Court of Justice EU, 23 November 2023, Seven.One v Corint

COPYRIGHT

Fair compensation for private use of broadcasts broadcasting organisations (Article 5(2)(b) Copyright Directive (2001/29))

- **Article 5(2)(b) Copyright Directive 2001 precludes national legislation which excludes broadcasting organisations, whose fixations of broadcasts are reproduced by natural persons for private use and for non-commercial ends, from the right to the fair compensation provided for in that provision, in so far as those organisations suffer potential harm which cannot be classified as '*minimal*'**

22. According to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (**judgment of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers, C-263/18, EU:C:2019:1111**, paragraph 38 and the case-law cited).
23. In the first place, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive, in the event 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 holders of that exclusive right receive fair compensation.
[…]
26. That literal interpretation is borne out, in the second place, by the context of those provisions and by the origins of Directive 2001/29.
[…]
30. Such an interpretation is borne out, in the third place, by the objectives pursued by the provisions at issue.
[…]
47. A difference in treatment between those broadcasting organisations and the other rightholders must, therefore, be based on an objective and reasonable criterion and be proportionate to the aim pursued by the treatment concerned.
48. In that regard, the absence, or the '*minimal*' level, of harm suffered by the category of rightholders composed of broadcasting organisations, on account of the private copying of fixations of their broadcasts, constitutes – in the light of the findings recalled in paragraphs 36 and 37 above – such an objective and reasonable criterion which does not go beyond what is necessary to safeguard a fair balance of rights between the rightholders and the users of protected subject matter.
49. However, having regard to the considerations in paragraphs 38 and 39 above, it is for the referring court, first, to satisfy itself, in the light of objective criteria, that broadcasting organisations, unlike the other categories of rightholders referred to in Article 2 of Directive 2001/29, suffer only harm which may be classified as '*minimal*' in respect of non-authorised reproduction of fixations of their broadcasts. Secondly, it is for the referring court to ascertain, also in the light of objective criteria, whether, in the category of rightholders composed of broadcasting organisations, all of those organisations are in comparable situations, in particular with regard to the harm they suffer, justifying that all of those organisations be excluded from the right to fair compensation.
50. It is only subject to that twofold condition that national legislation, which excludes all of those organisations from the right to fair compensation, should be regarded as meeting the requirements of Article 5(2)(b) of Directive 2001/29.
51. In that respect, the interested parties which have lodged written observations do not agree on the nature or the extent of the harm suffered by broadcasting organisations on account of private copying of the fixations of their broadcasts, or on whether the situations of those organisations are comparable according to whether or not they are entitled to public financing.
52. As the Advocate General observed, in essence, in point 26 of his Opinion, the existence and extent of any harm suffered by broadcasting organisations, as well as the examination of whether the situations of any distinct categories of broadcasting organisation are comparable, are assessments of fact, which are for the referring court to carry out.

Source: **C-260/22 – ECLI:EU:C:2023:900**

Court of Justice EU, 23 November 2023
(A. Arabadjiev, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele (Rapporteur))
JUDGMENT OF THE COURT (First Chamber)
23 November 2023 ([1])
(Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2(e) – Broadcasting organisations – Reproduction right of fixations of broadcasts – Article 5(2)(b) – Private copying exception – Fair compensation – Harm to broadcasting organisations – Equal treatment – National

[1] Language of the case: German.

legislation excluding broadcasting organisations from the right to fair compensation)
In Case C-260/22,
REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Erfurt (Regional Court, Erfurt, Germany), made by decision of 31 March 2022, received at the Court on 19 April 2022, in the proceedings
Seven.One Entertainment Group GmbH
v
Corint Media GmbH,
THE COURT (First Chamber),
composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele (Rapporteur), Judges,
Advocate General: A.M. Collins,
Registrar: K. Hötzel, Administrator,
having regard to the written procedure and further to the hearing on 29 March 2023,
after considering the observations submitted on behalf of:
- Seven.One Entertainment Group GmbH, by C. Masch and W. Raitz von Frentz, Rechtsanwälte,
- Corint Media GmbH, by O. Fiss and M. von Albrecht, Rechtsanwälte,
- the German Government, by J. Möller, J. Heitz and M. Hellmann, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,
- the Austrian Government, by G. Eberhard, F. Koppensteiner and G. Kunnert, acting as Agents,
- the European Commission, by G. von Rintelen and J. Samnadda, acting as Agents,
after hearing **the Opinion of the Advocate General at the sitting on 13 July 2023**,
gives the following
Judgment
1. This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
2 .The request has been made in proceedings between Seven.One Entertainment Group GmbH (‘*Seven.One’*), a broadcasting organisation, and Corint Media GmbH, a collective management company, concerning the payment of ‘*fair compensation’* under Article 5(2)(b) of Directive 2001/29.
Legal context
European Union law
3. Recitals 4, 9, 31, 35 and 38 of Directive 2001/29 state:
‘(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.
…
(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
…
(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.
…
(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.
…
(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the

information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.'

