Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 July 2013 *

(Approximation of laws — Intellectual property — Copyright and related rights — Exclusive right of reproduction — Directive 2001/29/EC — Article 5(2)(b) — Fair compensation — Indiscriminate application with a possible right to recovery of the private copying levy intended to finance compensation — Payment of the revenue collected in part to rightholders and in part to social or cultural institutions — Double payment of the private copying levy in the context of a cross-border transaction)

In Case C-521/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 20 September 2011, received at the Court on 12 October 2011, in the proceedings

Amazon.com International Sales Inc.,

Amazon EU Sàrl,

Amazon.de GmbH,

Amazon.com GmbH, in liquidation,

Amazon Logistik GmbH

v

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

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2012,

* Language of the case: German.

after considering the observations submitted on behalf of:

— Amazon.com International Sales Inc., Amazon EU Sàrl, Amazon.de GmbH, Amazon.com GmbH and Amazon Logistik GmbH, by G. Kucsko and U. Börger, Rechtsanwälte, and by B. Van Asbroeck, avocat,

— Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, by M. Walter, Rechtsanwalt, and U. Sedlaczek,

— the Austrian Government, by A. Posch, acting as Agent,

— the French Government, by G. de Bergues and S. Menez, acting as Agents,

— the Polish Government, by B. Majczyna, M. Szpunar and M. Drwięcki, acting as Agents,

— the Finnish Government, by M. Pere, acting as Agent,

— the European Commission, by J. Samnadda and F. Bulst, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2013,

gives the following

Judgment

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

2 The request was made in proceedings brought by Amazon.com International Sales Inc., Amazon EU Sàrl, Amazon.de GmbH, Amazon.com GmbH, in liquidation, and Amazon Logistik GmbH (together 'Amazon') against Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana') concerning a demand by the latter for payment of the remuneration due as a result of the placing on the market of recording media under the Austrian legislation.

Legal context

European Union law

3 According to recitals 10, 11 and 35 in the preamble to Directive 2001/29:

'(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

…

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

4 Article 2 of that directive provides:

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

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

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

5 Article 5 of that directive, entitled 'Exemptions and restrictions', provides in paragraph 2:

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

…

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

…'

Austrian law

6 Paragraph 42 of the Law on Copyright (Urheberrechtsgesetz) of 9 April 1936 (BGBl. 111/1936), as amended by the new law of 2003 on copyright (Urheberrechtsgesetz-Novelle 2003 BGBl. I, 32/2003, 'the UrhG'), reads:

'1. Any person may make single copies, on paper or a similar medium, of a work for personal use.

…

4. Any natural person may make single copies of a work on media other than those mentioned in subparagraph 1 for private use and for purposes which are not directly or indirectly commercial.

…'

7 Article 42b of the UrhG provides:

'1. Where it is to be anticipated that, by reason of its nature, a work which has been broadcast, made available to the public or captured on an image or sound recording medium manufactured for commercial purposes will be reproduced for personal or private use by being recorded on an image or sound recording medium pursuant to Paragraph 42(2) to (7), the author shall be entitled to equitable remuneration (blank cassette levy) in respect of recording material placed on the domestic market on a commercial basis and for consideration; blank image or sound recording media suitable for such reproduction or other image or sound recording media intended for that purpose shall be deemed to constitute recording material.

…

3. The following persons shall be required to pay equitable remuneration:

(1) as regards remuneration for blank cassettes and equipment, persons who, acting on a commercial basis and for consideration, are first to place the recording material or reproduction equipment on the market in national territory;

…

5. Only copyright collecting societies can exercise the right to remuneration laid down in subparagraphs 1 and 2.

6. Copyright collecting societies shall be required to repay the equitable remuneration:

(1) to persons who export abroad recording media or equipment before it is sold to the final consumer;

(2) to persons who use recording media for a reproduction with the authorisation of the rightholder; indications to this effect are sufficient.'

