2001/29 (see, to that effect, judgment in *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 31).

45 A system for the application of such a levy will be consistent with that provision only if its introduction is justified by practical difficulties and if the persons responsible for payment have a right to reimbursement of the levy where it is not due (see, to that effect, *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 31).

46 In that regard, a private copying levy system may be justified, inter alia, by the need to address the fact that it is impossible to identify the final users or the practical difficulties associated with identifying those users or other similar difficulties (see, to that effect, *Amazon.com International Sales and Others*, EU:C:2013:515, paragraphs 31 and 34).

- 47 However, it is apparent from the Court's case-law that, in any event, that levy cannot be applied to the supply of reproduction equipment, devices and media to persons other than natural persons for purposes clearly unrelated to private copying (see, to that effect, judgments in *Padawan*, EU:C:2010:620, paragraph 52, and *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 28).
- 48 Moreover, with regard to the right to reimbursement of the levy in question, it must be effective and not make it excessively difficult to repay the levy paid in cases falling outside that covered by Article 5(2)(b) of Directive 2001/29 (see, to that effect, *Amazon.com International Sales and Others*, EU:C:2013:515, paragraphs 31 and 34).
- 49 In the main proceedings, it is for the national court to determine, first, whether the introduction of the system providing for payment of the private copying levy when mobile telephone memory cards are placed on the market may be justified by practical difficulties such as those referred to at paragraph 46 above.
- 50 It is apparent from the considerations set out at paragraph 47 above that the placing on the market of such cards must be exempt from the levy in question, inter alia, where the producer or importer concerned establishes that he has supplied those cards to persons other than natural persons for purposes clearly unrelated to copying for private use.
- 51 Furthermore, it should be noted that the practical difficulties associated with the identification of the final users and the collection of the levy in issue cannot justify restricting the application of that exemption to the supply of mobile telephone memory cards to business customers registered with the organisation responsible for administering the private copying levy. Such a restriction would give rise to different treatment among the various groups of economic operators, since, in so far as concerns the private copying levy, those groups are all in a comparable situation, irrespective of whether they are registered with that organisation.
- 52 Second, the referring court must verify that the scope, the effectiveness, the availability, the public awareness and simplicity of use of the right to reimbursement allow for the correction of any imbalances created by the private copying levy system, in order to respond to the practical difficulties observed (see judgment in *Amazon.com International Sales and Others*, EU:C:2013:515, paragraph 36).
- 53 It should be observed in that regard that, as the private copying levy system at issue in the main proceedings permits those responsible for payment to pass on the amount of the levy in the amount charged for the mobile telephones in question and the final user therefore bears the burden of the levy, it is, in principle, consistent with the 'fair balance' between the interests of the copyright holders and those of the users of protected subject-matter referred to in recital 31 in the preamble to Directive 2001/29 that only the final purchaser of a mobile telephone should be able to obtain reimbursement of that levy and that reimbursement should be conditional upon the submission of an appropriate application to the organisation responsible for administering the levy.
- 54 To the extent that such a solution is possible, it is irrelevant whether or not the producers and importers of the telephones in question, who are required to pay the private copying levy, have information as to whether the final purchasers of the telephones are individuals or business customers.

55 In the light of the foregoing, the answer to Question 6 is that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation which requires payment of the private copying levy by producers and importers who sell mobile telephone memory cards to business customers and are aware that those cards will be sold on by those customers but do not know whether the final purchasers of the cards will be individuals or business customers, on condition that:

- the introduction of such a system is justified by practical difficulties;
- the persons responsible for payment are exempt from the levy if they can establish that they have supplied the mobile telephone memory cards to persons other than natural persons for purposes clearly unrelated to copying for private use, it being understood that the exemption cannot be restricted to the supply of business customers registered with the organisation responsible for administering the levy;
- the system provides for a right to reimbursement of the private copying levy which is effective and does not make it excessively difficult to repay the levy paid and only the final purchaser of such a memory card may obtain reimbursement, by submitting an appropriate application to that organisation.

