Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 11 June 2015 [1]

Case C-572/13

Hewlett-Packard Belgium SPRL
and
Epson Europe BV
v
Reprobel SCRL

(Request for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium))

(Approximation of laws — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Exclusive right of reproduction — Exceptions and limitations — Article 5(2)(a) and (b) — Reprography exception — Private copying exception — Concept of 'fair compensation' — Collection of remuneration in respect of fair compensation relating to multifunction printers — Concurrent application of flat-rate and proportional remuneration — Method of calculation — Beneficiaries of fair compensation — Authors and publishers)

1. In the present case, the Court of Justice is once more hearing a request for a preliminary ruling on the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29 or 'the Directive'), [2] and more specifically, Article 5(2)(a) and (b) thereof, which allows Member States to introduce into their national law exceptions to the exclusive right of reproduction of authors, namely, respectively, the reprography exception and the private copying exception.

2. The applicant undertakings in the main proceedings, in their capacity as importers and/or producers of multifunction printers, dispute, in essence, the amounts claimed from them as fair compensation payable under the reprography exception laid down in Article 5(2)(a) of the Directive, thus providing the Court with the opportunity to examine provisions which it has had far fewer occasions to interpret than it has those of Article 5(2)(b) of the Directive.

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

I – **Legal context**

A – *EU law*

3. Article 5(2)(a) and (b) of Directive 2001/29 provides:

‘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.’

4. The main recitals in the preamble to and other provisions of Directive 2001/29 that may be relevant to the resolution of the case in the main proceedings will be cited, as required, in the course of the following reasoning. It is, however, necessary to cite recital 37 to that directive, which reads:

‘Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.’

B – *Belgian law*

5. The Article 1(1) of the Loi relative au droit d’auteur et aux droits voisins (Law on Copyright and Related Rights) [3] of 30 June 1994 provides:

‘The author of a literary or artistic work shall have the sole right to reproduce it or authorise its reproduction in any manner and in any form whatsoever, whether direct or indirect, temporary or permanent, in whole or in part.

…’

6. Article 22(1) of the LDA, in the version in force on the date of the reference for a preliminary ruling, [4] provides:

‘Once a work has been lawfully published, its author may not prohibit,

…

(4) the reproduction in part or in whole of articles or works of plastic art or the reproduction of short fragments of other works fixed on a graphic or similar medium, where such reproduction is for a strictly private purpose and does not adversely affect a normal exploitation of the work;

3 — *Moniteur belge* of 27 July 1994, p. 19297; ‘the LDA’.

4 — It should be noted that those provisions were amended by the Loi portant des dispositions diverses, spécialement en matière de justice (Law on miscellaneous provisions, specifically relating to matters of justice) of 31 December 2012, *Moniteur belge* of 31 December 2012, p. 88936, which entered into force on 1 December 2013, after the case was brought before the Court of Justice.

(4)bis the reproduction in part or in whole of articles or works of plastic art or the reproduction of short fragments of other works fixed on a graphic or similar medium, where such reproduction is for the purpose of illustration for teaching or scientific research, to the extent justified by the not-for-profit purpose to be achieved, and does not adversely affect a normal exploitation of the work …

(5) reproductions of audio and audiovisual works made within and restricted to the family circle.'

7. Articles 59 to 61 of the LDA provide:

'Article 59

The authors and publishers of works fixed on a graphic or similar medium shall be entitled to remuneration for the reproduction of such works, including under the conditions set out in Article 22(1)(4) and (4a), and Article 22a(1)(1) and (2).

The remuneration shall be paid by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are placed on the market in national territory.

Article 60

In addition, proportional remuneration, determined on the basis of the number of copies made, shall be payable by natural or legal persons making copies of works or, as appropriate and in place of such persons, by those who, for consideration or free of charge, make a reproduction device available to others.

Article 61

The King shall fix the amount of the remuneration referred to in Articles 59 and 60, by Decree deliberated in the Council of Ministers. The remuneration referred to in Article 60 may be adjusted on the basis of the sectors concerned.

He shall determine the detailed rules for collecting, distributing and verifying that remuneration and also its amount where it is payable.

Subject to the international agreements, the remuneration laid down in Articles 59 and 60 shall be allocated, in equal parts, to authors and publishers.

In accordance with the detailed conditions he lays down, the King shall entrust an association representing all the collecting societies with ensuring the collection and distribution of the remuneration.'

8. The amounts of the flat-rate remuneration and the proportional remuneration are laid down by Articles 2, 4, 8 and 9 of the Royal Decree of 30 October 1997 on the remuneration of authors and publishers for the copying, for private or didactic purposes, of works fixed on a graphic or similar medium. [5] Those articles provide: [6]

5 — *Moniteur belge* of 7 November 1997, p. 29874; 'the Royal Decree of 30 October 1997'.

6 — Those figures are those resulting from the opinion of the Direction générale de la Régulation et de l'Organisation du marché of 4 November 2012 concerning the automatic indexing of the amounts referred to in the Royal Decree of 30 October 1997, *Moniteur belge* of 4 November 2013, p. 83560.

‘Article 2

1. The amount of the flat-rate remuneration applicable to copiers shall be set at:

(1) EUR [5.01] per copier producing fewer than 6 copies per minute;

(2) EUR [18.39] per copier producing from 6 to 9 copies per minute;

(3) EUR [60.19] per copier producing from 10 to 19 copies per minute;

(4) EUR [195.60] per copier producing from 20 to 39 copies per minute;

(5) EUR [324.33] per copier producing from 40 to 59 copies per minute;

(6) EUR [810.33] per copier producing from 60 to 89 copies per minute;

(7) EUR [1838.98] per copier producing more than 89 copies per minute.

In order for the amount of the flat-rate remuneration to be determined, the black and white copying speed shall be taken into consideration, including for machines which make colour copies.

2. The amount of the flat-rate remuneration applicable to duplicators and office offset machines shall be set at:

(1) EUR [324.33] per duplicator;

(2) EUR [810.33] per office offset machine.

…

Article 4

In the case of devices combining several of the functions of the devices referred to in Articles 2 and 3, the amount of the flat-rate remuneration shall be the highest of the amounts provided for in Articles 2 and 3 which are capable of being applied to the combined device.

…

Article 8

Failing cooperation, as defined in Articles 10 to 12, by the person liable for payment, the amount of the proportional remuneration shall be set at:

(1) EUR [0.0334] per copy of a protected work;

(2) EUR [0.0251] per copy of a protected work produced by means of devices used by an educational or public lending establishment.

In the case of colour copies of protected works in colour, the amounts referred to above shall be multiplied by two.

Article 9

In so far as the person liable for payment has cooperated in the collection of the proportional remuneration by the collecting society, the amount of that remuneration shall be set at:

(1) EUR [0,0201] per copy of protected work;

(2) EUR [0.0151] per copy of protected work produced by means of devices used by an educational or public lending establishment.

In the case of colour copies of protected works in colour, the amounts referred to above shall be multiplied by two.'

9. The cooperation referred to in Articles 8 and 9 is defined by Articles 10 to 12 of the Royal Decree of 30 October 1997. Article 10 provides:

'A person liable for payment shall be deemed to have cooperated in the collection of the proportional remuneration if he:

(1) has returned his declaration for the period concerned to the collecting society in accordance with the provisions of Section 3;

(2) has provisionally paid to the collecting society, when lodging the declaration with it, the proportional remuneration corresponding to the declared number of copies of protected works multiplied by the relevant rate referred to in Article 9, and;

(3) (a) has either estimated jointly with the collecting society, before the expiry of a time-limit of 200 working days from receipt by the collecting society of the declaration, the number of copies of protected works produced during the period concerned;

(b) or has provided the information necessary for drafting the opinion referred to in Article 14, where the collecting society has requested an opinion in accordance with that article.'

10. Article 14 of the Royal Decree of 30 October 1997 provides:

'1. Failing a joint estimate by the person liable for payment and the collecting society of the number of copies of protected works produced during the period concerned, the collecting society may request an opinion on the estimated number of copies of protected works produced during the period concerned.

The collecting society shall notify the person liable for payment of the request for an opinion within 220 working days from the date of receipt by the collecting society of that person's declaration.The opinion shall be given by one or more experts designated:

(1) either by common agreement between the person liable for payment and the collecting society;

(2) or by the collecting society.

Under (2) above, the collecting society may designate only an expert or experts approved by the Minister.

The opinion shall be delivered within three months of the date of receipt of the request for an opinion by the designated expert(s).

2. When the expert is or the experts are appointed by common agreement between the person liable for payment and the collecting society, the experts' fees shall be shared by common agreement between the parties.When the expert is or the experts are appointed by the collecting society alone in accordance with Article 14(1)(2), the collecting society may recover the experts' fees from the person liable for payment provided that all the following conditions are met:

(1) the person liable for payment has not previously sent the collecting society the information requested by that society in accordance with Article 22 or;

— following a request for information in accordance with Article 22, the person liable for payment has sent the collecting society information which is manifestly incorrect or incomplete;

(2) the collecting society has, in the request for information referred to in Article 22, clearly informed the person liable for payment that it may, in the situations referred to in (1) above, recover the costs of an independent expert's report requested by the collecting society;

(3) the expert fees are objectively justified;

(4) the expert fees are reasonable in relation to the volume of copies of protected works that the collecting society was reasonably entitled to consider could have been made.

