Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 June 2013*

(Intellectual and industrial property — Copyright and related rights in the information society — Directive 2001/29/EC — Reproduction right — Fair compensation — Concept 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' — Consequences of the non-application of technological measures which are available to prevent or restrict unauthorised acts — Consequences of an express or implied authorisation to reproduce)

In Joined Cases C-457/11 to C-460/11,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 21 July 2011, received at the Court on 5 September 2011, in the proceedings

Verwertungsgesellschaft Wort (VG Wort)

v

Kyocera, formerly Kyocera Mita Deutschland GmbH,

Epson Deutschland GmbH,

Xerox GmbH (C-457/11),

Canon Deutschland GmbH (C-458/11),

and

Fujitsu Technology Solutions GmbH (C-459/11),

Hewlett-Packard GmbH (C-460/11),

v

Verwertungsgesellschaft Wort (VG Wort),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský (Rapporteur), U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: E. Sharpston,

* Language of the case: German.

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 22 October 2012,

after considering the observations submitted on behalf of:

— Verwertungsgesellschaft Wort (VG Wort), by U. Karpenstein, G. Schulze and R. Staats, Rechtsanwälte,

— Fujitsu Technology Solutions GmbH, by C. Frank, Rechtsanwalt,

— Hewlett-Packard GmbH, by G. Berrisch and A. Strowel, Rechtsanwälte,

— Kyocera (formerly Kyocera Mita Deutschland GmbH), Epson Deutschland GmbH, Xerox GmbH and Canon Deutschland GmbH, by C. Lenz and T. Würtenberger, Rechtsanwälte,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Czech Government, by D. Hadroušek, acting as Agent,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent,

— the Lithuanian Government, by R. Mackevičienė and R. Vaišvilienė, acting as Agents,

— the Netherlands Government, by B. Koopman, C. Wissels and M. Bulterman, acting as Agents,

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

— the Polish Government, by B. Majczyna, acting as Agent,

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

— the United Kingdom Government, by L. Seeboruth, acting as Agent, and S. Malynicz, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 24 January 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 5 and 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The requests have been made in proceedings between, on the one hand, Verwertungsgesellschaft Wort (VG Wort) and, on the other, Kyocera, formerly Kyocera Mita Deutschland GmbH ('Kyocera'), Epson Deutschland GmbH ('Epson') and Xerox GmbH ('Xerox'), in Case C-457/11, and Canon Deutschland GmbH, in Case C-458/11, and between, on the one hand, Fujitsu Technology Solutions GmbH

('Fujitsu') and Hewlett Packard GmbH and, on the other, VG Wort, in Cases C-459/11 and C-460/11, respectively, concerning the remuneration that those businesses would be obliged to pay to VG Wort due to the placing on the market of printers and/or plotters and of personal computers.

Legal context

European Union law

3 Recitals 2, 5, 35, 36, 39 and 52 in the preamble to Directive 2001/29 are worded as follows:

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

…

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

…

(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.

(36) The 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.

…

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

…

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.'

4 Under Article 2 of Directive 2001/29:

'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(2) of Directive 2001/29 provides:

'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;

(c) in respect of 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;

…'

6 Article 5(3) of Directive 2001/29 provides:

‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

…

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

…’

7 Under Article 5(5) of Directive 2001/29:

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

8 Article 6 of Directive 2001/29 provides:

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

…

3. For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

…’

9 Article 10 of Directive 2001/29, entitled 'Application over time', states:

'1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.'

10 Under the first subparagraph of Article 13(1) of Directive 2001/29:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 22 December 2002 at the latest. They shall immediately inform the Commission thereof.'

German law

11 Paragraph 53 of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz) of 9 September 1965 (BGBl. I, p. 1273), as amended by Paragraph 1 of the Law of 10 September 2003 (BGBl. I, p. 1274) ('the UrhG') is worded as follows: 'Reproduction for private use and other personal uses

(1) It shall be permissible for a natural person to make single copies of a work for private use on any medium, provided that they do not serve any commercial purpose either directly or indirectly and provided that they are not copied from an obviously unlawfully produced model. A person authorised to make copies may have such copies made by another person where this is done free of charge or where this involves copies on paper or any similar medium, effected by the use of any kind of photomechanical technique or by some other process having similar effects.