Question 3

56 By its third question, which it is appropriate to examine in the fourth place, the national court is asking, in essence, how Article 5(2)(b) of Directive 2001/29, read in the light of the statement in recital 35 in the preamble to the directive that in certain situations where the prejudice to the rightholder ‘would be minimal, no obligation for payment may arise’, is to be interpreted.

57 In that regard, it should be noted, first, that the objective of Directive 2001/29 is to harmonise only certain aspects of the law on copyright and related rights (judgment in *Padawan*, EU:C:2010:620, paragraph 35). Second, the general scheme of the directive is circumscribed by a number of its provisions which disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive, such as Article 5, which sets out a series of exceptions and limitations which the Member States are free to transpose into their national law.

58 Moreover, in accordance with recital 35 in the preamble to Directive 2001/29, in the case of certain exceptions or limitations, rightholders must receive fair compensation. However, in certain cases in which the prejudice to the rightholder is minimal, it is possible not to require payment of such compensation.

59 In the same way that Member States may elect whether or not to adopt any of the exceptions set out in Article 5(2) of Directive 2001/29, they also have the option, as confirmed by recital 35 in the preamble to the directive, to provide — in certain cases covered by the exceptions which they have freely established — for an exemption from payment of fair compensation where the prejudice caused to rightholders is minimal.

60 That conclusion is fully applicable to the private copying exemption provided for in Article 5(2)(b) of Directive 2001/29.

61 For the reasons given in the preceding paragraphs, the setting of a threshold below which the prejudice may be classified as ‘minimal’, for the purpose of recital 35 in the preamble to Directive 2001/29, must also be within the discretion of the Member States, provided, inter alia, that the application of the threshold is consistent with the principle of equal treatment, as referred to in paragraph 31 above.

62 In the light of the foregoing, the answer to Question 3 is that Article 5(2)(b) of Directive 2001/29, read in the light of recital 35 in the preamble to that directive, must be interpreted as permitting Member States to provide, in certain cases covered by the private copying exception, for an exemption from payment of fair compensation, provided the prejudice caused to rightholders in such cases is minimal. It is within the discretion of the Member States to set the threshold for such prejudice, it being understood that that threshold must, *inter alia*, be applied in a manner consistent with the principle of equal treatment.

Question 1(a) and (b)

63 By Question 1(a) and (b), the national court is asking, in essence, what are the effects of the fact that the rightholder has given his consent to the use for private copying purposes, *inter alia*, of files containing protected works, in the light of the requirements laid down in Article 5(2)(b) of Directive 2001/29, in particular in so far as concerns fair compensation.

64 It is apparent from paragraphs 24 and 25 above that it is unnecessary to show that the users of such files actually make copies for private use, as such users are rightly presumed to benefit fully from the making available of those files. It follows that if a rightholder allows a natural person to use such files, by making them available to that person, the simple fact that those files may be used for the purpose of reproducing protected works justifies the application of the private copying levy.

65 Accordingly, with regard to the effect on fair compensation of the fact that the rightholder has consented to the use of files containing protected works, the Court has held that where a Member State has decided, pursuant to Article 5(2) of Directive 2001/29, to exclude, from the material scope of that provision, any right for rightholders to authorise reproduction of their works for private use, any authorising act a rightholder may adopt will be devoid of legal effects under the law of that State. Consequently, such an act has no effect on the harm caused to rightholders due to the introduction of the measure depriving them of that right and cannot, therefore, have any bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis, under the relevant provision of that directive (see judgment in *VG Wort and Others*, C-457/11 to C-460/11, EU:C:2013:426, paragraph 37).

66 Since, in circumstances such as those set out in paragraph 65 above, such authorisation is devoid of legal effects, it cannot, of itself, give rise to an obligation to pay remuneration of any kind in respect of the reproduction, for private use, by the user of the files concerned to the rightholder who authorised such use.