…'

II – **Facts giving rise to the case in the main proceedings**

11. The company Hewlett-Packard Belgium [7] imports into Belgium reprography devices for home and business use, in particular 'multifunction' devices, whose main function is to print documents at speeds which vary depending on print quality, and which can also be used to scan and copy documents and to receive and send faxes. Those multifunction printers, which are at the heart of the case in the main proceedings, are sold at prices not usually exceeding EUR 100.

12. Reprobel SCRL [8] is the collecting society responsible for the collection and distribution of the amounts in respect of fair compensation under the reprography exception.

13. On 16 August 2004 Reprobel sent HPB a fax informing it that the sale of multifunction printers involved, in principle, the payment of a levy of EUR 49.20 per device.

14. The meetings arranged and correspondence exchanged with Reprobel not having enabled an agreement to be reached on the rates applicable to those multifunction printers, HPB, by notice of 8 March 2010, brought an action against Reprobel before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels). HPB sought, first, an order from that court to the effect that no remuneration was payable for the devices it had offered for sale or, alternatively, that the remuneration it had paid corresponded to the fair compensation payable under Belgian legislation, interpreted in the light of Directive 2001/29. It sought, secondly, an order that Reprobel should,

7 — 'HPB.'

8 — 'Reprobel.'

within the year, on pain of a penalty of EUR 10 million, perform a study consistent with that referred to in Article 26 of the Royal Decree of 30 October 1997, relating to, inter alia, the number of devices at issue and their actual use as copiers of protected works and comparing that actual use with the actual uses of any other devices for reproducing protected works.

III – **The questions referred and the procedure before the Court**

15. It was in those circumstances that, by judgment of 23 October 2013, received by the Registry of the Court on 8 November 2013, the Cour d'appel de Bruxelles decided to stay proceedings and to refer the following questions to the Court:

'(1) Must the term "fair compensation" appearing in Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted differently depending on whether the reproduction on paper or a similar medium, effected by means of any kind of photographic technique or of any other process having similar effects, is effected by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial? If the answer is in the affirmative, on what criteria must that difference of interpretation be based?

(2) Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to fix the fair compensation payable to rightholders in the form of:

— a lump-sum remunerative payment made by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, the amount of which is calculated solely by reference to the speed at which the copier is capable of producing a number of copies per minute, without being otherwise linked to any harm suffered by rightholders; and

— a proportional remunerative payment, determined solely by means of a unit price multiplied by the number of copies produced, which varies depending on whether or not the person liable for payment has cooperated in the collection of that remuneration, which is payable by natural or legal persons making copies of works or, as the case may be, in lieu of those persons, by those who, for consideration or free of charge, make a reproduction device available to others.

If the reply to this question is in the negative, what are the relevant and consistent criteria that the Member States must apply in order to ensure that, in accordance with EU law, the compensation may be regarded as fair and that a fair balance is maintained between the persons concerned?

(3) Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to allocate half of the fair compensation due to rightholders to the publishers of works created by authors, the publishers being under no obligation whatsoever to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived?

(4) Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to introduce an undifferentiated system for recovering the fair compensation due to rightholders in the form of a lump-sum and an amount for each copy made, covering in part, implicitly but indisputably, the copying of sheet music and of counterfeit reproductions?'

16. By interlocutory judgment of 7 February 2014, the Cour d'appel de Bruxelles informed the Court that it was granting Epson Europe BV [9] leave to intervene voluntarily in the dispute in the main proceedings. In accordance with Article 97(2) of its Rules of Procedure, the Court, consequently, sent Epson the procedural documents already served on the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

17. Written observations were submitted by HPB, Epson and Reprobel, the parties to the main proceedings, and by the Belgian Government, Ireland, [10] the Austrian, Polish, Portuguese and Finnish [11] Governments and the European Commission. HPB, Epson and Reprobel, like the Belgian and Czech Governments and the Commission, also submitted oral observations at the public hearing which was held on 29 January 2015.

IV – **The concept of 'fair compensation' within the meaning of Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 (first question)**

18. By its first question, the national court asks the Court whether the term 'fair compensation', used in Article 5(2)(a) and (b) of Directive 2001/29, must be interpreted differently depending on whether the act of 'reproduction on paper or a similar medium, effected by means of any kind of photographic technique or of some other process having similar effects' is effected 'by any user' or 'by a natural person for private use and for ends that are neither directly nor indirectly commercial'.

19. That first question asked by the national court is not, it must be emphasised, without ambiguities, as demonstrated by the written observations submitted in response to it, which are highly contrasted both in their conclusions and in their reasoning. Thus, after a first superficial reading, it could be considered that the national court appears to suggest that the interpretation of Article 5(2)(a) of Directive 2001/29 not only could, but even ought to, take into account the capacity of the person copying a protected work and the purpose for which it is copied, that is to say, the criteria referred to in Article 5(2)(b) of that directive. It is therefore appropriate to start by identifying the meaning and precise implications of the first question in the light of the case in the main proceedings, by setting out, first of all, the explanations provided by the national court itself.

A – *The meaning and implications of the first question*

1. Explanations of the national court

20. The national court states that the Court has, until now, examined the concept of fair compensation only in the context of the interpretation of Article 5(2)(b) of Directive 2001/29.

21. Reprobel submitted before the national court, on the one hand, that only Article 5(2)(a) of Directive 2001/29 was at issue in the main proceedings and, on the other, that a distinction should be drawn between the reprography exception, referred to by that latter provision, and the private copying exception, referred to in Article 5(2)(b) of that directive. HPB, however, argued that Article 5(2)(b) of Directive 2001/29, in so far as it refers to reproduction on any medium, also applies to reprography by a natural person for private use.

9 — 'Epson.'

10 — Ireland, however, proposes responses only to the first and second questions referred.

11 — The Finnish Government, however, proposes responses only to the third and fourth questions referred.

22. The national court states, from that point of view, that, because multifunction printers are also used by natural persons for their private use, the question arises to whether the concept of fair compensation, which must be relative to the harm suffered by rightholders, must be interpreted in the same way, whether the reproduction is made for private or for any other use.

2. Analysis of the first question

23. The difficulty of the first question referred by the national court lies entirely in the fact that the very wording of that question appears to suggest that it is somehow possible to apply the 'limits' of fair compensation for private copying, laid down by Article 5(2)(b) of Directive 2001/29, concurrently with those of fair compensation for reprography, laid down by Article 5(2)(a) of the directive.

24. However, that is not, in my view, the meaning that is to be attributed to that first question.

25. It is important to point out, first of all, that the national court, as is clear from the actual wording of its question, takes up its position exclusively within the ambit of Article 5(2)(a) of Directive 2001/29, inasmuch as that question expressly and exclusively refers to 'reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects' and not, more broadly, to reproduction performed by means of a multifunction printer, for example.

26. Its first question does not, therefore, take as its starting-point the principle that the use of multifunction printers is capable of falling within both the reprography exception, referred to in Article 5(2)(a) of Directive 2001/29, and the private copying exception, referred to in Article 5(2)(b) of that directive. [12]

27. It must, in that regard, be pointed out that it is, generally, possible to consider that the use of multifunction printers for the purposes of reproducing protected works is capable of falling within both the material scope of the reprography exception, for the purposes of Article 5(2)(a) of Directive 2001/29, and that of the private copying exception, for the purposes of Article 5(2)(b) of that directive.

28. In addition to their primary function of printing onto paper documents from a wireless or hardwired terminal (for example, a computer, a tablet, a smartphone or a camera) or from a recording medium (for example, an external hard drive or a memory stick), those printers make it possible not only to photocopy or make reprographic copies of works on paper, an operation which falls within the reprography exception referred to in Article 5(2)(a) of Directive 2001/29, but also to scan or digitise those works and to store the resulting file on an electronic medium, [13] an operation which could fall within the private copying exception referred to in Article 5(2)(b) of that directive. [14]

29. However, it is clear from the file that, for the purposes of providing the national court with a useful answer, it is necessary neither to determine whether the use of multifunction printers falls solely within the reprography exception referred to in Article 5(2)(a) of Directive 2001/29 or whether it also and simultaneously falls, having regard, specifically, to their multiple functions, within the private copying

12 — A situation considered by Advocate General Sharpston in her Opinion in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:34, point 40).

13 — It is certainly necessary, in that regard, to draw a distinction between, on the one hand, the reproduction of protected works distributed in digital form (e-books or other works distributed on CD, DVD or the Internet) and, on the other hand, the reproduction of protected works distributed in analogue form (books, the printed press), noting in that regard that copied digital works, like digitised analogue works, are legal only in so far as they have been authorised by the rightholder or fall within either of the exceptions laid down by Directive 2001/29.