4. Article 2 of that directive, entitled '*Reproduction right'*, provides:

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

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

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

5. Article 5 of that directive, entitled '*Exceptions and limitations*', states, in paragraphs 2 and 5 thereof:

'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;

...

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

German law

6. Paragraph 53(1) of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273), in the version applicable to the dispute in the main proceedings ('*the UrhG'*), provides:

'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 a model that has obviously been unlawfully produced or made publicly accessible. 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.'

7. Under Paragraph 54(1) of the UrhG:

'If the nature of the work gives rise to an expectation of reproduction permitted under Paragraph 53(1) or (2) or Paragraphs 60a to 60f, the author of the work shall have a claim to payment of fair remuneration against the producer of devices and of storage media of the type used, alone or in combination with other devices, storage media or accessories, to make such reproductions.'

8. Paragraph 87 of the UrhG is worded as follows:

'(1) Broadcasting organisations have the exclusive right to,

...

2. make video or audio recordings of their broadcast, take photographs of their broadcast, as well as reproduce and distribute the video and audio recordings or photographs, with the exception of the rental right,

...

(4) Paragraph 10(1) and the provisions of Section 6 of Part 1, with the exception of the second sentence of Paragraph 47(2), and Paragraph 54(1), shall apply mutatis mutandis.'

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

9. Corint Media is a collective management company which manages copyright and related rights of private television channels and radio stations. In that connection, it distributes the revenues from the blank media levy to broadcasting organisations.

10. Seven.One is a broadcasting organisation which produces and broadcasts, throughout German territory, a private, advertising-financed television channel.

11. There is a management contract between those parties, which governs the exclusive exercise and exploitation by Corint Media of Seven.One's copyright and related rights in respect of that channel. In that regard, Seven.One, inter alia, requested Corint Media, in accordance with that contract, to pay it compensation in respect of the blank media levy. Corint Media cannot, however, accede to that request, because Paragraph 87(4) of the UrhG excludes broadcasting organisations from the right to fair compensation.

12. The referring court has doubts as to whether that national legislation is compatible with EU law. That court observes, first of all, that fair compensation must, in accordance with Article 5(2)(b) of Directive 2001/29, be paid to holders of the exclusive reproduction right that are affected by the private copying exception, including broadcasting organisations. It states that that provision does not provide for a restriction of fair compensation to the detriment of certain rightholders. Next, in the referring court's view, the exclusion provided for by the national legislation is questionable in the light of the principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('*the Charter'*). Lastly, the referring court states that that exclusion is likely to restrict the freedom to broadcast, provided for in Article 11 of the Charter.

13. In those circumstances the Landgericht Erfurt (Regional Court, Erfurt, Germany) decided to stay the

proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Directive 2001/29/EC be interpreted as meaning that broadcasting organisations are entitled, directly and originally, to the right to the fair compensation provided for under the "private copying" exception, in accordance with Article 5(2)(b) of Directive 2001/29/EC?

(2) Having regard to their right under Article 2(e) of Directive 2001/29/EC, can broadcasting organisations be excluded from the right to fair compensation under Article 5(2)(b) of Directive 2001/29/EC because they may also be entitled to fair compensation in their capacity as film producers under that provision?

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

Is the general exclusion of broadcasting organisations permissible even though, depending on their specific programming, they sometimes acquire film producers' rights only to a very small extent (in particular in the case of television channels with a high proportion of programmes licensed from third parties) and they sometimes acquire no film producers' rights at all (in particular in the case of radio broadcasters)?'

The request to have the oral part of the procedure reopened

14. By document lodged at the Court Registry on 26 July 2023, Seven.One requested the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

15. In support of its request, Seven.One argues that the Opinion of the Advocate General requires a more detailed discussion or a correction. In particular, Seven.One observes, first, that the exclusive right of broadcasting organisations to authorise the reproduction of fixations of their broadcasts under Article 2(e) of Directive 2001/29 must be treated the same way as the exclusive right of those organisations to authorise or prohibit the fixation of their broadcasts, laid down in Article 7(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28). Secondly, it claims that the assessment of harm to broadcasting organisations in respect of private copying cannot be left to the assessment of the national court.