8 Paragraph 13 of the Austrian Law on collecting societies (Verwertungsgesellschaftengesetz; 'the VerwGesG') of 13 January 2006 (BGBl. I, 9/2006), provides:

'1. Collecting societies may create institutions for social and cultural purposes for the beneficiaries which they represent and for their family members.

2. Collecting societies which exercise the right to remuneration for blank cassettes shall create institutions for social or cultural purposes and pay to them 50% of the funds generated by that remuneration, minus the relevant administration costs. …

3. Collecting societies must establish strict rules concerning the sums paid by their institutions for social and cultural purposes.

4. As regards the funds paid to social and cultural institutions deriving from remuneration in respect of blank cassettes, the federal Chancellor may determine, by regulation, the circumstances to be taken into account by the rules to be established under subparagraph 3. That regulation must ensure, inter alia, that:

(1) there is a fair balance between the sums allocated to social institutions and those allocated to cultural institutions;

(2) in the case of social establishments, it is possible, primarily, to provide support for rightholders suffering hardship;

(3) the sums allocated to cultural establishments are used to promote the interests of rightholders.'

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

9 Austro-Mechana is a copyright collecting society which exercises rights of authors and holders of related rights to receive payment of the remuneration for recording media under Paragraph 42b(1) of the UhrG.

10 Amazon is an international group which sells products via the internet, including recording media within the meaning of the above provision.

11 In response to orders placed via the internet by customers in Austria who concluded contracts for that purpose, initially with Amazon.com International Sales Inc., established in the United States, and subsequently with Amazon EU Sàrl, established in Luxembourg, from May 2006 onwards Amazon placed recording media on the market in Austria within the meaning of Paragraph 42b(1) of the UhrG.

12 Austro-Mechana brought an action against Amazon before the Handelsgericht Wien for the payment on the basis of joint and several liability of equitable remuneration within the meaning of Paragraph 42b(1) of the UhrG for recording media placed on the market in Austria from 2002 to 2004.

13 The amount claimed by Austro-Mechana for recording media placed on the market in the first half of 2004 was EUR 1 856 275. For the remainder of the period to which its claim for payment relates, Austro-Mechana sought an order requiring Amazon to provide the accounting data necessary for it to quantify its claim.

14 In its interim judgment, the Handelsgericht Wien granted the application for an order to produce accounts and reserved its decision on the claim for payment. As that judgment was upheld on appeal, Amazon brought the matter before the Oberster Gerichtshof as the court of final resort.

15 It is against that background that the Oberster Gerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Can a legislative scheme be regarded as establishing "fair compensation" for the purposes of Article 5(2)(b) of Directive 2001/29, where

(a) the persons entitled under Article 2 of Directive 2001/29 have a right to equitable remuneration, exercisable only through a collecting society, against persons who, acting on a commercial basis and for remuneration, are first to place on the domestic market recording media capable of reproducing the works of the rightholders,

(b) this right applies irrespective of whether the media are marketed to intermediaries, to natural or legal persons for use other than for private purposes or to natural persons for use for private purposes, and

(c) the person who uses the media for reproduction with the authorisation of the rightholder or who prior to its sale to the final consumer re-exports the media has an enforceable right against the collecting society to obtain reimbursement of the remuneration?

(2) If Question 1 is answered in the negative:

(a) Does a scheme establish "fair compensation" for the purposes of Article 5(2)(b) of Directive 2001/29 if the right specified in Question 1(a) applies only where recording media are marketed to natural persons who use the recording media to make reproductions for private purposes?

(b) If Question 2(a) is answered in the affirmative:

Where recording media are marketed to natural persons must it be assumed until the contrary is proven that they will use such media with a view to making reproductions for private purposes?

(3) If Question 1 or 2(a) is answered in the affirmative:

Does it follow from Article 5 of Directive 2001/29 or other provisions of EU law that the right to be exercised by a collecting society to payment of fair compensation does not apply if, in relation to half of the funds received, the collecting society is required by law not to pay these to the persons entitled to compensation but to distribute them to social and cultural institutions?