14 — In that regard see, below, points 42 to 45 of the present Opinion.

exception referred to in Article 5(2)(b) of that directive, nor, consequently, to define the respective ambits of those two provisions with regard to those printers and, more broadly, with regard to any hybrid reproduction equipment or device capable of being used for the purposes of analogue and digital reproductions of protected works.

30. It must be noted that the Belgian Government and Reprobel have pointed out, on the one hand, that the provisions of Article 5(2)(a) of Directive 2001/29 were transposed into Article 22(1)(4) of the LDA and that the provisions of Article 5(2)(b) of that directive were transposed into Article 22(1)(5) of the LDA. They take the view, secondly, that it is Article 22(1)(4) of the LDA which applies, in the main proceedings, to the exclusion of Article 22(1)(5) of the LDA.

31. It may, in that regard, be noted that, in its version applicable at the date of the reference for a preliminary ruling, Article 22(1)(5) of the LDA actually referred only to 'reproductions of audio and audiovisual works made within and restricted to the family circle'. It may therefore be concluded from this that the private copying exception is not to be applied, at the very least before the reform of 31 December 2012, which came into force on 1 December 2013, to the use of multifunction printers, not even to the digitisation of protected works by means of a scanner.[15] That, however, is a conclusion that only the national court may reach, for, in accordance with settled case-law, the Court of Justice has no jurisdiction to interpret national law.

32. Nevertheless, the question asked by the national court in that connection, seeks, in my view, to ascertain whether and, if so, to what extent fair compensation under the reprography exception, as referred to in Article 5(2)(a) of Directive 2001/29, to which the use of multifunction printers for the purpose of making reprographic copies of protected works must normally, and without exception, give rise, may 'differ' on the basis of whether that use is made by any user or 'by a natural person for private use and for ends that are neither directly nor indirectly commercial', according to the wording borrowed from Article 5(2)(b) of that directive.

33. The question asked by the national court is not, therefore, whether it is possible to apply the limits laid down in Article 5(2)(b) of Directive 2001/29 in the context of the application of Article 5(2)(a) of that directive, but more specifically and more exactly whether under Directive 2001/29, in so far as fair compensation must be determined on the basis of the harm suffered by the rightholders as a result of the reproduction made, the fair compensation collected in respect of reprography on the use of multifunction printers may or, in some circumstances, must be adjusted, depending on whether the reproduction is made by a natural person for private use or by any other person for other purposes.

34. In other words, the Court is asked to determine, finally and strictly, whether and, if so, to what extent Directive 2001/29 enables or requires the Member States which have decided to implement the reprography exception referred to in Article 5(2)(a) thereof and, as in the present case, introduced the collection of flat-rate and proportional remuneration relating to the use of multifunction printers for the purpose of financing the fair compensation laid down in that provision to take into account in every case whether or not those printers are used by natural persons for private use.

15 — It is clear, however, from the report to the King preceding the Royal Decree of 30 October 1997 that that possibility had already been taken into consideration.

B – *The existence of a requirement of differentiated collection of fair compensation depending on the uses of multifunction printers*

35. It is important to point out, first of all, that, in accordance with Article 5(2) of Directive 2001/29, Member States merely have the right, but are not obliged, to give effect in their national law to the exceptions to or limitations of the exclusive right of reproduction of works protected by the copyright referred to in Article 2 of that directive — which exceptions and limitations are listed in Article 5(2) and (3) thereof –, including the reprography exception referred to in Article 5(2)(a) of that directive and the private copying exception referred to in Article 5(2)(b) thereof.

36. When those Member States decide to introduce the reprography exception or the private copying exception, they are, none the less, required to provide, pursuant to Article 5(2)(a) and (b) of Directive 2001/29, for the payment of fair compensation to holders of the exclusive right of reproduction. [16]

37. The Court has ruled that the concept of fair compensation, a necessary element common to the reprography exception and the private copying exception, was an autonomous concept of EU law that had to be interpreted uniformly in all the Member States. [17] That means, in particular, that where the Member States decide to introduce the reprography exception or the private copying exception, they are not free to determine the limits of fair compensation, the essential element, inconsistently or in an unharmonised way. [18]

38. The Court has, however, also held that, because Directive 2001/29 did not expressly regulate the issue, the Member States had broad discretion to delimit, in accordance with the principle of non-discrimination, the various elements of the fair compensation system which they must then establish, in particular to determine the persons required to pay that compensation but also the form, detailed arrangements for collection and level of that compensation. [19]

39. However, as the Court has repeatedly held, fair compensation must necessarily be calculated on the basis of the harm, whether potential [20] or actual, caused to the copyright holders by the introduction of the exception to the exclusive right of reproduction concerned. [21]

40. It is in the light of that fundamental guidance that an answer should be given to the first question referred by the national court.

41. In the present case, it should be observed, first of all, that the parameters of the reprography exception and of the private copying exception are defined in Article 5(2)(a) and (b) of Directive 2001/29, respectively, on the basis of highly contrasting criteria. [22] The reprography exception is 'defined' in terms of the medium of reproduction ('on paper or any similar medium') and the means of reproduction used ('any kind of photographic technique or … some other process having similar effects'), whereas the private copying exception is 'defined' in terms of the medium of reproduction ('any medium'), but above all in terms of the identity of the person making the reproduction ('a natural person') and of the objective pursued by the reproduction ('for private use and for ends that are neither directly nor indirectly commercial').

16 — See, most recently, judgment in *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 19) and case-law cited.

17 — See judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 33).

18 — See judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 36) and *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 49).

19 — See, most recently, judgment in *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraphs 19 and 20, 30 to 41, 57 and 59) and case-law cited.

20 — See, in particular, recital 35 to Directive 2001/29 and judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 39).

21 — Judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 42); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 47); *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 55), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 21).

22 — As Advocate General Sharpston had earlier pointed out in her Opinion in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:34, point 39).

42. Those clarifications are not really criteria defining the two exceptions, but rather elements which make it possible to delimit the parameters of their respective spheres and therefore to determine, to a certain extent, their ambit *ratione personae* and *ratione materiae*, but according to very different terms and detailed rules.

43. Article 5(2)(b) of Directive 2001/29, which is not at issue in the main proceedings, thus defines, in essence, by twice restricting it, the ambit *ratione personae* of the private copying exception. Only natural persons are authorised to reproduce protected works by making private copies and are authorised to do so only for their private use and for ends that are neither directly nor indirectly commercial. Consequently, fair compensation, to which any reproduction of a protected work must, on that basis and without exception, give rise, can be collected only from those natural persons. That provision does not restrict, however, at least expressly, the ambit *ratione materiae* of the private copying exception. It merely states, in that regard, that it is applicable irrespective of the medium of reproduction used. Indeed, as is clear from the case-law of the Court, it is actually Article 5(2)(a) of Directive 2001/29 which restricts the ambit *ratione materiae* of the private copying exception solely to digital reproductions.

44. Article 5(2)(a) of Directive 2001/29, which is the only provision at issue in the main proceedings, defines, in essence, by restricting it threefold, the ambit *ratione materiae* of the reprography exception and, consequently, and negatively, the private copying exception. Only 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, fall within the reprography exception.

45. As the Court has pointed out, the actual wording of Article 5(2)(a) of Directive 2001/29 thus establishes a distinction between the medium of reproduction, namely paper or a similar medium, and the means which are used to make that reproduction, namely any kind of photographic technique or some other process having similar effects. [23]

46. The medium of reproduction must be paper, which is expressly referred to, or any other 'substrate which must possess similar qualities, namely qualities comparable and equivalent qualities to those of paper', [24] which excludes all non-analogue reproduction media and therefore, in particular, digital media. [25]

47. The means by which a reproduction on paper or similar support may be made refers not only to photographic technique but also to 'some other process having similar effects', namely any other means allowing for a similar result to that obtained by a photographic technique to be achieved, that is to say, the analogue representation of a protected work or other subject-matter. [26] The Court thus stated that the reprography exception was focused not on the technique used but rather on the result obtained. [27]

48. It can therefore be inferred from the case-law of the Court that the photocopying function of multifunction printers, which enables the reproduction of protected works on paper, falls within the reprography exception referred to in Article 5(2)(a) of Directive 2001/29, while their scanning function, which enables the reproduction of protected works on an electronic medium, that is to say, the digitisation of works published on paper, could fall within the private copying exception referred

23 — See judgment in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 64).

24 — Ibid., paragraph 65.

25 — Ibid., paragraph 67.

26 — Ibid., paragraph 68.

27 — Ibid., paragraph 69.

to in Article 5(2)(b) of that directive. However, and as I have already pointed out,[28] that aspect of the issue does not fall within the field of the questions referred to the Court for a preliminary ruling, as the national legislature did not envisage that possibility, at least before the reform of 31 December 2012, which came into force on 1 December 2013, after the reference was made to the Court.

