Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

24 March 2022 *

(Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction – Article 5(2)(b) – Private copying exception – Concept of 'any medium' – Servers owned by third parties made available to natural persons for private use – Fair compensation – National legislation that does not make the providers of cloud computing services subject to the private copying levy)

In Case C-433/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), made by decision of 7 September 2020, received at the Court on 15 September 2020, in the proceedings

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

v

Strato AG,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2021,

after considering the observations submitted on behalf of:

– Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, by M. Walter, Rechtsanwalt,

– Strato AG, by A. Anderl and B. Heinzl, Rechtsanwälte,

* Language of the case: German.

– the Austrian Government, by J. Schmoll, G. Kunnert and M. Reiter, acting as Agents,

– the Danish Government, by M. Wolff, V. Jørgensen and J. Nymann-Lindegren, acting as Agents,

– the French Government, by E. de Moustier, A. Daniel and A.-L. Desjonquères, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the European Commission, by T. Scharf, G. von Rintelen and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana'), a copyright collecting society, and Strato AG, a provider of cloud storage services, concerning the remuneration for copyright payable by Strato in respect of the provision of that service.

Legal context

European Union law

3 Recitals 2, 5, 21, 31, 35 and 38 of Directive 2001/29 state:

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

…

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

…

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

…

(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. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of trans-border exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

…

(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. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.’

4 Article 2 of Directive 2001/29, entitled 'Reproduction right', provides:

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

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

5 Article 3(1) of that directive provides:

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

6 Article 5 of that directive, entitled 'Exceptions and limitations', states:

'1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and the sole purpose of which is to enable:

(a) a transmission in a network between third parties by an intermediary,

or

(b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

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;

…’

Austrian law

7 Paragraph 42b of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the main proceedings, provides:

‘(1) If a work which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium …, the author shall be entitled to equitable remuneration (remuneration in respect of storage media) in the case where storage media of any kind which are suitable for making such reproductions are, in the course of a commercial activity, placed on the market in national territory.

…

(3) The following persons shall be required to pay the remuneration:

1. as regards remuneration in respect of storage media and devices, the person who, acting on a commercial basis, is first to place the storage media or reproduction device on the market from a place located on national territory or abroad …; however, any person who, over a six-month period, acquires storage media with a recording time that does not exceed 10 000 hours, or is a small business, shall be exempt from any liability …’

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

8 Austro-Mechana is a copyright collecting society which, acting in its own name but in a fiduciary capacity in the interest and on behalf of the rightholders, exercises, inter alia, the statutory rights to the remuneration that is due under Paragraph 42b(1) of the Law on Copyright, in the version applicable to the dispute in the main proceedings.

9 Austro-Mechana applied to the Handelsgericht Wien (Commercial Court, Vienna, Austria) for an order to allow it to invoice for, and take payment of remuneration in respect of, ‘storage media of any kind’, on the ground that Strato provides its business and private customers with a service known as ‘HiDrive’, by which it makes cloud computing storage space available to them.

10 Strato contested the application on the ground that no remuneration was due in respect of cloud computing services. That company stated that it had already paid the required copyright fee in Germany, the Member State in which its servers are hosted, that fee having been incorporated in the price of the servers by their manufacturer or importer. It added that users in Austria had also already paid a levy for the making of private copies (‘the private copying levy’) on the terminal equipment necessary to upload content to the cloud.

11 By judgment of 25 February 2020, the Handelsgericht Wien (Commercial Court, Vienna) dismissed Austro-Mechana’s application, holding that Strato does not make storage media available to its customers, but provides them with an online storage service.

12 Austro-Mechana appealed against that judgment to the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which observes, referring to the judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913), that it is not entirely clear whether the storage of content in the context of cloud computing comes within the scope of Article 5(2)(b) of Directive 2001/29.

13 In those circumstances, the Oberlandesgericht Wien, (Higher Regional Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

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

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

Consideration of the questions referred

The first question

14 By its first question, the referring court asks, in essence, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the expression 'reproductions on any medium' referred to in that provision covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud computing service.

15 It should first be noted that, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 of that directive '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'.

16 As regards, in the first place, the question whether the saving of copies in a cloud storage space constitutes a 'reproduction', for the purposes of Article 5(2)(b) of Directive 2001/29, it should be noted that the concept of 'reproduction' must be construed broadly, in the light both of the requirement expressed in recital 21 of that directive that the acts covered by the reproduction right are to benefit from a broad definition in order to ensure legal certainty within the internal market, and of the wording of Article 2 of that directive, which uses expressions such as 'direct or

indirect', 'temporary or permanent', 'by any means' and 'in any form'. In addition, the scope of such protection of the acts covered by the reproduction right also follows from the main objective of that directive, which is to introduce a high level of protection, in particular for authors (see, to that effect, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 40 to 43).