67 In the light of the foregoing considerations, the answer to Question 1(a) and (b) is that Directive 2001/29 is to be interpreted as meaning that, where a Member State has decided, pursuant to Article 5(2) of that directive, to exclude, from the material scope of that provision, any right for rightholders to authorise reproduction of their works for private use, any authorisation given by a rightholder for the use of files containing his works can have no bearing on the fair compensation payable for reproductions made in accordance with Article 5(2)(b) of that directive with the help of such files and cannot, of itself, give rise to an obligation on the part of the user of the files concerned to pay remuneration of any kind to the rightholder.

Question 1(c) and (d) and Question 2

68 By Question 1(c) and (d) and Question 2, which it is appropriate to examine in the sixth place, the national court is asking, in essence, whether the implementation of technological measures, as referred to in Article 6 of Directive 2001/29, for devices used to reproduce protected works, such as DVDs, CDs, MP3 players or computers, may have an effect on the fair compensation payable in respect of reproductions made for private use by means of such devices.

- 69 In that regard, the Court has already held 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 prevent acts which do not comply with the strict conditions imposed by that provision (judgments in *VG Wort and Others*, EU:C:2013:426, paragraph 51, and *C-435/12, ACI Adam and Others*, EU:C:2014:254, paragraph 43).
- 70 Moreover, in so far as it is Member States and not rightholders which establish the private copying exception and which authorise, for the purposes of the making of such a copy, such use of protected works or other subject-matter, it is for the Member State which, by the establishment of that exception, has authorised the making of copies for private use to ensure the proper application of that exception, and thus to restrict acts which are not authorised by rightholders (judgments in *VG Wort and Others*, EU:C:2013:426, paragraphs 52 and 53, and *ACI Adam and Others*, EU:C:2014:254, paragraph 44).
- 71 Having regard to the voluntary nature of the technological measures referred to in Article 6 of Directive 2001/29, the Court has held that, even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due (judgment in *VG Wort and Others*, EU:C:2013:426, paragraph 57).
- 72 Nevertheless, it is open to the Member State concerned to make the actual level of compensation owed to rightholders dependent on whether or not such technological measures are applied, so that those rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception (judgment in *VG Wort and Others*, EU:C:2013:426, paragraph 58).
- 73 As a consequence, the answer to Question 1(c) and (d) and Question 2 is that the implementation of technological measures under Article 6 of Directive 2001/29 for devices used to reproduce protected works, such as DVDs, CDs, MP3 players and computers, can have no effect on the fair compensation payable in respect of reproductions made for private use by means of such devices. However, the implementation of such measures may have an effect on the actual level of such compensation.

Question 1(f)

- 74 By Question 1(f), which it is appropriate to examine in the seventh place, the national court is asking, in essence, whether Directive 2001/29 precludes national legislation which provides for fair compensation to be paid in respect of reproductions made using unlawful sources, namely by means of protected works made available to the public without the rightholder's consent.
- 75 The Court has already ruled that that directive precludes 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 (see, to that effect, *ACI Adam and Others*, EU:C:2014:254, paragraph 58).
- 76 In that regard, the Court has held that the need for a restrictive interpretation of Article 5(2)(b) of Directive 2001/29 means that that provision cannot be understood as requiring, beyond the limitation which is provided for expressly, copyright holders to tolerate infringements of their rights which may accompany the making of copies for private use (see, to that effect, *ACI Adam and Others*, EU:C:2014:254, paragraph 31).
- 77 The Court has also stated that a private copying levy system with characteristics such as that at issue in the main proceedings which does not, as regards the calculation of the amount of fair compensation payable to its recipients, distinguish the situation in which the source from which a reproduction for private use has been made is lawful from that in which that source is unlawful, does not respect the

fair balance to be struck between the interests of the copyright holders and those of the users of protected subject matter, since, under such a system, all the users who purchase equipment, devices or media subject to that levy are indirectly penalised (see, to that effect, judgment in *ACI Adam and Others*, EU:C:2014:254, paragraphs 54 to 56).