49. By contrast, Article 5(2)(a) of Directive 2001/29 contains no restriction relating to the capacity of the person making the reproduction or to the purpose for which that reproduction is made. Consequently, fair compensation, to which any reproduction of a protected work must, without exception, give rise under the reprography exception, must, in principle, be collected from any person making such a reproduction.[29]

50. It is clear from the foregoing analysis that under Article 5(2)(a) of Directive 2001/29 the Member States which have chosen to implement the reprography exception are neither expressly required to adjust (that is the question referred to the Court) nor formally forbidden to adjust, depending on the purpose for which the reproduction is made and the capacity of the person making that reproduction, the collection of fair compensation payable for the use of multifunction printers for the purpose of reproductions of protected works.

51. It must, in particular, be emphasised that a succinct answer cannot be given to the national court's first question to the effect that such adjustment is excluded because Article 5(2)(a) of Directive 2001/29, unlike Article 5(2)(b) thereof, does not distinguish the capacity of the person making the reproduction from the purpose for which it is made, applying, in short, the saw that where the law does not distinguish, we ought not to distinguish (*ubi lex non distinguit, nec nos distinguere debemus*).

52. The first conclusion to which that analysis leads me is that the Member States are not obliged to put in place a system for collecting a levy, intended to finance fair compensation under the reprography exception, for the purposes of Article 5(2)(a) of Directive 2001/29, on multifunction printers and/or their use, that is differentiated depending on the capacity of the user and/or the purpose for which they are used.

53. The second conclusion to be drawn from that analysis is that the Member States are free, none the less, to establish such a differentiated system, provided, however, that that compensation remains linked to the harm suffered by the rightholders by reason of the introduction of that exception, which requires such differentiation to be based on objective, transparent and non-discriminatory criteria,[30] as is clear, in particular, from the following examination of the second question referred for a preliminary ruling.

54. I propose, therefore, that the Court should answer the first question by ruling that Article 5(2)(a) of Directive 2001/29 must be interpreted as meaning that it does not require, but does permit, Member States to establish a system for collecting a levy, intended to finance fair compensation under the reprography exception laid down in that provision, on multifunction printers and/or their use, which is differentiated depending on the capacity of the user and/or the purpose for which they are used, provided, first, that that compensation remains linked to the harm suffered by the rightholders by reason of the introduction of that exception and, secondly, that such differentiation is based on objective, transparent and non-discriminatory criteria.

28 — See points 29 to 31 of this Opinion.

29 — It is important to point out here that this appears to be the case in the main proceedings, as is clear from the explanations of the Belgian Government.

30 — On that requirement, see judgment in *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraphs 30 to 41).

V – **Fixing of the flat-rate remuneration and proportional remuneration intended to finance the fair compensation (second question)**

55. By its second question, the national court asks the Court, in essence, whether Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as authorising a Member State to put in place, for the purposes of financing the fair compensation required by those provisions, a system of twofold flat-rate and proportional remuneration with the characteristics of the system at issue in the main proceedings, in particular having regard to the fair balance which it is required to guarantee between the interests of the various persons concerned.

56. Before undertaking an answer to the national court's second question, it is necessary to note the main characteristics of the flat-rate and proportional remuneration at issue in the main proceedings and then to set out the explanations provided by the national court.

A – *Principal elements of the Belgian system of flat-rate and proportional remuneration*

57. The reproduction of protected works under the reprography exception laid down in Article 22(1)(4) of the LDA entitles authors and publishers [31] of works fixed on a graphic or similar medium to fair compensation financed by a flat-rate remuneration, laid down in Article 59 of the LDA, and by a proportional remuneration, laid down in Article 60 of the LDA.

58. The flat-rate remuneration is paid by the manufacturer, importer or intra-Community acquirer of devices capable of being used to copy protected works, at the time when such devices are placed on the market in national territory. Article 1 of the Royal Decree of 30 October 1997 defines importer and intra-community acquirer as the importers and acquirers whose commercial activity consists in distributing devices. Its amount, set by Article 2 of the Royal Decree of 30 October 1997, is based on the maximum black and white copying speed of the device in question. For multifunction printers of the type at issue in the main proceedings (20 to 39 copies per minute), the amount is EUR 195.60.

59. The proportional remuneration is payable by natural and legal persons who make copies of protected works or, as appropriate, in place of natural persons, by those who, for consideration or free of charge, make a reproduction device available to others, [32] at the time when the protected work is copied. [33] Its amount is calculated on the basis of the number of copies made with each device and a rate which varies according to whether or not the person liable for payment cooperates in its collection; it is set at EUR 0.0201 per copy of protected works if the person liable for payment has cooperated and at EUR 0.0334 if that person has not cooperated. [34]

60. That cooperation is defined in Articles 10 to 12 of the Royal Decree of 30 October 1997, which distinguish standardised cooperation, applicable to educational or public lending establishments, [35] from general cooperation, applicable to other persons liable for payment, [36] irrespective of their capacity, [37] according to detailed arrangements which vary on the basis of the criteria set out in Article 12(3) of the Royal Decree of 30 October 1997.

31 — The third question referred by the national court relates specifically to those two categories of beneficiaries of the fair compensation.

32 — See Article 60 of the LDA, which is referred to by Article 1(14) of the Royal Decree of 30 October 1997, defining the person liable for payment of the proportional remuneration.

33 — See Article 15 of the Royal Decree of 30 October 1997.

34 — Those rates are, respectively, EUR 0.0251 and EUR 0.0151 per copy of protected work made with devices used by an educational or public lending establishment. They are, furthermore, multiplied by two for colour copies.

35 — Article 11 of the Royal Decree of 30 October 1997. Those establishments are defined in Article 1(16) and (17) of that royal decree.

36 — Article 12 of the Royal Decree of 30 October 1997.

37 — See the explanations provided in the report to the King preceding the Royal Decree of 30 October 1997, *Moniteur belge*, p. 29874, 29895.

61. To be deemed to have cooperated, the person liable for payment of the proportional remuneration must have, inter alia and generally speaking, satisfied his declaration obligations to the collecting society for the period concerned and paid a provisional amount corresponding to the number of copies of protected works declared (general cooperation) or to the number of copies of protected works determined on the basis of a standardised scale (standardised cooperation).

B – *Explanations of the national court*

62. The national court states first of all that, in accordance with the case-law of the Court, fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the exception. Noting, however, that the Court accepted that the mere fact that devices are able to make copies was sufficient in itself to justify the application of fair compensation, the national court takes the view that the question remains of the level at which it is possible, without lapsing into arbitrariness, to set such compensation.

63. The national court states, furthermore, that, since the Member States must take into consideration the most relevant criteria when setting the amount of the fair compensation, without losing sight of the fact that the fair compensation is not to be dissociated from the elements constituting the harm, the question arises whether they may or must provide for no compensation when the harm is minimal.

64. Examining, next, the Belgian legislation, the national court points out that it is the maximum black and white copying speed per minute that was taken into consideration as the most relevant criterion and not whether the device is intended for domestic or commercial use or its technical characteristics, such as the range of its functions. It also notes that, although for scanners the flat-rate remuneration cannot exceed a certain percentage of the price, for other devices no reference is made to the price of the device, in particular for multifunction devices, to which the highest amount that can be applied is applied.

65. The national court concludes from that analysis that the question could be asked whether the levying on multifunction printers of a flat-rate remuneration, paid by manufacturers, importers and acquirers, combined with the collection of a proportional remuneration, paid by users of such printers, does no go beyond compensation for the harm caused by the use of those printers, whether it is fair and whether it observes a fair balance between the rights and interests of the copyright holders and those of the users of the protected subject-matter.

C – *Analysis*

1. Admissibility

66. There is no need to dwell unduly on the admissibility of the second question referred, challenged by Reprobel, which is hardly in doubt. It is true that the case in the main proceedings principally concerns producers of multifunction printers who, in that capacity, are liable only for the flat-rate remuneration and not for the proportional remuneration. The fact nevertheless remains that the second question referred by the national court relates both to the two forms of remuneration considered individually and to the system of twofold remuneration as a whole.

2. Substance

67. It is at the start to be noted that, having regard to the ambit of the applicable national legislation and for the reasons set out above, there is no need for the Court to interpret the provisions of Article 5(2)(b) of Directive 2001/29.