(4) If Question 1 or 2(a) is answered in the affirmative:

Does Article 5(2)(b) of Directive 2001/29 or other provision of EU law preclude the right to be exercised by a collecting society to payment of fair compensation if in another Member State – possibly on a basis not in conformity with EU law – equitable remuneration for putting the media on the market has already been paid?'

The questions referred for a preliminary ruling

The first question

16 By its first question, the referring court asks, essentially, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it precludes legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in national territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision.

17 In that regard, it must be borne in mind that, under Article 2 of that directive, the Member States are to provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of their works, of fixations of their performances, of their phonograms, of the original and copies of their films and of fixations of their broadcasts.

18 However, under Article 5(2)(b) of that directive, Member States may provide for an exception to that exclusive reproduction right 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 (so-called 'private copying' exception).

19 The Court has held that, where Member States decide to introduce the private copying exception into their national law, they are required, in particular, to provide, pursuant to Article 5(2)(b), for the payment of 'fair compensation' to holders of the exclusive right of reproduction (see Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 30, and Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-5331, paragraph 22).

20 The Court has also held that, since the provisions of Directive 2001/29 do not expressly address the issue of who is to pay that compensation, the Member States enjoy broad discretion when determining who must discharge that obligation (*Stichting de Thuiskopie*, paragraph 23). The same is true of the form, detailed arrangements and possible level of such compensation.

21 In the absence of sufficiently precise Community criteria in a directive to delimit the obligations under the directive, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by European Union law and in particular by the directive concerned, compliance with that directive (see, as regards the derogation from the exclusive public lending right under 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), Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313, paragraph 33 and case-law cited).

22 As stated in recital 35 of Directive 2001/29, when determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case.

23 As regards the private copying exception under Article 5(2)(b) of that directive, the Court has held that, since the person who has caused the harm to the holder of the exclusive right of reproduction is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm related to that copying by financing the compensation which will be paid to that rightholder (*Padawan*, paragraph 45, and *Stichting de Thuiskopie*, paragraph 26).

24 The Court has however accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction for the harm caused to them, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy (*Padawan*, paragraph 46, and *Stichting de Thuiskopie*, paragraph 27).

25 The Court has, further, pointed out that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the 'fair balance' between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject-matter (*Stichting de Thuiskopie*, paragraph 28).

26 In the present case, in the system established by Paragraph 42b of the UrhG for the financing of fair compensation within the meaning of Article 5(2)(b) of Directive 2001/29, the private copying levy is payable by those who make available, for commercial purposes and for consideration, recording media suitable for reproduction.

27 In principle, such a system, as has already been pointed out in paragraph 25 of the present judgment, enables the persons responsible for payment to pass on the amount of that levy in the sale price of those media, so that the burden of the levy is ultimately borne, in accordance with the requirement of a 'fair balance', by the private user who pays that price, if such a user is the final recipient.

28 The Court has held that a system for financing fair compensation such as that described in paragraphs 24 and 25 of this judgment is compatible with the requirements of a 'fair balance' only if the digital reproduction equipment, devices and media concerned are liable to be used for private copying and, therefore, are likely to cause harm to the author of the protected work. There is therefore, having regard to those requirements, a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for private copying, such that the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case where they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2) of Directive 2001/29 (*Padawan*, paragraphs 52 and 53).

29 The system at issue in the main proceedings amounts to the indiscriminate application of the private copying levy to recording media suitable for reproduction, including in the case where the final use thereof does not fall within the case covered by Article 5(2)(b) of Directive 2001/29.

30 The question therefore arises as to whether, in such a situation, a right to reimbursement of the levy paid allows the restoration of the 'fair balance' which is to be struck, according to the requirements of Directive 2001/29, between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject-matter.