- 78 By bearing the burden of the levy, which is determined regardless of whether the source from which such reproductions are made is lawful or unlawful, those users inevitably contribute towards the compensation for the harm caused by reproductions for private use made from an unlawful source, which are not permitted by Directive 2001/29, and are thus led to assume an additional, non-negligible cost in order to be able to make the copies for private use covered by the exception provided for by Article 5(2)(b) of that directive (see judgment in *ACI Adam and Others*, EU:C:2014:254, paragraph 56).
- 79 In the light of the foregoing, the answer to Question 1(f) is that Directive 2001/29 precludes national legislation which provides for fair compensation in respect of reproductions made using unlawful sources, namely from protected works which are made available to the public without the rightholder's consent.

Question 1(e)

- 80 By Question 1(e), which it is appropriate to examine in the eighth place, the national court is asking, in essence, whether Directive 2001/29 precludes national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device belonging to a third party.
- 81 It should be recalled in that regard that Article 5(2)(b) of Directive 2001/29 sets out three factors which, together, determine the scope of that provision, namely the subject matter of the reproduction, the person making the reproduction and the reproduction itself.
- 82 With regard, first, to the subject matter of the reproduction, it should be noted that that provision lays down an exception to the exclusive right of a rightholder to authorise or prohibit the reproduction of the work in question. That necessarily presupposes that the subject matter of the reproduction covered by that provision is a protected work, not a counterfeited or pirated work (see, to that effect, judgment in *ACI Adam and Others*, EU:C:2014:254, paragraph 58).
- 83 Next, Article 5(2)(b) of Directive 2001/29 provides that the only person authorised to make the reproduction is a natural person who makes copies of the protected work in question for private use and for ends that are neither directly nor indirectly commercial.
- 84 Lastly, as regards the reproduction itself, Article 5(2)(b) of Directive 2001/29 refers only to the media on which the protected work may be reproduced.
- 85 It is, in fact, sufficient to compare the wording of the private copying exception with that of the exception to the right of reproduction set out in Article 5(2)(a) of Directive 2001/29. Whereas the latter applies to 'reproductions on paper or any similar medium', the private copying exception is applicable to 'reproductions on any medium'.
- 86 On the other hand, the wording of Article 5(2)(b) of Directive 2001/29 does not specify the characteristics of the devices by or with the aid of which copies for private use are made. In particular, that provision does not contain any reference to the legal nature of the connection, such as the right to property, which may exist between the natural person who makes the reproduction for private use and the device used by that person.

- 87 It should be noted, first, that the exception provided for in Article 5(2)(b) of Directive 2001/29 must be interpreted restrictively, so that it cannot give rise to an interpretation going beyond the cases expressly envisaged (see, by analogy, judgments in *ACI Adam and Others*, EU:C:2014:254, paragraph 23, and *Melzer*, C-228/11, EU:C:2013:305, paragraph 24).
- 88 Second, the objective of Directive 2001/29 is to harmonise only certain aspects of the law on copyright (judgment in *Padawan*, EU:C:2010:620, paragraph 35). As it did not mention in that directive the characteristics or specific features referred to at paragraph 86 above, the EU legislature did not consider these to be relevant, in the light of the objective which it pursued by its measure of partial harmonisation.
- 89 It follows that the question whether the device used by a private individual to make copies for private use must belong to that person or whether it may belong to a third party falls outside the scope of Article 5(2)(b) of Directive 2001/29.
- 90 In those circumstances, contrary to what is claimed by the European Commission, Article 5(2)(b) of Directive 2001/29 should not be read in the light of Article 5(5) of the directive, as the latter provision is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein (see judgment in *ACI Adam and Others*, EU:C:2014:254, paragraph 26).
- 91 In the light of the foregoing, the answer to question 1(e) is that Directive 2001/29 does not preclude national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party.

Question 1(g)

- 92 By Question 1(g), which it is appropriate to examine in the ninth place, the national court is asking whether Directive 2001/29 precludes national legislation which provides for fair compensation in respect of reproductions made using unlawful sources 'by some other means', such as, for example, the internet.
- 93 According to the Court's settled case-law, where a national court does not provide to the Court the factual or legal material necessary to enable it to give a useful answer to the question submitted, that question must be rejected as inadmissible (see, to that effect, judgment in *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 16, and order in *Stefan*, C-329/13, EU:C:2014:815, paragraph 24).
- 94 In the present case, the national court has failed to provide sufficient information relating to the nature of the reproductions to which the question submitted relates.
- 95 Accordingly, the Court is not in a position to give a useful answer to Question 1(g). That question must therefore be rejected as inadmissible.