(2) It shall be permissible to make single copies of a work or to have these made:

1. for personal scientific use if and to the extent that such reproduction is necessary for that purpose;

2. for inclusion in a personal archive if and to the extent that the reproduction is necessary for that purpose and a personal copy of the work is used as the model from which the copy is made;

3. for personal information concerning current affairs if the work was broadcast;

4. for all other personal use:

   (a) in the case of small parts of a released work or individual articles published in newspapers or periodicals;

   (b) in the case of a work which has been out of print for at least two years.

Those provisions shall apply in the case referred to in the first sentence, point 2, only if in addition,

1. the copy is produced on paper or any similar medium by the use of any kind of photomechanical technique or by some other process having similar effects, or

2. use is exclusively analogue in nature, or

3. the archive is not used for any direct or indirect economic or commercial purpose.

Those provisions shall apply in the cases referred to under the first sentence, points 3 and 4, only if in addition one of the conditions under the second sentence, points 1 or 2, is satisfied.

(3) It shall be permissible to make copies or have copies made of small parts of a work, of small-scale works or of individual articles published in newspapers or periodicals or made available to the public if those copies are for personal use in the following cases:

1. for teaching purposes in schools, in non-commercial training and further training institutions, as well as in vocational training institutions in the quantities required for a class of students, or

2. for state examinations and examinations in schools, higher education institutions, non-commercial training and further training institutions, as well as vocational training institutions in the required quantities, if and to the extent that the making of copies is required for those purposes.

(4) The reproduction of

(a) graphic recordings of musical works;

(b) a book or a periodical, in the case of reproduction which is more or less complete,

to the extent that this does not occur by means of manual transcription, shall be permissible only with the consent of the rightholder or under the conditions in subparagraph (2), point 2, or for personal use, if the work has been out of print for at least two years.

(5) Subparagraph (1), subparagraph (2), points 2 to 4, and subparagraph (3), point 2, shall not apply to databases whose the elements are individually accessible by electronic means.

Subparagraph (2), point 1, and subparagraph (3), point 1, shall apply to such databases on condition that the scientific use or educational use does not have commercial purposes.

(6) The copies may neither be distributed nor communicated to the public. It shall, however, be permissible to lend lawfully produced copies of newspapers and out-of-print works, as well as those works in which small damaged or missing parts have been replaced by copies.

(7) The recording of public lectures, productions or performances of a work on video or audio recording mediums, the realisation of plans and sketches of artistic works and the construction of a copy of architectural works shall be permissible only with the consent of the rightholder.'

12 Paragraph 54a of the UrhG provides:'Obligation to pay remuneration for each copy made by means of photocopying

(1) Where the nature of a work makes it probable that it will be reproduced, pursuant to Paragraph 53(1) to (3), by means of photocopying or by any process having similar effects, the author of the work shall be entitled to payment, from the manufacturer of devices designed to make such copies, of fair remuneration to compensate for the possibility of such copies being made resulting from the sale or another form of placing on the market of those devices. Any person commercially importing or reimporting the devices into the territory where the present law applies or trading in those devices shall be jointly and severally liable along with the manufacturer. A trader shall not be obliged to pay if he purchases fewer than 20 devices over a period of six months.

(2) Where devices of that type are used in schools, higher education institutions, vocational training institutions or other training and further training institutions (educational establishments), research institutions, public libraries or establishments which make the devices available for photocopying in exchange for payment, the author shall also be entitled to payment of fair remuneration from the operator of the device.

(3) Paragraph 54(2) shall apply *mutatis mutandis*.'

13 Pursuant to Paragraph 54d of the UrhG and the annex thereto, the levy on devices referred to in Paragraph 54a(1) is set at a sum varying from EUR 38.35 to EUR 613.56, depending on the number of copies that can be made per minute and the availability or not of colour copying. However, other amounts may be fixed by agreement.