31 In that regard, it must be held that a system of financing fair compensation consisting in the indiscriminate application of a private copying levy on the placing on the market, for commercial purposes and for consideration, of recording media suitable for reproduction, together with such a right to reimbursement, provided that that right is effective and does not make it excessively difficult to repay the levy paid, may prove to be consistent with Article 5(2)(b) of Directive 2001/29, where the practical difficulties described in paragraph 24 of the present judgment or other similar difficulties justify its application.

32 If a Member State has introduced a private copying exception into its national law, it must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction by reason of the reproduction of protected works by final users who reside on the territory of that State (see, to that effect, *Stichting de Thuiskopie*, paragraph 36). Thus, where such recovery presents difficulties, the Member State concerned is also required to resolve them by taking into account the circumstances of each case.

33 However, where there are no practical difficulties, or where such difficulties are not sufficient, the necessary link between the application of the private copying levy on media, on the one hand, and the use of those media for the purposes of private reproduction, on the other, is absent, so that the indiscriminate application of that levy is not justified and does not reflect the 'fair balance' to be struck between the interests of the rightholders and those of the users of the protected subject-matter.

34 It is for the national court to verify, in the light of the particular circumstances of each national system and the limits imposed by Directive 2001/29, whether the practical difficulties justify such a system of financing fair compensation and, if so, whether the right to reimbursement of any levies paid in cases other than that under Article 5(2)(b) of Directive 2001/29 is effective and does not make repayment of those levies excessively difficult.

35 In the present case, the referring court must verify, first of all, whether the indiscriminate application of a private copying levy on the placing on the market, for commercial purposes and for consideration, of recording media suitable for reproduction is warranted by sufficient practical difficulties in all cases. In that context, account must be taken of the scope, the effectiveness, the availability, the publicisation and the simplicity of use of the a priori exemption mentioned by Austro-Mechana in its written observations and at the hearing.

36 Secondly, the referring court must also verify that the scope, the effectiveness, the availability, the publicisation and the simplicity of use of the right to reimbursement allow the correction of any imbalances created by the system in order to respond to the practical difficulties observed. In that regard, it must be observed that the referring court itself stresses that the cases of reimbursement are not limited to those expressly covered by Paragraph 42(b)(6) of the UrhG.

37 In the light of the foregoing observations, the answer to the first question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it does not preclude legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in national territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision, where, having regard to the particular circumstances of each national system and the limits imposed by Directive 2001/29, which it is for the national court to verify, practical difficulties justify such a system of financing fair compensation and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult.

The second question

38 Since the second question is dependent on the first question and the answer to the first question is a matter for the discretion of the referring court, the second question must also be answered.

39 By its second question the referring court asks, essentially, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it precludes the establishment by a Member State of a rebuttable presumption of private use of recording media suitable for reproduction in the case of the marketing of such media to natural persons, in the context of a system of financing of fair compensation under that provision by means of a private copying levy imposed on persons who first place such media on the market in their territory for commercial purposes and for consideration.

40 In that regard, it must be held that, in the context of the wide discretion enjoyed by the Member States in determining the form, the detailed arrangements and the possible level of such compensation, it is legitimate for them to provide for presumptions, inter alia, as was observed in paragraph 32 of the present judgment, where the actual collection of the fair compensation to make good the damage suffered by the holders of the exclusive right of reproduction on their territory presents difficulties.

41 In the context of systems of financing similar to that established by Paragraph 42b of the UrhG, the Court has held that, where the recording media capable of being used for reproduction have been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of those media and have therefore actually caused harm to the holder of the exclusive right of reproduction, given that those natural persons are rightly presumed to

benefit fully from the making available of those media, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying (*Padawan*, paragraphs 54 and 55).

42 The mere fact that those media are suitable for making copies is sufficient to justify the application of the private copying levy, provided that the media have been made available to natural persons as private users (*Padawan*, paragraph 56).