68. Next, it is to be borne in mind that the Court's case-law relating to the private copying exception, referred to in Article 5(2)(b) of Directive 2001/29, may be applied, by analogy, to the reprography exception referred to in Article 5(2)(a) of that directive, observing the fundamental right to equal treatment under Article 20 of the Charter of Fundamental Rights of the European Union. [38]

69. In the present case, it is clear from the case-law of the Court that the purpose of fair compensation is to provide adequate compensation to copyright holders for the reproduction, without their authorisation, of protected works, so that it must be regarded as recompense for the harm suffered by those holders as a result of the act of reproduction. [39] Accordingly, it must necessarily be calculated on the basis of the criterion of the harm caused to the copyright holders by the introduction of the exception at issue, in the present case, the reprography exception. [40]

70. The Court has also held that, in so far as the provisions of Directive 2001/29 do not expressly regulate that question, the Member States enjoy broad discretion when determining the form, detailed arrangements for financing and collecting, and the possible level of, such compensation. [41]

71. It is, in particular, for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by EU law, compliance with that directive, taking into account the particular circumstances of every case. [42] In that regard, it must be stated that this means, not that Member States are required to 'choose' from among the, incidentally, imprecise criteria those that are the most relevant, but merely that it is for them, in accordance with the objectives of Directive 2001/29 and, more broadly, EU law, to determine the criteria they consider to be relevant.

72. Furthermore, if the provisions of Directive 2001/29 do not expressly regulate the issue of who is liable to pay the fair compensation either, so that the Member States enjoy broad discretion in that regard too, [43] it is, in principle, for the person who has caused the harm, namely the person who reproduced the protected work without seeking prior authorisation from the rightholder, to make good the harm suffered, by financing the fair compensation that must be paid to that rightholder. [44]

73. However, the Court has acknowledged, on the one hand, that identifying the persons who, through their acts of reproduction, cause harm to the holders of the exclusive right of reproduction and obliging them to compensate those holders could be difficult in practice. [45] It emphasised, on the other hand, that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment, in accordance with the last sentence of recital 35 to Directive 2001/29. [46]

38 — Judgment in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 73).

39 — See judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 39 and 40) and *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 75).

40 — See judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 42) and *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 47).

41 — See recital 35 to Directive 2001/29 and judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 37); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 20), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 20).

42 — See judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 21 and 22). See also, by analogy, judgment in *VEWA* (C-271/10, EU:C:2011:442, paragraph 35).

43 — See, for the private copying exception, judgments in *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraph 23) and *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 20); for the reprography exception, see judgment in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 74).

44 — See judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 44 and 45); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 23), and *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 51).

45 — See judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraph 46); *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraph 27); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 24), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 23).

46 — See judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 46).

74. The Court has consequently accepted that it is open to the Member States to establish, for the purposes of financing fair compensation under either exception, remuneration chargeable not to the users of reproduction equipment and devices who make reproductions of protected works that cause harm to rightholders, but to the persons who have such equipment and devices and who, on that basis, in law or in fact, make them available to those users or who provide copying services for them. [47]

75. However, in order to guarantee that a fair balance is struck between the interests of the holders of the exclusive right of reproduction and those of the users of the equipment and devices, such a system must, first of all, enable the persons liable for payment to pass on the costs of that remuneration in the price charged for making that equipment and those devices available to users or in the price for the copying services supplied, so that the burden of the remuneration is ultimately borne by those users. [48] It must, next, be based on the existence of a necessary link between the application of the remuneration to that equipment and those devices and their use for the purposes of reproducing protected works, [49] which may mean that is necessary to ensure a right to reimbursement of any remuneration unduly paid that is effective and does not make repayment excessively difficult. [50]

76. It is in the light of those clarifications that an answer should be given to the second question referred by the national court, examining first the flat-rate remuneration and the proportional remuneration separately, and then the fair compensation system as a whole. It is in fact conceivable that, taken individually, the flat-rate remuneration and the proportional remuneration may be consistent with the requirements set out above, but that, taken together and in combination, they are disproportionate and upset the 'fair balance' to be struck between the interests of the holders of the exclusive right of reproduction and those of the users of the reprography equipment or devices.

77. It is important, in that regard, however, to note from the outset that the logic underpinning each of the forms of remuneration, which are intended to finance the fair compensation required by Article 5(2)(a) of Directive 2001/29, is very different. The flat-rate remuneration, which is levied on reprography equipment and devices, is based on an evaluation of the potential harm which their use may cause to rightholders and therefore on an assessment ex ante of their likely capacity to cause such harm. The proportional remuneration, however, which is levied on declared reproductions of protected works, is based on the determination of the actual harm which those reproductions cause to rightholders and therefore on a quantification *ex post* of the actual harm caused to those holders.

a) The flat-rate remuneration

78. The flat-rate remuneration introduced by the Belgian legislation has two main characteristics. First, it is paid by the manufacturers, or the importers, or the acquirers of the reprography equipment and devices, including the multifunction printers at issue in the main proceedings, when they are placed on the market. Secondly, its amount is estimated by taking into consideration the potential harm which the use of that equipment and those devices for reproducing protected works is liable to cause to rightholders, harm which is itself assessed on the basis of the devices' maximum black and white copying speed per minute.

47 — See, for the private copying exception, judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 46 and 50); *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraphs 27 and 29); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 24); and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraphs 23 and 43); for the reprography exception, judgment in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 76).

48 — See, for the private copying exception, judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 46 and 49), *Stichting de Thuiskopie* (C-462/09, EU:C:2011:397, paragraphs 27 and 28); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 24 and 25), and *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 52); for the reprography exception, judgment in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraphs 76 and 77).

49 — See, for the private copying exception, judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 28 and 33).

50 — See judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 30 to 34).

79. The flat-rate remuneration can therefore be regarded, in essence, as a levy on the marketing of all equipment and devices capable of the reprographic copying of protected works, which is indirectly collected from their purchasers. It should be pointed out that it is not disputed that the manufacturers, importers and intra-Community acquirers of such equipment and devices, designated as liable to pay the flat-rate remuneration, may pass on its amount in their retail price, so that ultimately it is always paid by the end purchasers, that is to say, either the persons likely to use them to reproduce, in particular, protected works, or the persons who make them available to such persons in the context of reprography services and who may themselves pass on that amount in the cost of those services.

80. As has been pointed out by the Belgian and Austrian Governments, it may be considered that the introduction of such a flat-rate remuneration is justified by the existence of objective practical difficulties in identifying the persons making copies of protected works and requiring them to pay the fair compensation.

81. It must, in that regard, be pointed out that the fact that the Belgian legislation provides also for proportional remuneration collected on the actual use of reprography equipment and devices cannot, in itself, constitute proof that the introduction of the flat-rate remuneration is unjustified, in that it demonstrates that there are no practical difficulties in collecting fair compensation on the reprography of protected works. However, it is a different question whether the twofold nature of the fair compensation system established by the Belgian legislature, that is to say the combination of the flat-rate remuneration and the proportional remuneration, meets the requirements of a fair balance laid down in Directive 2001/29, a matter which I shall examine below.

82. The fact remains that the flat-rate remuneration established by Belgian legislation must guarantee the fair balance required by Directive 2001/29, which involves a threefold examination.

83. That fair balance can, in the first place, be guaranteed only in so far as there is a necessary link between the application of the flat-rate remuneration to the reprography equipment and devices and the presumed use of the latter for reproducing protected works.

84. In the present case, since the flat-rate remuneration is actually collected at the time of the placing on the market of all equipment and devices capable of being used for the reprographic copying of protected works, for the purposes of Article 5(2)(a) of Directive 2001/29, it must, in principle, be presumed that such a link is established. As the Court had occasion to point out in another context, persons who have acquired multifunction printers, such as those at issue in the main proceedings, are rightly presumed to benefit fully from them and therefore to take advantage of all of their functions, so that the simple fact that that equipment is able to make reprographic copies is sufficient in itself to justify the application of the flat-rate remuneration. [51]

85. In the second place, the fair balance required by Directive 2001/29 also requires an examination of whether the different levels of flat-rate remuneration set by Belgian legislation are within the limits imposed by EU law, in particular the principle of proportionality.

86. It is true, as was pointed out above, that the Member States have broad discretion to establish, in particular, the level of fair compensation required under the reprography exception. The flexibility afforded to the Member States is not, however, without limits. They must use relevant criteria, taking into account the particular circumstances of every case, [52] and ensure that the exercise of their discretion does not produce any negative effects on the functioning of the internal market and does

51 — See, by analogy with the making available to natural persons of recording media which can be used for the reproduction of protected works in respect of private copying, judgments in *Padawan* (C-467/08, EU:C:2010:620, paragraphs 54 to 56); *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 41 and 42), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraphs 24 and 25).

52 — See judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 21 and 22).

not compromise the objectives pursued by Directive 2001/29.[53] In so far as fair compensation and the system on which it is based must be linked to the harm resulting for the rightholders on account of the reproductions made, its amount must, in principle, be established by the competent authorities by reference to the relative importance of the capacity of the equipment or device to reproduce protected works.[54]

87. In the present case, it is for the national court to examine whether the various rates fixed by the Belgian legislation, which are determined according to the maximum black and white copying speed per minute of the reprography equipment and devices and which, in the case of multifunction printers, may amount to three times their retail price, are reasonable and proportionate in relation to the potential harm posed by the marketing of those devices.