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

Case C-457/11

14 VG Wort is an authorised copyright collecting society. It has exclusive responsibility for representing authors and publishers of literary works in Germany. It is therefore entitled to claim remuneration, on behalf of authors, from manufacturers, importers and distributors of devices under Paragraph 54a(1) of the UrhG.

15 Acting in its own name and on behalf of another collecting society representing those who hold rights in graphic works of all kinds, namely VG Bild-Kunst, VG Wort asked for information on the nature of the printers sold or otherwise placed on the market from 1 January 2001, and the quantities concerned, and, secondly, on the capabilities and on the sources of supply of devices in Germany. In addition, VG Wort sought a declaration that Kyocera, Epson and Xerox should pay it remuneration, by way of a levy on personal computers, printers and/or plotters marketed in Germany from 1 January 2001 to 31 December 2007. The amounts claimed were based on the rates agreed with VG Bild-Kunst and published in the *Bundesanzeiger* (Federal Gazette).

16 The Landgericht Düsseldorf (Regional Court, Düsseldorf) granted the application for information in full and found that, to a large extent, Kyocera, Epson and Xerox were obliged to pay compensation to VG Wort. On appeal by Kyocera, Epson and Xerox, the appellate court set aside the judgment of the Landgericht Düsseldorf. Citing a decision of 6 December 2007, the Bundesgerichtshof (Federal Court of Justice) dismissed, by order, VG Wort's appeal on a point of law.

17 The Bundesverfassungsgericht (Federal Constitutional Court) quashed the decision of the Bundesgerichtshof and sent the case back to that court.

18 At the rehearing of the appeal on a point of law, VG Wort submitted that the judgment of the Landgericht Düsseldorf should be upheld. The defendants in the main proceedings requested that the appeal on a point of law be dismissed.

19 Taking the view that the outcome of the appeal depended on the interpretation of Directive 2001/29, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In interpreting national law, is account to be taken of Directive 2001/29 in respect of events which occurred after the directive entered into force on 22 June 2001, but before it became applicable on 22 December 2002?

2. Do reproductions effected by means of printers constitute reproductions effected by the use of any kind of photographic technique or by some other process having similar effects within the meaning of Article 5(2)(a) of the directive?

3. If Question 2 is answered in the affirmative: can the requirements laid down in the directive relating to fair compensation for exceptions or limitations to the right of reproduction under Article 5(2) and (3) of the directive, having regard to the fundamental right to equal treatment under Article 20 of the EU Charter of Fundamental Rights [('the Charter')], be fulfilled also where the appropriate reward must be paid not by the manufacturers, importers and distributors of the printers but by the manufacturers, importers and distributors of another device or several other devices of a chain of devices capable of making the relevant reproductions?

4. Does the possibility of applying technological measures under Article 6 of the directive render inapplicable the condition relating to fair compensation within the meaning of Article 5(2)(b) of the directive?

5. Is the condition relating to fair compensation (Article 5(2)(a) and (b) of the directive) and the possibility thereof (see recital 36 in the preamble to the directive) inapplicable where the rightholders have expressly or implicitly authorised reproduction of their works?'

Cases C-458/11 to C-460/11

20 The facts and the legal arguments at issue in Cases C-458/11 to C-460/11 correspond essentially to those in Case C-457/11.

21 In Cases C-457/11 and C-458/11, the questions referred are identical. In Case C-460/11, the questions referred for a preliminary ruling are identical to the first, second and third referred in Case C-457/11. In Cases C-457/11 and C-459/11, the first, fourth and fifth questions are identical. By contrast, in Case C-459/11, the second and third questions are different to those referred in Case C-457/11, in so far as they relate not to printers, but to computers.

22 In Case C-459/11, the second and third questions referred for a preliminary ruling are the following:

'2. Do reproductions effected by means of personal computers constitute reproductions effected by the use of any kind of photographic technique or by some other process having similar effects within the meaning of Article 5(2)(a) of the directive?