17 In the present case, it must be stated that the upload of a work from a user's connected terminal to a cloud storage space made available to that user in the context of a cloud computing service involves making a reproduction of that work, since that service consists of, inter alia, storing a copy of that work in the cloud. Moreover, other reproductions of that work may also be made, in particular where the user accesses the cloud by means of a connected terminal in order to download onto that terminal a work that was previously uploaded to the cloud.

18 It follows that the saving of a copy of a work in storage space made available to a user in connection with a cloud computing service constitutes a reproduction of that work, for the purposes of Article 5(2)(b) of Directive 2001/29.

19 In the second place, as regards the question whether the concept of 'any medium', referred to in that provision, covers a server in which storage space is made available to a user by the provider of a cloud computing service for the saving of copies of works protected by copyright, it must be noted that that concept is not defined in that directive and does not refer to the law of the Member States in order to define its scope.

20 In accordance with settled case-law of the Court, it follows from the need for a uniform application of EU law that, where a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an autonomous and uniform interpretation throughout the European Union which must take into account the context of the provision and the objective pursued by the legislation in question (judgment of 8 March 2018, *DOCERAM*, C-395/16, EU:C:2018:172, paragraph 20 and the case-law cited).

21 First, it should be observed that, in their broad sense, the words 'any medium' refer to all media on which a protected work may be reproduced, including servers such as those used in cloud computing.

22 Since the wording of Article 5(2)(b) of Directive 2001/29 does not in any way specify the characteristics of the devices by or with the aid of which copies for private use are made, it must be held that 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 (see, to that effect, judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraphs 86 and 88).

23 Accordingly, the fact that the storage space is made available to a user on a server belonging to a third party is not decisive in that regard (see, to that effect, judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 89). It follows that Article 5(2)(b) of Directive 2001/29 may also apply to reproductions made by a natural person with the aid of a device which belongs to a third party.

24 Second, that broad interpretation of the concept of 'any medium' is supported by the context of that provision and, in particular, by comparing the wording of the exception referred to in Article 5(2)(b) of Directive 2001/29, which does not in any way specify the characteristics of devices by or with the aid of which copies for private use are made, with that of the exception to

the reproduction right laid down in Article 5(2)(a) of that directive. Whereas the latter applies to 'reproductions on paper or any similar medium', the private copying exception is applicable to 'reproductions on any medium' (see, to that effect, judgments of 27 June 2013, *VG Wort and Others*, C-457/11 to C-460/11, EU:C:2013:426, paragraph 65, and of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraphs 85 and 86).

25 Third, as regards the objectives of the legislation at issue, it is clear from recitals 2 and 5 of Directive 2001/29 that that directive seeks to create a general and flexible framework at EU level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of exploiting protected works (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 47 and the case-law cited).

26 In that regard, the Court has already pointed out, in the light of the mandatory exception referred to in Article 5(1) of Directive 2001/29, that the exemption provided for in that provision must allow and ensure the development and operation of new technologies, and must safeguard a fair balance between the rights and interests of rightholders and of users of protected works who wish to avail themselves of those technologies (judgment of 5 June 2014, *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, paragraph 24 and the case-law cited).

27 Such an interpretation, which is consistent with the principle of technological neutrality, according to which the law must specify the rights and obligations of persons in a generic manner, so as not to favour the use of one technology to the detriment of another (see, to that effect, judgment of 15 April 2021, *Eutelsat*, C-515/19, EU:C:2021:273, paragraph 48), must also be accepted with regard to the optional exception referred to in Article 5(2)(b) of Directive 2011/29, as the Advocate General observed, in essence, in point 36 of his Opinion.

28 The achievement of the objective, recalled in paragraph 25 of the present judgment, of preventing copyright protection in the European Union from becoming outdated or obsolete as a result of technological developments and the emergence of new forms of exploitation of copyright-protected content, which follows from recital 5 of Directive 2001/29, would be undermined if the exceptions and limitations to the protection of copyright which, according to recital 31 of that directive, were adopted in the light of the new electronic environment, were interpreted in such a way as to have the effect of excluding similar account being taken of those technological developments and of the emergence in particular of digital media and cloud computing services.