43 Given the practical difficulties connected with the determination of the private purpose of the use of a recording medium suitable for reproduction, the establishment of a rebuttable presumption of such use when that medium is made available to a natural person is, in principle, justified and reflects 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 protected subject-matter.

44 It is for the national court to verify, in the light of the particular circumstances of each national system and the limits imposed by Directive 2001/29, whether the practical difficulties involved in determining whether the purpose of the use of the media at issue is private justify the establishment of such a presumption and, in any event, whether the presumption established results in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in Article 5(2)(b) of Directive 2001/29.

45 In those circumstances, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that, in the context of a system of financing of fair compensation under that provision by means of a private copying levy to be borne by persons who first place recording media suitable for reproduction on the market in the territory of the Member State concerned for commercial purposes and for consideration, that provision does not preclude the establishment by that Member State of a rebuttable presumption of private use of such media where they are marketed to natural persons, where the practical difficulties of determining whether the purpose of the use of the media in question is private justify the establishment of such a presumption and provided that the presumption established does not result in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in that provision.

The third question

46 By its third question, the referring court asks, essentially, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation under that provision, or the private copying levy intended to finance such compensation, may be excluded if half of the funds received by way of such compensation or levies is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled.

47 In that connection, it must be borne in mind that the notion and level of fair compensation under Article 5(2)(b) of Directive 2001/29 are linked to the harm resulting for the holders of the exclusive right of reproduction from the reproduction for private use of their protected works without their authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by such rightholders and must necessarily be calculated on the basis of the criterion of the harm caused to them by the introduction of the private copying exception (*Padawan*, paragraphs 40 and 42).

48 Moreover, the Court has held that, with regard to the right to fair compensation payable to holders of the exclusive right of reproduction under the private copying exception, it does not follow from any provision of Directive 2001/29 that the European Union legislature envisaged the possibility of that right being waived by the person entitled to it (jCase C-277/10 *Luksan* [2012] ECR, paragraph 105).

49 However, as the Advocate General observed in point 76 of his opinion, Directive 2001/29 does not require Member States which have introduced the private copying exception into their national law to pay those entitled to such fair compensation all the fair compensation in cash and does not preclude those Member States from providing, in the exercise of the wide discretion which they enjoy, that part of that compensation be provided in the form of indirect compensation.

50 In that regard, the fact that the fair compensation must be regarded as recompense for the harm suffered by holders of the exclusive right of reproduction by reason of the introduction of the private copying exception, and must necessarily be calculated on the basis of the criterion of such harm, does not constitute an obstacle to the indirect payment to those entitled, through the intermediary of social and cultural establishments set up for their benefit, of a part of the revenue intended for fair compensation.

51 Indeed, as the Advocate General observed in point 76 of his opinion, remuneration systems for private copying are at present necessarily imprecise with regard to most recording media, in that it is impossible in practice to determine which work was reproduced by which user and on which medium.

52 Moreover, it must be observed that such a system of indirect collection of fair compensation by those entitled to it meets one of the objectives of the appropriate legal protection of intellectual property rights under Directive 2001/29, which is, as is apparent from recitals 10 and 11 of that directive, to ensure that European cultural creativity and production receive the necessary resources to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers.

53 Consequently, the fact that a part of the revenue intended for fair compensation under Article 5(2)(b) of Directive 2001/29 is intended for social and cultural establishments set up for the benefit of those entitled to such compensation is not in itself contrary to the objective of that compensation, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.

54 It would not be consistent with the objective of that compensation for such establishments to grant their benefits to persons other than those entitled or to exclude, *de jure* or *de facto*, those who do not have the nationality of the Member State concerned.

55 In the light of the foregoing observations, the answer to the third question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation under that provision or the private copying levy intended to finance that compensation cannot be excluded by reason of the fact that half of the funds received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.