3. If Question 2 is answered in the affirmative: can the requirements laid down in the directive relating to fair compensation for exceptions or limitations to the right of reproduction under Article 5(2) and (3) of the directive, having regard to the fundamental right to equal treatment under Article 20 of the [Charter], be fulfilled also where the appropriate reward must be paid not by the manufacturers, importers and distributors of the personal computers but by the manufacturers, importers and distributors of another device or several other devices of a chain of devices capable of making the relevant reproductions?'

23 By order of the President of the Court of 6 October 2011, Cases C-457/11 to C-460/11 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The first question

24 By its first question the referring court asks, in essence, whether, with regard to the period from 22 June 2001, the date on which that directive came into force, to 22 December 2002, the date by which that directive was to have been transposed into national law, acts of using protected works or other subject-matter are affected by Directive 2001/29.

25 According to settled case-law, when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently to comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (Case C-282/10 *Dominguez* [2012] ECR, paragraph 24 and the case-law cited).

26 The general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired (see, to that effect, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 115).

27 With regard, more particularly, to Directive 2001/29, Article 10(2) of the directive states that it applies without prejudice to any acts concluded and rights acquired before 22 December 2002.

28 As is apparent from the history of the origin of Article 10(2) and, in particular, from the Commission's initial proposal of 10 December 1997 (COM(97) 628), which led to the adoption of Directive 2001/29, the protection of the acts described reflects 'a general principle, ensuring that the Directive has no retroactive effect and does not apply to acts of exploitation of protected works and other subject-matter which occurred before the date on which the Directive has to be implemented by Member States'.

29 In the light of the foregoing, the answer to the first question is that, with regard to the period from 22 June 2001, the date on which Directive 2001/29 entered into force, to 22 December 2002, the date by which that directive was to have been transposed into national law, acts of using protected works or other subject-matter are not affected by that directive.

The fifth question

30 By its fifth question, which it is appropriate to examine second, the referring court asks, in essence, whether the fact that rightholders have expressly or implicitly authorised reproduction of their protected work or other subject-matter affects the fair compensation which is provided for, on a compulsory or optional basis, under the relevant provisions of Directive 2001/29, and, where appropriate, whether such authorisation may mean that no compensation is due.

31 In that regard, it should first of all be borne in mind that the Court has already held, in relation specifically to the private copying exception, that the purpose of fair compensation is to compensate authors for private copying, without their authorisation, of their protected works, meaning that it must be regarded as recompense for the harm suffered by authors, resulting from such a copy which is not authorised by them (see, to that effect, Case C-467/08 *Padawan* [2010] ECR I-10055, paragraphs 39 and 40).

32 That case-law is also relevant as regards the other provisions of Article 5 of Directive 2001/29.

33 In Article 5, the European Union legislature, in the very title of that article, makes a distinction between, first, exceptions and, secondly, limitations to the exclusive right of rightholders to authorise or prohibit the reproduction of their protected works or other subject-matter.

34 Accordingly, that exclusive right may, depending on the circumstances, be either, as an exception, totally excluded, or merely limited. It is conceivable that such a limitation may include, depending on the particular situations that it governs, in part an exclusion, a restriction, or even the retention of that right.

35 That distinction in the legislation should therefore be given effect.

36 It must also be noted that, pursuant to Article 5(2) and (3) of Directive 2001/29, it is open to Member States to decide to introduce, in their national law, exceptions or limitations to the exclusive reproduction right. Where a Member State does not make use of that option, rightholders retain, within that State, their exclusive right to authorise or prohibit reproduction of their protected works or other subject-matter.

37 Where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effects under the law of that State. Consequently, such an act has no effect on the harm caused to the rightholders due to the introduction of the relevant measure depriving them of that right, and cannot therefore have any bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis, under the relevant provision of that directive.

38 By contrast, where a Member State has decided not to exclude completely the right for the rightholders to authorise reproduction of their protected works or other subject-matter, but merely to introduce a limitation of that right, it is necessary to establish whether, in the particular case, the national legislature intended to preserve the reproduction right from which the authors benefit.