88. In that regard, it is true that, as the Belgian Government pointed out, the criterion of the maximum black and white copying speed per minute of the reprography equipment and devices, on which the various flat-rate remuneration rates are based, is a criterion which, to a certain extent, objectively takes into account the latter's capacity to cause potential harm. It is also true, conversely, that the cost of the equipment or device is not an objective element capable of taking that capacity into account.

89. None the less, it is equally true that the potential harm resulting from the purchase by a natural person of a multifunction printer, like those at issue in the main proceedings, for his personal use is in no way comparable to the potential harm resulting from the purchase of the same printer by a legal person, such as a public library, to be used by the latter's staff or even, and *a fortiori*, to be made available to the public. Furthermore, at comparable copy speeds, the potential capacity of a multifunction printer to cause harm is, given in particular the diversity of its functions and the variety of its uses, in no way comparable to that of a machine which is specially designed for the mass production of photocopies.

90. The fair balance required by Directive 2001/29, which means that the level of the flat-rate remuneration should not be completely dissociated from the elements which constitute the harm caused to rightholders,[55] would therefore undoubtedly be better guaranteed, if account were taken of, in addition to the copy speed, other objectively assessed elements, such as the nature or the purpose of the equipment or device placed on the market, which were referred to specifically, but set aside, by the Belgian Government in its observations.

91. At the very least, the legislature's assessment of the potential capacity of the reprography equipment and devices to cause harm ought to be based on other objective and up-to-date information, in particular statistical information, capable of establishing a degree of correspondence between the different rates of the flat-rate remuneration and the seriousness of the potential harm specific to every type of equipment or device.

92. It may, in that regard, be noted that the rate applied to multifunction printers capable of producing from 20 to 39 black and white copies per minute, namely EUR 195.60, when compared to the rate of the proportional remuneration applied to a cooperating person for each copy of a protected work, namely, EUR 0.0201, is equivalent to making some 9 731 copies of protected works. The Belgian Government has not, however, provided any specific information making more credible the claim that it is actually likely that a natural person's use of a multifunction printer for his personal use might cause harm of that seriousness.

53 — See, in particular, recital 31 to Directive 2001/29.

54 — See judgment in *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraphs 21 and 27).

55 — To reproduce the expression used by the Court with regard to Article 5(1) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); see judgment in *VEWA* (C-271/10, EU:C:2011:442, paragraph 37).

93. It is necessary, in the present case, to note that the Belgian Government pointed out that the introduction of the flat-rate remuneration was based on preliminary studies referred to in the report to the King preceding the Royal Decree of 30 October 1997. In the present case, that report provides some statistics from the time on the various types of reprography equipment and devices subject to the flat-rate remuneration, drawing a distinction between copiers, fax machines, duplicators and offset machines and stating, for each type, the number of devices used, their average selling price and the number of copies they make it possible to produce. The Belgian Government states, furthermore, that 'the amount of the flat-rate remuneration is adapted according to the actual use of the device on the market', on the basis, in essence, of 'information provided by the manufacturers' representatives'. Taking into account the use of the device in that way, however, has resulted only in the classification of reprography equipment and devices into seven categories defined on the basis of the black and white copying speed per minute.

94. The Court does not, furthermore, have at its disposal the studies that the collecting society was to arrange periodically, pursuant to Article 26(1) of the Royal Decree of 30 October 1997, and which were to compile a certain amount of specific statistical information, in particular on the volume of copies of protected works made and their distribution by sector of activity.

95. It is, however, for the court making the reference, at all events, to assess all the facts of the case. It is for that court, first of all, to assess the relevance of the criterion defined by the legislature for determining the rates of the flat-rate remuneration and to draw the appropriate conclusions. It is also for that court, next, to assess whether the different rates of the flat-rate remuneration may be regarded as reasonably related to the seriousness of the potential harm caused to the rightholders by the placing on the market of the multifunction printers at issue in the main proceedings.

96. The fair balance required by the case-law of the Court involves, lastly and in the third place, an examination of whether the flat-rate remuneration must, in any event, be accompanied by the possibility of obtaining the repayment of any flat-rate remuneration unduly paid. [56]

97. It must, in that regard, be noted that the Court has, to date, laid down such a requirement of reimbursement only in a very specific context, in the case in question that of a levy collected on the sale of reproduction media under the private copying exception laid down in Article 5(2)(b) of Directive 2001/29. However, the situation at issue in the main proceedings is not entirely comparable to that at issue in *Amazon.com International Sales and Others*.

98. It is true that, like the reproduction media at issue in that latter case, multifunction printers lend themselves, by their very nature, to very different uses, some of which, such as the printing of personal documents, are totally unrelated to the reprography of protected works. It would therefore be contrary to the fair balance required by Directive 2001/29 to require persons who use such multifunction printers only for purposes unrelated to the reproduction of protected works to pay such remuneration.

99. It is necessary, however, also to bear in mind that the extent of the private copying exception, as was pointed out in the examination of the first question referred, is more restricted *ratione personae* than that of the reprography exception. The private copying exception benefits only those natural persons who wish to make copies of protected works for private purposes, so that it is relatively simple to establish a system to collect a private copying levy on all recording media, accompanied by a mechanism which makes it possible to reimburse those persons who legitimately request it.

56 — See judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 30 to 32).

100. By contrast, the reproduction of protected works under the reprography exception must, in principle, give rise to fair compensation irrespective of the person carrying it out. However, as the Austrian Government argued, monitoring the use of multifunction printers for the purpose of reproductions of protected works by any person, natural or legal, who has acquired such a device runs foul of considerable practical difficulties, which are specifically those which form the basis of the very permissibility of flat-rate remuneration.

101. Consequently, the fact that the flat-rate remuneration is not accompanied by a reimbursement mechanism cannot in itself be considered to compromise the fair balance required by Directive 2001/29. However, the issue of whether the lack of a mechanism for reimbursing the flat-rate repayment to persons required to pay the proportional remuneration may compromise that balance is quite a different matter, and one that I shall examine below.

b) The proportional remuneration

102. The proportional remuneration established by the Belgian legislation is, in essence, presented as a levy on the actual use or operation of any equipment and devices capable of the reprographic copying of protected works, such as the multifunction printers at issue in the main proceedings; the amount of that levy is, in principle, determined on the basis of the actual harm which that use or operation has actually caused to the rightholders. It is either paid directly by the acquirers/users of the reprography equipment and devices that produce reproductions of protected works, or passed on to the latter by the persons making such equipment and devices available to them. Its amount is, furthermore, determined, when it is due, on the basis of the actual declarations made by the users of the reprography equipment or devices, declarations which state the number of copies of protected works made during the period concerned or provide the necessary information in that regard.

103. At first sight, it may therefore be considered that, by thus making the proportional remuneration directly or indirectly payable by users of reprography equipment and devices correspond pro rata to the number of reproductions of protected works made by them, the Belgian legislation ensures that the levying of the compensation required by Directive 2001/29 is fair for both the rightholders and those users, and therefore meets the requirements of fair balance set out in that directive.

104. It is important, however, to emphasise that the scope *ratione personae* of the proportional remuneration is a matter of dispute between the parties. The Belgian Government argues that it is not paid by the individual users of reprography equipment and devices, without, however, providing any evidence to justify an assertion which is not apparent from the Belgian legislation. Reprobel confirmed at the hearing that only large users or copy shops, that is to say, professionals making a significant number of copies, were required to pay the proportional remuneration, stating that it would be practically and legally impossible to collect it from individuals, as the monitoring which would be involved would impinge on the right to privacy. According to Epson, however, the proportional remuneration is applied without any distinction based on the user or the purposes of reproduction.

105. It must, in that regard, be pointed out that it is not for the Court to interpret national law, and therefore the Court can only refer that matter back to the national court for examination, it being understood that, given the discretion available to Member States to determine the persons liable to pay fair compensation, the conclusion reached in that regard by the national court should have an impact only on the assessment of whether the combination of the flat-rate remuneration and the proportional remuneration is compatible with the requirements of Directive 2001/29.

106. What call for most attention, however, are the detailed rules for determining the amount of the proportional remuneration, which varies according to the user's level of cooperation. Epson and the Commission argue, in particular, that that cooperation is unrelated to harm, and therefore that the proportional remuneration is disproportionate and upsets the fair balance required by Directive 2001/29.

107. In that regard, it must again be recalled that the Member States have wide discretion to determine both the amount of the fair compensation and the detailed rules for its collection. The fact remains that the difference in the rates applied to the persons responsible for paying the proportional remuneration, depending on whether or not they cooperate with its collection, must be justified by an objective and reasonable criterion proportionate to the objective pursued.

108. In the present case, the proportional remuneration, the purpose of which is to finance the fair compensation required by Article 5(2)(a) of Directive 2001/29, is based on the determination of the number of copies of protected works which it is established have been made by the users of reprography equipment or devices over a given period, and therefore depends closely on the cooperation of the latter.