16. In that regard, it must be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 9 June 2022, Préfet du Gers and Institut national de la statistique et des études économiques, C-673/20, EU:C:2022:449, paragraph 40 and the case-law cited).

17. Secondly, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. It is not, therefore, an opinion addressed to the judges or to the parties which stems from an authority outside the Court, but rather, it is the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself. Under these circumstances, the Advocate General's Opinion cannot be debated by the parties. Moreover, the Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 9 June 2022, Préfet du Gers and Institut national de la statistique et des études économiques, C-673/20, EU:C:2022:449, paragraph 41 and the case-law cited).

18. Nevertheless, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the interested persons.

19. In the present case, the Court considers, however, after hearing the Advocate General, that it has all the information necessary to rule on the present request for a preliminary ruling. Furthermore, it notes that the evidence put forward by Seven.One in support of its request that the oral part of the procedure be reopened does not amount to new facts of such a nature as to be a decisive factor for the decision which the Court is thus called upon to give.

20. In those circumstances, there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

21. By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding national legislation which excludes broadcasting organisations, whose fixations of broadcasts are reproduced by natural persons for private use and for non-commercial ends, from the right to the fair compensation provided for in that provision.

22. According to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (**judgment of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers, C-263/18, EU:C:2019:1111**, paragraph 38 and the case-law cited).

23. In the first place, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive, in the event 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 holders of that exclusive right receive fair compensation.

24. In that respect, it is expressly apparent from Article 2(e) that broadcasting organisations, in the same way as the other rightholders referred to in Article 2(a) to (d), enjoy 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 fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

25. It thus follows from a combined reading of Article 2(e) and Article 5(2)(b) of Directive 2001/29 that broadcasting organisations which are holders of an exclusive reproduction right, must in principle be granted the right, in the Member States which have implemented the private copying exception, to fair compensation when reproductions of fixations of their broadcasts are made by natural persons for private use and for ends that are neither directly nor indirectly commercial.

26. That literal interpretation is borne out, in the second place, by the context of those provisions and by the origins of Directive 2001/29.

27. Accordingly, it must be noted, first, that Article 2 of Directive 2001/29, which defines, in points (a) to (e) thereof, the exclusive reproduction right of the different categories of rightholders, applies no difference in treatment between those categories of rightholders. In that respect, it is also clear from the Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997 (COM(97) 628 final), on which Directive 2001/29 was based, that the solution adopted in Article 2 of that directive ensures that all of the authors, performers, phonogram and film producers and broadcasting organisations benefit from the same level of protection for their works or other subject matter as regards acts protected by the reproduction right.

28. Secondly, it follows from recital 35 of Directive 2001/29 that, in certain cases of exceptions, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. Moreover, it is apparent from Article 5(5) of Directive 2001/29 that the exception referred to in Article 5(2)(b) of that directive is applicable only in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.

29. It follows that, unless they are to be deprived of all practical effect, those provisions impose on a Member State which has introduced the private copying exception to guarantee, within the framework of its competences, the effective collection of that compensation intended to compensate the rightholders affected for the harm suffered, in particular if that harm arose on the territory of that Member State (see, to that effect, **judgment of 8 September 2022, Ametic, C-263/21, EU:C:2022:644**, paragraph 69 and the case-law cited).

30. Such an interpretation is borne out, in the third place, by the objectives pursued by the provisions at issue.

31. First, recitals 4 and 9 of Directive 2001/29 state that that directive seeks to provide a high level of protection of intellectual property, which must foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, and that any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.

32. Secondly, as regards specifically the objective pursued by Article 5(2)(b) of that directive, it is apparent from recitals 35 and 38 thereof that that provision reflects the EU legislature's intention to establish a specific system of compensation which is triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to '*compensate'* them (judgments of **24 March 2022, Austro-Mechana, C-433/20, EU:C:2022:217**, paragraph 37, and of **8 September 2022, Ametic, C-263/21, EU:C:2022:644**, paragraph 35 and the case-law cited).

33. Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the rightholder concerned, since it is done without seeking prior authorisation from that rightholder (**judgment of 29 November 2017, VCAST, C-265/16, EU:C:2017:913**, paragraph 33 and the case-law cited).

34. In the light of the foregoing considerations, it must be held that broadcasting organisations, referred to in Article 2(e) of Directive 2001/29 must, in principle, in the Member States which have implemented the private copying exception, be granted the right to fair compensation provided for in Article 5(2)(b) of that directive, in the same way as the other rightholders expressly referred to in Article 2.