39 Where, in the particular case, that reproduction right has been preserved, the provisions relating to fair compensation cannot apply, given that the limitation provided for by the national legislature does not allow a reproduction to be made without the authorisation of the authors and, therefore, it does not cause the type of harm for which fair compensation would constitute recompense. Conversely, where, in the particular case, the reproduction right has not been retained, the act of authorisation does not affect the harm caused to the authors, and cannot therefore have any bearing on the fair compensation owed.

40 In the light of the foregoing, the answer to the fifth question is that, in the context of an exception or limitation provided for by the relevant provision of Directive 2001/29, an act by which a rightholder may have authorised the reproduction of his protected work or other subject-matter has no bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis under the relevant provision of that directive.

The fourth question

41 By its fourth question, which should be examined third, the referring court asks, essentially, whether the possibility of applying technological measures under Article 6 of Directive 2001/29 may render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of the directive.

Admissibility

42 Without expressly raising an objection of inadmissibility, Fujitsu has expressed doubts as to the relevance of the fourth question in determining the issue in the main proceedings.

43 In its submissions, Fujitsu maintains, in essence, that Article 5(2)(b) of Directive 2001/29 does not apply to the case in the main proceedings, because it concerns only reproductions of audio, visual and audiovisual material for private use and not copies of texts and still images on computers.

44 In that regard, it should be recalled that, according to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 33, and Case C-463/11 *L* [2013] ECR, paragraph 28).

45 It is not quite obvious that the interpretation of Article 5(2)(b) of Directive 2001/29 sought by the referring court bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical.

46 Moreover, the objection raised by Fujitsu, alleging that that provision is inapplicable to the cases in the main proceedings, does not relate to the admissibility of the fourth question but concerns its substance.

47 In those circumstances, the fourth question must be held to be admissible.

Substance

48 As it is clear from Article 5(2)(b) of Directive 2001/29, Member States may provide, in their national law, for a private copying exception, on condition, however, that the rightholders receive fair compensation which takes account of the application or non-application of technological measures, referred to in Article 6 of that directive, to the works or other subject-matter concerned.

49 In that regard, it should be borne in mind first of all, as follows from paragraph 31 above, that the purpose of fair compensation is to compensate authors for the harm suffered by them following the introduction of the private copying exception, and therefore for the use made of their protected works without their authorisation.

50 Moreover, for the purposes of Article 6(3) of Directive 2001/29, 'technological measures' should be understood as meaning any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright.

51 It follows that the 'technological measures' to which the wording of Article 5(2)(b) of Directive 2001/29 refers are technologies, devices or components intended to restrict acts which are not authorised by the rightholders, that is to say to ensure the proper application of that provision, which constitutes a restriction on copyright or rights related to copyright, and thus to prevent acts which do not comply with the strict conditions imposed by that provision.

52 It is, however, Member States and not the rightholders which establish the private copying exception and which authorise, for the purposes of the making of such a copy, such use of protected works or other subject-matter.

53 Consequently it is for the Member State which, by the establishment of that exception, has authorised the making of the private copy to ensure the proper application of that exception, and thus to restrict acts which are not authorised by the rightholders.

54 It follows that the fact that a Member State has not ensured the proper application of the private copying exception cannot in any way render inapplicable the fair compensation due to the rightholders, who are moreover liable to suffer additional harm precisely because of such an omission of that Member State.

55 That being so, it should be noted that, according to recital 52 in the preamble to Directive 2001/29, rightholders may make use of voluntarily applied technological measures which are compatible with the private copying exception and which accommodate achieving the objective of that exception. Such technological measures should be encouraged by Member States.

56 Accordingly, the technological measures that rightholders have the possibility of using should be understood as technologies, devices or components which are capable of ensuring that the objective pursued by the private copying exception is achieved or capable of preventing or limiting reproductions which are not authorised by the Member States within the framework of that exception.

57 Having regard to the voluntary nature of those technological measures, even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due.

58 Nevertheless, it is open to the Member State concerned to make the actual level of compensation owed to rightholders dependent on whether or not such technological measures are applied, so that those rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception.