109. In the light of its objective, the means which can be legally implemented in order to achieve that objective and the costs likely to be incurred in that implementation, adjusting the amount of the proportional remuneration collected for each reproduction on the basis of whether those users have cooperated does not, in itself, appear to be totally arbitrary or manifestly unreasonable.

110. The Belgian Government has not, however, provided any explanation as to the elements capable of justifying the difference, a twofold increase, between the amounts applied. Nothing, either in the LDA, in the Royal Decree of 30 October 1997 or in the report to the King preceding that decree, tends particularly to demonstrate that that difference is objectively justified by the additional costs involved in the collection of the proportional remuneration in the event of non-cooperation by the person liable for payment, a point raised, however, by the Conseil d'État in its opinion of 9 July 1997 on the draft royal decree finally adopted on 30 October 1997. [57]

111. It is, however, for the national court to examine, having regard to the explanations provided, where relevant, by the Belgian Government, whether that difference in amount is objectively justified and proportionate to the objective pursued.

c) The system of twofold remuneration as a whole

112. The question whether Directive 2001/29 must be interpreted as precluding the twofold system of flat-rate remuneration and proportional remuneration established by the Belgian legislature remains to be examined. This involves, in particular, an examination of whether it can be regarded as legitimate, in the light of the requirements of fair balance set out in Directive 2001/29, to collect, in combination, a proportional remuneration from persons using reprography equipment or devices, calculated on the basis of the number of copies of protected works that they have actually made during any given period, and therefore required to compensate for the harm actually suffered by rightholders, although those persons are considered already to have paid, directly or indirectly, the flat-rate remuneration collected at the time of acquiring the equipment or device used.

57 — See the commentary on Article 6, *Moniteur belge* of 7 November 1997, p. 29910.

113. It is necessary, in that regard, to point out immediately that, as is clear from the foregoing, Member States are, in principle, free, in so far as both the detailed arrangements for collection and the amount of the fair compensation fall within the discretion afforded to them, to finance the fair compensation under the reprography exception by collecting either flat-rate remuneration or proportional remuneration, provided that they do not upset the fair balance between the interests of the holders of the exclusive right of reproduction and those of the users of the reprography equipment or devices required by Directive 2001/29.

114. However, the combined collection, from the same person, of the flat-rate remuneration in respect of the acquisition of reprography equipment or a reprography device and the proportional remuneration in respect of the actual use of that equipment or device for the purpose of reproducing protected works is not, in principle, permissible in the light of the requirements of the fair balance required by Directive 2001/29.[58]

115. Since the Belgian legislation provides for the levying of proportional remuneration, deemed to correspond to the actual harm suffered by rightholders as a result of the actual use of reprography equipment and devices for reproducing protected works, the levying on the same person of an additional flat-rate remuneration, corresponding to the potential harm which the marketing of that equipment and those devices is deemed to cause to rightholders, cannot, as matters now stand, in principle be considered to meet the requirements of fair balance required by Directive 2001/29.

116. Although it is true that,[59] as has already been pointed out on several occasions, the Member States enjoy broad discretion when determining the form, detailed arrangements for financing and possible level of the compensation required by Directive 2001/29, the exercise of the power thus conferred on them is not without limit and must, at all events, ensure that the fair balance required by that directive is observed. The national legislature may not, in particular, exercise that power contrary to the principle of non-discrimination or arbitrarily. By automatically requiring, in certain circumstances, persons using reprography equipment or devices for the purpose of reproducing protected works to pay in succession both flat-rate remuneration and proportional remuneration, the Belgian legislature has, without justification, upset the fair balance which it is required to maintain between the rights and interests of rightholders and those of such persons.

117. In short, that proportional remuneration, which best guarantees the fair balance required by Directive 2001/29, in so far as it is determined, in principle, according to the actual harm suffered by rightholders, may be levied only on condition that it is established that its amount is actually determined taking account of the flat-rate remuneration already paid or on condition that the person liable to pay it can, at that time or *a posteriori*, obtain either reimbursement of the flat-rate remuneration he paid directly when acquiring the reprography equipment or device used, or deduction of the amount he paid indirectly in respect of that flat-rate remuneration.

118. Any contrary solution would, almost of necessity, mean that the same person had to finance twice over the fair compensation required by Article 5(2)(a) of Directive 2001/29, which would not be consistent with the fair balance required by that directive. It has not been claimed, and nothing in the file enables the Court to find, that the Belgian legislation at issue in the main proceedings fulfils either of those conditions. It is, however, for the national court to carry out the necessary investigations in that regard and to draw the appropriate conclusions from them.

58 — It is important, furthermore, to point out in that regard that the Belgian Government did not adduce any objective supporting evidence that only legal persons are required to pay both the flat-rate remuneration and the proportional remuneration, unlike natural persons, who are not subject to the requirement to pay the proportional remuneration.

59 — See, in particular, points 38 and 70 of this Opinion.

d) Conclusions

119. The foregoing considerations lead me to the three following conclusions.

120. Article 5(2)(a) of Directive 2001/29 must be interpreted as not, in principle, precluding national legislation such as that at issue in the main proceedings which provides, for the purpose of financing the fair compensation payable under the reprography exception pursuant to that provision, for the levying of flat-rate remuneration relating to the placing on the market of reprography equipment and devices from their manufacturers, importers or acquirers, provided, first, that that remuneration is levied consistently and without discrimination, secondly, that the latter may pass on the amount for which they are liable to the users of such equipment and devices and, thirdly, that its amount is reasonably proportionate to the seriousness of the potential harm which may be caused to rightholders by the placing on the market of the equipment and devices, which it is for the national court to determine.

121. Article 5(2)(a) of Directive 2001/29 must be interpreted as not, in principle, precluding national legislation, such as that at issue in the main proceedings, which provides, for the purpose of financing the fair compensation payable under the reprography exception pursuant to that provision, for the levying on natural or legal persons using reprography equipment or devices for the purpose of reproducing protected works, or in place of those persons from persons making such equipment and devices available to others, of proportional remuneration determined by multiplying the number of reproductions made by one or several rates, provided, first, that that remuneration is levied consistently and without discrimination and, secondly, that the differentiation applied to the rates is based on objective, reasonable and proportionate criteria, which it is for the national court to determine.

122. Article 5(2)(a) of Directive 2001/29 must be interpreted as precluding national legislation such as that at issue in the main proceedings, which requires, for the purpose of financing the fair compensation payable under the reprography exception which it lays down, the successive and combined levying, on the same person, of flat-rate remuneration relating to the acquisition of reprography equipment or a reprography device, and then of proportional remuneration relating to its use for the purpose of reproducing protected works, without actually taking into account, in the context of the proportional remuneration, the amount paid in respect of the flat-rate remuneration or without allowing that person to obtain the reimbursement or deduction of the flat-rate remuneration paid.

VI – **The beneficiaries of the compensation (third question)**

123. By its third question, the national court asks the Court whether Article 5(2)(a) of Directive 2001/29 must be interpreted as authorising Member States to allocate half of the fair compensation provided for therein to the publishers of works created by authors, the former being under no obligation to ensure that the latter benefit, even indirectly, from some of that compensation.

124. Article 2(a) of Directive 2001/29 lays down, for authors only, the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works.

125. Publishers are therefore not included among the holders of the exclusive right of reproduction protected by Directive 2001/29, unlike, for example, phonogram producers or producers of the first fixations of films, referred to respectively in Article 2(c) and (d) of that directive, for whom the investment required to produce products such as phonograms, films or multimedia products is

deemed to be considerable and therefore capable of justifying adequate legal protection. [60]

126. It is to be noted too that Article 4 of Directive 2001/29 allows only authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

127. Publishers cannot, therefore, in principle, be the beneficiaries of fair compensation under the exceptions to that exclusive right of reproduction, laid down in Article 5(2)(a) and (b) of Directive 2001/29, which must be paid only to the rightholders referred to in Article 2 of that directive or, at the very least, must benefit only the latter or those claiming under them.

128. The Court has ruled that Directive 2001/29 did not oblige the Member States to pay rightholders or their legal successors all the fair compensation in cash, nor did it preclude them from providing, in the exercise of the wide discretion which they enjoy, that part of that compensation be made in the form of indirect compensation, through the intermediary of social and cultural establishments set up for their benefit, provided, however, that those establishments actually benefit them and that the detailed arrangements for their operation are not discriminatory. [61]

129. Such a system of indirect levying of fair compensation meets one of the objectives of the adequate legal protection of intellectual property rights covered by Directive 2001/29, which is, as is clear from recitals 10 and 11, to ensure that European cultural creativity and production receive the necessary resources enabling them to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers. [62]

130. However, publishers can in no way be equated with social and cultural establishments set up for the benefit of authors and it has neither been in any way claimed nor, *a fortiori*, demonstrated that the remuneration paid to publishers in the end actually benefited authors.

131. Article 5(2)(a) of Directive 2001/29 must, therefore, be interpreted as precluding Member States from allocating some of the fair compensation laid down in that provision to the publishers of works created by authors, without any obligation for the latter to ensure that the latter benefit, even indirectly, from some of that fair compensation.