29 In those circumstances, it is not necessary, in terms of functionality, to make a distinction, for the purpose of applying Article 5(2)(b) of Directive 2001/29, according to whether the reproduction of a protected work is carried out on a server on which storage space has been made available to a user by the provider of a cloud computing service or whether such a reproduction is made on a physical recording medium belonging to that user.

30 Consequently, it must be held that the concept of 'any medium', referred to in Article 5(2)(b) of Directive 2001/29, includes a server on which storage space has been made available to a user by the provider of a cloud computing service.

31 That finding is not called into question by the argument advanced by the European Commission that the saving of a copy in the cloud is not separable from possible acts of communication, with the result that such an act, on the basis of the case-law derived from the judgments of 29 November 2017, *VCAST*, (C-265/16, EU:C:2017:913), and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111), should come under Article 3(1) of Directive 2001/29. In fact, the case in the main proceedings is to be distinguished from those that gave rise to the judgments relied on by the Commission. First, the case that gave rise to the judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913), concerned a service with a dual functionality, namely not only reproduction in the cloud, but also, simultaneously or almost simultaneously, communication to the public. Secondly, the case that gave rise to the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111), concerned the provision by a club of an online service consisting of a virtual market for 'second-hand' electronic books, in which protected works were made available to any person who registered on that club's website, with such persons being able to access the site from a place and at a time individually chosen by them, such a service having to be regarded as communication to the public, within the meaning of Article 3(1) of that directive.

32 In any event, any communication that would result from the sharing of a work by the user of a cloud storage service would constitute an act of exploitation that is distinct from the reproduction act referred to in Article 2(a) of Directive 2001/29, which may come within the scope of Article 3(1) of that directive, if the conditions for the application of that provision are satisfied.

33 In the light of the foregoing considerations, the answer to the first question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the expression 'reproductions on any medium', referred to in that provision, covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud computing service.

The second question

34 As a preliminary point, it should be noted that, while it is apparent from the wording of the second question that, in formal terms, it relates to the issue of whether Article 5(2)(b) of Directive 2001/29 'is applicable' to national legislation such as that at issue in the main proceedings, it must be stated, in the light of the grounds of the request for a preliminary ruling, that the referring court seeks, in essence, to determine whether that provision precludes legislation that implements the private copying exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation.

35 Accordingly, by its second question, the referring court asks, in essence, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial.

36 It was observed in paragraph 15 of the present judgment that, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive in the case of reproductions on any medium made by natural persons for private use and for ends that are neither directly nor indirectly commercial, on the condition that the holders of that exclusive right receive fair compensation, taking account of the technological measures referred to in Article 6 of that directive.

37 As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) thereof reflects the EU legislature's intention to establish a specific compensation scheme which is triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to compensate them (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 26 and the case-law cited).

38 It follows that, when Member States decide to implement the private copying exception provided for under that provision in their national law, they are required, in particular, to provide for the payment of fair compensation to rightholders (judgment of 9 June 2016, *EGEDA and Others*, C-470/14, EU:C:2016:418, paragraph 20 and the case-law cited). As is apparent from the Court's case-law, a Member State which has introduced such an exception into its national law has, in that regard, an obligation to achieve a certain result, in the sense that that State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction owing to the reproduction of protected works by end users who reside on the territory of that State (see, to that effect, judgment of 21 April 2016, *Austro-Mechana*, C-572/14, EU:C:2016:286, paragraph 20 and the case-law cited).

39 The copying by natural persons acting in a private capacity, without seeking the prior consent of the holder of the exclusive right of reproduction of a protected work, must, indeed, be regarded as an act likely to cause harm to that rightholder (see, to that effect, judgments of 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 26, and of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 22 and the case-law cited).

40 Accordingly, in so far as, first, as is apparent from the answer to the first question, the expression 'reproductions on any medium', referred to in Article 5(2)(b) of Directive 2001/29, covers the saving, for private purposes, of copies of works protected by copyright on a server in which storage space is made available to a user by the provider of a cloud computing service and, second, the reproductions at issue are made by a natural person for private use and for ends that are neither directly nor indirectly commercial, this being a matter which it is for the referring court to determine, it must be held that Member States which implement the exception referred to in that provision are obliged to provide for a system of fair compensation intended to compensate rightholders, in accordance with that provision.

41 According to the Court's settled case-law, since the provisions of Directive 2001/29 do 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 that compensation (judgments of 21 April 2016, *Austro-Mechana*, C-572/14, EU:C:2016:286, paragraph 18, and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 27 and the case-law cited).