59 In the light of the foregoing, the answer to the fourth question is that the possibility of applying technological measures under Article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of that directive.

The second and third questions

60 By its second and third questions, which should be examined lastly and together, the referring court asks, essentially, whether the concept of 'reproductions effected by the use of any kind of photographic technique or by some other process having similar effects' within the meaning of Article 5(2)(a) of Directive 2001/29 must be interpreted as including reproductions effected using a printer or a personal computer, essentially where the two are linked together, and, in such a case, which person must be considered as owing the fair compensation under that provision.

61 In the first place, it must be borne in mind that, under Article 2 of Directive 2001/29, Member States are, in principle, to grant to authors and the holders of related rights the exclusive right to authorise or prohibit the direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their protected works or other subject-matter.

62 However, in accordance with Article 5(2)(a) of Directive 2001/29, Member States may provide for an exception or limitation to the exclusive reproduction right of the author or the holder of related rights as regards his protected work or other subject-matter 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, provided, however, that the rightholders receive fair compensation ('the reproduction on paper or similar medium exception').

63 It must be observed at the outset that the question as to the nature of the original from which the reproduction is effected clearly does not arise in the disputes in the main proceedings. Therefore, there is no need to rule on that point.

64 Article 5(2)(a) of Directive 2001/29, as is clear from its wording, distinguishes 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.

65 First of all, as regards the medium, the material element on which the given reproduction of a protected work or other subject-matter is found, the wording of Article 5(2)(a) of Directive 2001/29 explicitly refers to paper, to which it joins, in general terms, another substrate which must possess similar qualities, namely qualities comparable and equivalent qualities to those of paper.

66 It follows that mediums which do not have comparable and equivalent qualities to those of paper do not come within the scope of the exception referred to in that provision. If it were otherwise, the effectiveness of that exception could not be ensured, particularly in the light of the exception referred to in Article 5(2)(b) of Directive 2001/29, which concerns 'reproductions on any medium'.

67 It follows that all non-analogue mediums of reproduction, namely, in particular, digital mediums, must be excluded from the scope of Article 5(2)(a) of Directive 2001/29, since, as the Advocate General observed in paragraph 63 of her Opinion, in order to be similar to paper as a medium for reproduction, a substrate must be capable of bearing a physical representation capable of perception by human senses.

68 Next, as regards the means by which a reproduction on paper or similar support may be made, the wording of Article 5(2)(a) of Directive 2001/29 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.

69 That conclusion is supported, moreover, by the explanatory memorandum to the Commission proposal (COM(97) 628) which led to the adoption of Directive 2001/29, according to which the exception concerned is not focused on the technique used but rather on the result obtained.

70 As long as that result is ensured, the number of operations or the nature of the technique or techniques used during the reproduction process at issue does not matter, on condition, however, that the various elements or non-autonomous stages of that single process act or are carried out under the control of the same person and are all intended to reproduce the protected work or other subject-matter on paper or a similar medium.

71 That interpretation is supported by recitals 2 and 5 in the preamble to Directive 2001/29, according to which the aim of Directive 2001/29 is to create a general and flexible framework at European Union level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new forms of exploitation of protected works (Case C-283/10 *Circul Globus Bucureşti* [2011] ECR I-12031, paragraph 38).

72 It follows that Article 5(2)(a) of Directive 2001/29 does not, subject to the qualifications set out in paragraph 70 above, exclude the use in the process referred to in that provision of several devices, including those with a digital function.

73 In the second place, as regards the question of which person must be considered as owing the fair compensation, in the context of such a process involving the combination of several devices, some of which have an analogue function and others a digital function, it is appropriate to recall at the outset the case-law of the Court, which admittedly relates to the private copying exception but may none the less be applied by analogy to the reproduction on paper or similar medium exception, provided that the fundamental right to equal treatment under Article 20 of the Charter is respected.

74 As regards the identification of the person who must be considered as owing the fair compensation, the Court has held that the provisions of Directive 2001/29 do not expressly address the question of who owes that compensation, so that the Member States enjoy a broad discretion in that regard (see, to that effect, Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-5331, paragraph 23).