The fourth question

56 By its fourth question, the referring court seeks to know, essentially, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the obligation undertaken by a Member State to pay, on the placing on the market, for commercial purposes and for consideration, of recording media suitable for reproduction, a private copying levy intended to finance the fair compensation under that provision, may be excluded by reason of the fact that a comparable levy has already been paid in another Member State.

57 In that regard, it must be borne in mind that Article 5(2)(b) of Directive 2001/29 imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, within the framework of its powers, that the fair compensation intended to compensate the holders of the exclusive right of reproduction harmed for the prejudice sustained is actually recovered, especially if that harm arose on the territory of that Member State (*Stichting de Thuiskopie*, paragraph 34).

58 Since it is in principle for the final users who, for their private use, reproduce a protected work without seeking prior authorisation from the holder of the exclusive right of reproduction, thereby causing him harm, to make good that harm, it can be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which those final users reside (*Stichting de Thuiskopie*, paragraph 35).

59 It follows that, if a Member State has introduced an exception for private copying into its national law and if the final users who, on a private basis, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction on the territory of that State (*Stichting de Thuiskopie*, paragraph 36).

60 Moreover, it must be recalled that the system of recovery chosen by the Member State concerned cannot relieve that Member State of the obligation to achieve the certain result of ensuring that the holders of the exclusive right of reproduction who have suffered harm actually receive payment of fair compensation for the prejudice which arose on its territory (*Stichting de Thuiskopie*, paragraph 39).

61 In that regard, it is of no bearing on that obligation that, in the case of distance selling arrangements, the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, is established in another Member State (*Stichting de Thuiskopie*, paragraph 40).

62 In the light of the fact that, as observed in paragraph 47 of the present judgment, fair compensation must be regarded as recompense for the harm suffered by the holders of the exclusive right of reproduction by reason of the introduction of the private copying exception and must necessarily be calculated on the basis of the criterion of such harm, it cannot be validly argued that the transfer from one Member State to another Member State of recording media suitable for reproduction can increase the harm caused to such rightholders.

63 Article 5(2)(b) of Directive 2001/29 provides for fair compensation, not for the placing on the market of recording media suitable for reproduction, but 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. There is no such reproduction in the case of a transfer from one Member State to another Member State of recording media suitable for reproduction.

64 Given that a Member State which has introduced the private copying exception into its national law and in which the final users who privately reproduce a protected work live must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by those entitled, the fact that a levy intended to finance that compensation has already been paid in another Member State cannot be relied on to exclude the payment in the first Member State of such compensation or of the levy intended to finance it.

65 However, a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law.

66 In the light of the foregoing observations, the answer to the fourth question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the obligation undertaken by a Member State to pay, on the placing on the market, for commercial purposes and for consideration, of recording media suitable for reproduction, a private copying levy intended to finance the fair compensation under that provision may not be excluded by reason of the fact that a comparable levy has already been paid in another Member State.

Costs

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

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

1. **Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that it does not preclude legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in its territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision, where, having regard to the particular circumstances of each national system and the limits imposed by that directive, which it is for the national court to verify, practical difficulties justify such a system of financing fair compensation and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult.**

2. **Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that, in the context of a system of financing of fair compensation under that provision by means of a private copying levy to be borne by persons who first place recording media suitable for reproduction on the market in the territory of the Member State concerned for commercial purposes and for consideration, that provision does not preclude the establishment by that Member State of a rebuttable presumption of private use of such media where they are marketed to natural persons, where the practical difficulties of determining whether the purpose of the use of the media in question is private justify the establishment of such a presumption and provided that the presumption established does not result in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in that provision.**

3. **Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation under that provision or the private copying levy intended to finance that compensation cannot be excluded by reason of the fact that half of the funds received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.**

4. **Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the obligation undertaken by a Member State to pay, on the placing on the market, for commercial purposes and for consideration, of recording media suitable for reproduction, a private**

copying levy intended to finance the fair compensation under that provision may not be excluded by reason of the fact that a comparable levy has already been paid in another Member State.

[Signatures]