42 As stated in recital 35 of Directive 2001/29, Member States must, when making that determination, take account of the particular circumstances of each case (judgment of 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 22).

43 As regards, in the first place, the person liable for the fair compensation, the Court has already held that it is, in principle, for the person carrying out private copying to make good the harm connected with that copying by financing the compensation that will be paid to the copyright holder (judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 45; of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 22; and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 30). Accordingly, as regards the provision of cloud computing storage services, it is, in principle, for the user of those services to finance the compensation paid to that holder.

44 The Court has, however, ruled that, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and may therefore not give rise to an obligation for payment, 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 digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or provide copying services for them. Under such a system, it is the persons having that equipment who must pay the private copying levy (see, to that effect, judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 46; of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 23; and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 31).

45 The Court has pointed out in this regard that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a manner consistent with the 'fair balance', referred to in recital 31 of Directive 2001/29, between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject matter (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 33).

46 It follows that, as EU law currently stands, the introduction of a system of fair compensation, in which the producer or importer of the servers by means of which the cloud computing services are offered to private persons is required to pay the private copying levy, that levy being passed on economically to the purchaser of such servers, combined with the introduction of a private copying levy on the media that are integrated into the connected devices that make it possible to make copies of protected subject matter in a cloud computing storage space, such as mobile telephones, computers and tablets, falls within the discretion allowed to the national legislature for defining the various elements of the fair compensation system, as recalled in paragraph 41 above.

47 It is, however, for the national court to ensure, in accordance with the case-law of the Court, having regard to the particular circumstances of the national system and the limits imposed by Directive 2001/29, that the establishment of such a system is justified by practical difficulties in identifying the final users or other similar difficulties and that the persons responsible for

payment have a right to reimbursement of that levy in cases where it is not due (see, to that effect, judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraphs 34 and 35 and the case-law cited).

48 As regards the provision of storage services in the context of cloud computing, it must be held in that regard, as the Danish Government in essence stated, that such difficulties may arise from the dematerialised nature of such services, which may be offered from Member States other than that concerned or from third countries, which generally include the possibility for the user to alter as he or she wishes, in an evolving and dynamic manner, the size of the storage space that may be used for private copying.

49 In the second place, as regards the form, detailed arrangements and level of fair compensation, the Court has already held that that 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 rightholders from the making of copies for private use (judgments of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 21, and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 28 and the case-law cited).

50 Any fair compensation that is not be linked to the harm caused to rightholders as a result of such copying would not be compatible with the requirement, set out in recital 31 of Directive 2001/29, that a fair balance must be safeguarded between the rightholders and the users of protected subject matter (judgments of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraph 86, and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 54).

51 In the present case, as has been noted in paragraph 17 of the present judgment, the copying of protected works in storage space in the context of cloud computing requires the carrying out of several acts of reproduction, which may be effected from a number of connected terminals.

52 As the Advocate General stated in point 71 of his Opinion, in so far as the uploading and downloading of copyright-protected content during the use of storage services in the context of cloud computing may be classified as a single process for the purposes of private copying, it is open to the Member States, in the light of the broad discretion which they enjoy, as recalled in paragraphs 41 and 46 of the present judgment, to put in place a system in which fair compensation is paid solely in respect of the devices or media which form a necessary part of that process, provided that such compensation may reasonably be regarded as reflecting the possible harm to the copyright holder (see, to that effect, judgment of 27 June 2013, *VG Wort and Others*, C-457/11 to C-460/11, EU:C:2013:426, paragraph 78).

53 In that context, while it is open to the Member States to take account, when setting the private copying levy, of the fact that certain devices and media may be used for the purpose of private copying in connection with cloud computing, they must ensure that the levy thus paid, in so far as it affects several devices and media in that single process, does not exceed the possible harm to the rightholders resulting from the act in question, as stated in recital 35 of Directive 2001/29.

54 In the light of those considerations, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons,

who are users of those services, for private use and for ends that are neither directly nor indirectly commercial, in so far as that legislation provides for the payment of fair compensation to the rightholders.

Costs

55 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 (Second 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 must be interpreted as meaning that the expression 'reproductions on any medium', referred to in that provision, covers the saving, for private purposes, of copies of works protected by copyright on a server in which storage space is made available to a user by the provider of a cloud computing service.**

2. **Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial, in so far as that legislation provides for the payment of fair compensation to the rightholders.**

[Signatures]