75 That said, as 'fair compensation' is a concept which has its own independent meaning in European Union law, the Court has made clear, as pointed out in paragraph 31 above, that the purpose of that compensation is to compensate authors for the reproduction, without their authorisation, of their protected works, so that it must be regarded as recompense for the harm suffered by authors as a result of that reproduction. Accordingly, it is, in principle, for the person who has caused the harm, namely the person who makes a copy of the protected work without seeking prior authorisation from the rightholder, to make good the harm suffered by financing the compensation which will be paid to the rightholder (see, to that effect, *Padawan*, paragraphs 44 and 45).

76 The Court has however accepted that, given the practical difficulties connected with such a system of fair compensation, it is open to the Member States to go back to the stages before the actual copying and put in place a 'private copying levy', for the purposes of financing fair compensation, chargeable to persons who are in possession of the reproduction equipment, devices and mediums and, on that basis, in law or in fact, make those items available to persons making copies or provide copying services for them, since such a system enables the persons liable to pay compensation to pass on the cost of the levy to private users, and the latter therefore assume the burden of the private copying levy (see, to that effect, *Padawan*, paragraphs 46 and 49, and *Stichting de Thuiskopie*, paragraphs 27 and 28).

77 Applying that case-law mutatis mutandis to the reproduction on paper or similar medium exception, it is, in principle, for the person who has made such a reproduction to finance the compensation which will be paid to the rightholders. However, Member States are free, given the practical difficulties encountered, to put in place, where appropriate, a levy chargeable to the persons in possession of the equipment on which the reproduction has been made.

78 Where the reproductions at issue have been made by means of a single process, with the use of a chain of devices, it is likewise open to the Member States to go back to the stages before the copying stage and put in place, where appropriate, a system in which fair compensation is paid by the persons in possession of a device forming part of that chain which contributes to that process in a non-autonomous manner, in so far as those persons have the possibility of passing on the cost of the levy to their customers. Nevertheless, the overall amount of fair compensation owed as recompense for the harm suffered by the rightholders at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device.

79 In those circumstances, the fundamental right to equal treatment of all interested parties is respected.

80 In the light of the foregoing, the answer to the second and third questions is that the concept of 'reproductions effected by the use of any kind of photographic technique or by some other process having similar effects' within the meaning of Article 5(2)(a) of Directive 2001/29 must be interpreted

as including reproductions effected using a printer and a personal computer, where the two are linked together. In this case, it is open to the Member States to put in place a system in which the fair compensation is paid by the persons in possession of a device contributing, in a non-autonomous manner, to the single process of reproduction of the protected work or other subject-matter on the given medium, in so far as those persons have the possibility of passing on the cost of the levy to their customers, provided that the overall amount of the fair compensation owed as recompense for the harm suffered by the author at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device.

Costs

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

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

1. **With regard to the period from 22 June 2001, the date on which 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 entered into force, to 22 December 2002, the date by which that directive was to have been transposed into national law, acts of using protected works or other subject-matter are not affected by that directive.**

2. **In the context of an exception or limitation provided for by Article 5(2) or (3) of Directive 2001/29, an act by which a rightholder may have authorised the reproduction of his protected work or other subject-matter has no bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis under the relevant provision of that directive.**

3. **The possibility of applying technological measures under Article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of that directive.**

4. **The concept of 'reproductions effected by the use of any kind of photographic technique or by some other process having similar effects' within the meaning of Article 5(2)(a) of Directive 2001/29 must be interpreted as including reproductions effected using a printer and a personal computer, where the two are linked together. In this case, it is open to the Member States to put in place a system in which the fair compensation is paid by the persons in possession of a device contributing, in a non-autonomous manner, to the single process of reproduction of the protected work or other subject-matter on the given medium, in so far as those persons have the possibility of passing on the cost of the levy to their customers, provided that the overall amount of the fair compensation owed as recompense for the harm suffered by the author at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device.**

[Signatures]