35. Since the provisions of Directive 2001/29 do not provide any further details concerning the various elements of the fair compensation system, the Member States enjoy broad discretion in defining those elements. It is for the Member States to determine, inter alia, who must pay that compensation and to establish the form, detailed arrangements for collection and the level of that compensation (see, to that effect, **judgments of 24 March 2022, Austro-Mechana, C-433/20, EU:C:2022:217**, paragraph 41, and of **8 September 2022, Ametic, C-263/21, EU:C:2022:644**, paragraph 36 and the case-law cited).

36. When determining the form, detailed arrangements and possible level of such fair compensation, it is for the Member States, as is apparent from recital 35 of Directive 2001/29, to take account of the particular circumstances of each case and, in particular, of the possible harm to the rightholders resulting from the act in question. Moreover, that recital states that in certain situations in which the prejudice to the rightholder would be minimal, no obligation for payment may arise.

37. It thus follows from settled case-law that fair compensation and, therefore, the system on which it is

based, as well as the level of compensation, must be linked to the harm resulting for the rightholders from the making of copies for private use. Any fair compensation that is not linked to the harm caused to rightholders as a result of such copying would not be compatible with the requirement, set out in recital 31 of Directive 2001/29, that a fair balance must be safeguarded between the rightholders and the users of protected subject matter (**judgments of 11 July 2013, Amazon.com International Sales and Others, C-521/11, EU:C:2013:515**, paragraph 62, and of **24 March 2022, Austro-Mechana, C-433/20, EU:C:2022:217**, paragraphs 49 and 50 and the case-law cited).

38. In that regard, the Court has already held that, in the same way that Member States may elect whether or not to adopt any of the exceptions set out in Article 5(2) of Directive 2001/29, including the private copying exemption, they also have the option, as confirmed by recital 35 of that directive, to provide – in certain cases covered by the exceptions which they have freely established – for an exemption from payment of fair compensation where the prejudice caused to rightholders is minimal (**judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144**, paragraphs 59 and 60).

39. As regards the determination of the prejudice, it is true that, according to the case-law of the Court, the setting of a threshold below which the prejudice may be classified as '*minimal*', for the purpose of that recital, must be within the discretion of the Member States (**judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144**, paragraph 61).

40. However, in applying that threshold, the Member States must still be consistent with the principle of equal treatment, which is a general principle of EU law, enshrined in Article 20 of the Charter (**judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144**, paragraph 31 and the case-law cited).

41. In the present case, it must be noted at the outset, first, as the Advocate General observed in point 30 of his Opinion, that the circumstance, relied on by the German Government in order to justify excluding all of the broadcasting organisations from the right to fair compensation, namely the fact that some of those organisations that also have the capacity of film producers already receive fair compensation in that respect, is irrelevant.

42. The subject matter of the exclusive right of reproduction of those various rightholders is not identical. Whereas Article 2(d) of Directive 2001/29 confers on producers of the first fixations of films the exclusive right to authorise reproduction in respect of the original and copies of their films and protects the organisational and economic performance of those producers, Article 2(e) of that directive confers on broadcasting organisations the exclusive reproduction right in respect of fixations of their broadcasts which they transmit and protects the technical performance embodied in the broadcast. It follows that the harm to those rightholders in respect of private copying is not the same either.

43. Moreover, as is clear from the file, the capacity as film producers of broadcasting organisations is likely to be present to varying degrees, depending on whether those broadcasting organisations produce their broadcasts themselves, with their own material and human resources, transmit broadcasts produced on commission by contractual partners or transmit under licence broadcasts produced by third parties.

44. Secondly, as has been recalled in paragraphs 37 and 40 above, the system on which fair compensation is based and the level of such compensation must be linked to the harm caused to the rightholders on account of private copying and be consistent with the principle of equal treatment, as enshrined in Article 20 of the Charter.

45. In that connection, the Court has already held that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned (judgments of **16 December 2008, Huber, C-524/06, EU:C:2008:724**, paragraph 75, and of 4 May 2023, Glavna direktsia '*Pozharna bezopasnost i zashtita na naselenieto*' (Night work), C-529/21 to C-536/21 and C-732/21 to C-738/21, EU:C:2023:374, paragraph 52 and the case-law cited).

46. In that respect, having regard to the considerations in paragraphs 23 to 34 above, it must be held that broadcasting organisations, referred to in Article 2(e) of Directive 2001/29, are in a comparable situation to that of the other rightholders referred to in that article, in that all of those rightholders enjoy the exclusive right of reproduction provided for therein.