132. According to the explanations given by the Belgian Government and Reprobel, however, the remuneration paid to publishers is compensation *sui generis* established by the Belgian legislature outside the ambit of Directive 2001/29 for specific reasons of cultural policy.

133. In that regard, it is important to point out, first of all, that the Belgian Government in no way argues that that fair compensation *sui generis* is covered by recital 36 to Directive 2001/29, [63] that it compensates, for example, for the harm resulting from 'specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage' referred to in Article 5(2)(c) of that directive.

134. It should be pointed out, next, that the interpretation of the Belgian legislation thus advocated by Reprobel and the Belgian Government, which is not apparent from the reference for a preliminary ruling, is based, in essence, on the *travaux préparatoires* for the Royal Decree of 30 October 1997. In paragraph 2.1 the report to the King preceding that royal decree, [64] it is stated that the original holders

60 — See recital 10 to Directive 2001/29.

61 — See judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraphs 49, 50 and 53).

62 — Ibid., paragraph 52.

63 — That recital states that '[t]he Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation'.

64 — See, Part II - Statutory licence procedure, paragraph 2.1, p. 29878.

of the right to remuneration are the authors and publishers, the author being defined by the first paragraph of Article 6 of the LDA as the natural person who created the work. That report also states that the LDA, although it does not define the publisher, acknowledges that the latter has a right to remuneration *ab initio*, which may not be treated in the same way as copyright.

135. It may also be noted that, in its opinion of 9 July 1997 on the draft royal decree finally adopted on 30 October 1997, the Conseil d'État, for its part, merely pointed out that the remuneration referred to in Article 59 of the LDA, payable as a result of the reproduction of protected works, must be paid to authors and publishers whose works have actually been reproduced and allocated in equal parts to authors and publishers, in accordance with the third paragraph of Article 61 of the LDA.

136. The Belgian legislature has therefore, through Articles 59 to 61 of the LDA, on the one hand established for authors the fair compensation laid down in Article 5(2)(a) of Directive 2001/29 and, on the other, established for publishers a specific remuneration, both collected at the same time and following the same procedures.

137. It is necessary, having regard to those claims, to point out that, in the context of the preliminary ruling procedure, it is not for the Court to interpret national law or, *a fortiori*, to assess the veracity of a Member State's interpretation of its own national law. It is therefore for the national court to determine whether the national legislation does establish remuneration specifically for publishers, distinct from the fair compensation payable to authors under Article 5(2)(a) of Directive 2001/29.

138. From that point of view, the third question referred by the national court should be regarded as asking in fact whether Directive 2001/29 must be interpreted as precluding Member States from establishing, outwith the ambit of its requirements, remuneration specifically for publishers of protected works, such as that at issue in the main proceedings.

139. It is my view that that question should, in principle, be answered in the negative, with, however, one clarification.

140. Directive 2001/29 which, as its very title states, harmonises only certain aspects of copyright and related rights, does not contain any provision precluding the right of Member States to establish remuneration specifically for publishers, such as that at issue in the main proceedings, intended to compensate for the harm suffered by the latter as a result of the marketing and use of reprography equipment and devices.

141. It could be otherwise only if it were established that the introduction of that specific remuneration for publishers had an adverse effect on the fair compensation payable to authors pursuant to Directive 2001/29. However, bearing in mind that the Member States have broad discretion to determine, in particular, the amount of the fair compensation laid down in Article 5(2)(a) and (b) of Directive 2001/29, it must be pointed out that it is not clear from the file and has not been claimed that the remuneration specifically for publishers is levied and paid to the detriment of the fair compensation payable to authors.

142. It is, however, for the national court to carry out the necessary investigations in that regard.

143. Directive 2001/29 must, therefore, be interpreted as not precluding Member States from establishing remuneration specifically for publishers, intended to compensate for the harm suffered by the latter as a result of the marketing and use of reprography equipment and devices, provided that that remuneration is not levied and paid to the detriment of the fair compensation payable to authors under Article 5(2)(a) and (b) of Directive 2001/29. It is for the national court to carry out the necessary investigations in that regard.

VII – **The collection of fair compensation relating to sheet music (fourth question)**

144. By its fourth question, the national court asks the Court, in essence, whether Article 5(2)(a) of Directive 2001/29 must be interpreted as meaning that it authorises the Member States to introduce a system for the levying of fair compensation covering the copying of sheet music and of counterfeit reproductions.

145. In order to answer that question it is necessary to distinguish the reprographic copying of sheet music from the reprographic copying of counterfeit reproductions.

146. First of all, in its judgment in *ACI Adam and Others*,[65] the Court ruled that Article 5(2)(b) of Directive 2001/29, read in conjunction with Article 5(5) thereof, was to be interpreted as precluding 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. That judgment was confirmed by the judgment in *Copydan Båndkopi*.[66] It is my view that, by analogy and for the same reasons, Article 5(2)(a) of Directive 2001/29 must be interpreted in the same way as regards the reprography of counterfeit reproductions.

147. Next, Article 5(2)(a) of Directive 2001/29 expressly excludes sheet music from the scope of the reprography exception. Directive 2001/29 cannot, therefore, and for reasons which are, in essence, identical to those relied on by the Court in its judgment in *Copydan Båndkopi*,[67] be interpreted as permitting the Member States to introduce a system for the collection of fair compensation covering the copying of sheet music.

148. I therefore propose that the Court should rule that Article 5(2)(a) of Directive 2001/29 must be interpreted as precluding Member States from introducing a system for the collection of fair compensation covering the copying of sheet music and of counterfeit reproductions.

VIII – **Conclusion**

149. I therefore propose that the Court should answer the four questions referred by the Cour d'appel de Bruxelles, by ruling that :

(1) Article 5(2)(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as not requiring, but permitting, the Member States to introduce a system for collecting a levy, intended to finance fair compensation under the reprography exception laid down in that provision, on multifunction printers and/or on their use, and differentiated depending on the capacity of the user and/or the purpose for which those printers are used, provided, first, that that compensation remains proportionate to the harm suffered by the rightholders by reason of the introduction of that exception and, secondly, that such differentiation is based on objective, transparent and non-discriminatory criteria.

65 — C-435/12, EU:C:2014:254, paragraphs 20 to 58.

66 — C-463/12, EU:C:2015:144, paragraphs 74 to 79.

67 — C-463/12, EU:C:2015:144, paragraphs 74 to 79.

(2) Article 5(2)(a) of Directive 2001/29 must be interpreted as not, in principle, precluding national legislation such as that at issue in the main proceedings which provides, for the purpose of the financing of the fair compensation payable under the reprography exception pursuant to that provision:

— either for the levying of flat-rate remuneration relating to the placing on the market of reprography equipment and devices payable by their manufacturers, importers or acquirers, provided, first, that that remuneration is levied consistently and without discrimination, secondly, that those manufacturers, importers or acquirers may pass on the amount for which they are liable to the users of such equipment and devices and, thirdly, that its amount is reasonably proportionate to the seriousness of the potential harm that the rightholders could be caused by the placing on the market of that equipment and those devices, which it is for the national court to determine;

— or for the levying, on natural or legal persons using reprography equipment or devices for the purpose of reproducing protected works or, relieving the former of that levy, on persons making such equipment and devices available to others, of proportional remuneration determined by multiplying the number of reproductions made by one or several rates, provided, first, that that remuneration is levied consistently and without discrimination and, secondly, that the differentiation applied to the rates is based on objective, reasonable and proportionate criteria, which it is for the national court to determine.

Article 5(2)(a) of Directive 2001/29 must, however, be interpreted as precluding national legislation such as that at issue in the main proceedings, which requires, for the purpose of financing the fair compensation payable under the reprography exception which it lays down, the successive and combined levying, on the same person, of flat-rate remuneration relating to the acquisition of reprography equipment or devices, and then of proportional remuneration relating to its use for the purpose of reproducing protected works, without actually taking into account, in the context of the proportional remuneration, the amount paid in respect of the flat-rate remuneration or without allowing that person to obtain the reimbursement or deduction of the flat-rate remuneration paid.

(3) Article 5(2)(a) of Directive 2001/29 must be interpreted as precluding the Member States from allocating some of the fair compensation provided for in that provision to the publishers of works created by authors, without any obligation for the former to ensure that the latter benefit, even indirectly, from some of that fair compensation.

However, Directive 2001/29 must be interpreted as not precluding the Member States from establishing remuneration specifically for publishers, intended to compensate for the harm suffered by the latter as a result of the marketing and use of reprography equipment and devices, provided that that remuneration is not levied and paid to the detriment of the fair compensation payable to authors under Article 5(2)(a) and (b) of Directive 2001/29. It is for the national court to carry out the necessary investigations in that regard.

(4) Article 5(2)(a) of Directive 2001/29 must be interpreted as precluding the Member States from introducing a system for the collection of fair compensation that could cover the copying of sheet music and of counterfeit reproductions.