Costs

- 96 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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 does not preclude national legislation which provides that fair compensation is to be paid, in accordance with the exception to the reproduction right for copies made for private use, in respect of multifunctional media such as mobile telephone memory cards, irrespective of whether the main function of such media is to make such copies, provided that one of the functions of the media, be it merely an ancillary function, enables the operator to use them for that purpose. However, the question whether the function is a main or an ancillary one and the relative importance of the medium's capacity to make copies are liable to affect the amount of fair compensation payable. In so far as the prejudice to the rightholder may be regarded as minimal, the making available of such a function need not give rise to an obligation to pay fair compensation.
2. Article 5(2)(b) of Directive 2001/29 does not preclude national legislation which makes the supply of media that may be used for copying for private use, such as mobile telephone memory cards, subject to the levy intended to finance fair compensation payable in accordance with the exception to the reproduction right for copies for private use, but does not make the supply of components whose main purpose is to store copies for private use, such as the internal memories of MP3 players, subject to that levy, provided that those different categories of media and components are not comparable or the different treatment they receive is justified, which is a matter for the national court to determine.
3. Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation which requires payment of the levy intended to finance fair compensation, in accordance with the exception to the reproduction right for copies for private use, by producers and importers who sell mobile telephone memory cards to business customers and are aware that those cards will be sold on by those customers but do not know whether the final purchasers of the cards will be individuals or business customers, on condition that:
 - the introduction of such a system is justified by practical difficulties;
 - the persons responsible for payment are exempt from the levy if they can establish that they have supplied the mobile telephone memory cards to persons other than natural persons for purposes clearly unrelated to copying for private use, it being understood that the exemption cannot be restricted to the supply of business customers registered with the organisation responsible for administering the levy;
 - the system provides for a right to reimbursement of that levy which is effective and does not make it excessively difficult to repay the levy and only the final purchaser of such a memory card may obtain reimbursement by submitting an appropriate application to that organisation.
4. Article 5(2)(b) of Directive 2001/29, read in the light of recital 35 in the preamble to that directive, must be interpreted as permitting the Member States to provide, in certain cases covered by the exception to the reproduction right for copies for private use, for an exemption from the requirement under that exception to pay fair compensation, provided that the prejudice caused to rightholders in such cases is minimal. It is within the discretion of the Member States to set the threshold for such prejudice, it being understood that that threshold must, inter alia, be applied in a manner consistent with the principle of equal treatment.

5. Directive 2001/29 is to be interpreted as meaning that, where a Member State has decided, pursuant to Article 5(2) of that directive, to exclude, from the material scope of that provision, any right for rightholders to authorise reproduction of their works for private use, any authorisation given by a rightholder for the use of files containing his works can have no bearing on the fair compensation payable in accordance with the exception to the reproduction right for reproductions made in accordance with Article 5(2)(b) of that directive with the aid of such files and cannot, of itself, give rise to an obligation on the part of the user of the files concerned to pay remuneration of any kind to the rightholder.
6. The implementation of technological measures under Article 6 of Directive 2001/29 for devices used to reproduce protected works, such as DVDs, CDs, MP3 players and computers, can have no effect on the requirement to pay fair compensation in accordance with the exception to the reproduction right in respect of reproductions made for private use by means of such devices. However, the implementation of such measures may have an effect on the actual level of such compensation.
7. Directive 2001/29 precludes national legislation which provides for fair compensation, in accordance with the exception to the reproduction right, in respect of reproductions made using unlawful sources, namely from protected works which are made available to the public without the rightholder's consent.
8. Directive 2001/29 does not preclude national legislation which provides for fair compensation, in accordance with the exception to the reproduction right, in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party.

[Signatures]