47. A difference in treatment between those broadcasting organisations and the other rightholders must, therefore, be based on an objective and reasonable criterion and be proportionate to the aim pursued by the treatment concerned.

48. In that regard, the absence, or the '*minimal*' level, of harm suffered by the category of rightholders composed of broadcasting organisations, on account of the private copying of fixations of their broadcasts, constitutes – in the light of the findings recalled in paragraphs 36 and 37 above – such an objective and reasonable criterion which does not go beyond what is necessary to safeguard a fair balance of rights between the rightholders and the users of protected subject matter.

49. However, having regard to the considerations in paragraphs 38 and 39 above, it is for the referring court, first, to satisfy itself, in the light of objective criteria, that broadcasting organisations, unlike the other categories of rightholders referred to in Article 2 of Directive 2001/29, suffer only harm which may be classified as '*minimal*' in respect of non-authorised reproduction of fixations of their broadcasts. Secondly, it is for the referring court to ascertain, also in the light of objective criteria, whether, in the category of rightholders

composed of broadcasting organisations, all of those organisations are in comparable situations, in particular with regard to the harm they suffer, justifying that all of those organisations be excluded from the right to fair compensation.

50. It is only subject to that twofold condition that national legislation, which excludes all of those organisations from the right to fair compensation, should be regarded as meeting the requirements of Article 5(2)(b) of Directive 2001/29.

51. In that respect, the interested parties which have lodged written observations do not agree on the nature or the extent of the harm suffered by broadcasting organisations on account of private copying of the fixations of their broadcasts, or on whether the situations of those organisations are comparable according to whether or not they are entitled to public financing.

52. As the Advocate General observed, in essence, in point 26 of his Opinion, the existence and extent of any harm suffered by broadcasting organisations, as well as the examination of whether the situations of any distinct categories of broadcasting organisation are comparable, are assessments of fact, which are for the referring court to carry out.

53. In the light of all the foregoing considerations, the answer to the questions raised is that Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding national legislation which excludes broadcasting organisations, whose fixations of broadcasts are reproduced by natural persons for private use and for non-commercial ends, from the right to the fair compensation provided for in that provision, in so far as those organisations suffer potential harm which cannot be classified as '*minimal*'.

Costs

54. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

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 precluding national legislation which excludes broadcasting organisations, whose fixations of broadcasts are reproduced by natural persons for private use and for non-commercial ends, from the right to the fair compensation provided for in that provision, in so far as those organisations suffer potential harm which cannot be classified as '*minimal*'.

OPINION OF ADVOCATE GENERAL A.M. COLLINS

OPINION OF ADVOCATE GENERAL
COLLINS

delivered on 13 July 2023(1)
Case C-260/22
Seven.One Entertainment Group GmbH
v
Corint Media GmbH
(Request for a preliminary ruling from the Landgericht Erfurt (Regional Court, Erfurt, Germany))
(Reference for a preliminary ruling – Directive 2001/29/EC – Article 2(e) – Reproduction right for broadcasting organisations of fixations of their broadcasts – Article 5(2)(b) – Private copying exception – Fair compensation condition – Blank media levy – Harm to broadcasting organisations – Charter of Fundamental Rights of the European Union – Equal treatment – Principles of primacy of EU law and direct effect – Emanations of the State)

I. Introduction

1. This request for a preliminary ruling by the Landgericht Erfurt (Regional Court, Erfurt, Germany) arises in the context of proceedings concerning an exclusive copyright management contract ('the contract') concluded between Seven.One Entertainment Group GmbH, a broadcasting organisation that produces and broadcasts 'SAT.1 Gold' (2) in Germany ('the applicant'), and Corint Media GmbH, a collective management organisation that defends and enforces the copyright interests of private television channels and radio stations ('the defendant'). Under the contract, the defendant has taken on the obligation to enforce the applicant's right to receive fair compensation for reproductions of fixations of its broadcasts that natural persons make for their private use. The defendant claims that it is not obliged to enforce that right because, although national copyright law permits private copying of fixations of broadcasts, it excludes any corresponding right to compensation.

2. The request for a preliminary ruling concerns the interpretation of Article 2(e) and Article 5(2)(b) of Directive 2001/29/EC. (3) Article 2(e) of Directive 2001/29 confers an exclusive reproduction right on broadcasting organisations over fixations of their broadcasts. By Article 5(2)(b) of Directive 2001/29, Member States may opt to limit the exclusive reproduction rights in Article 2 of that directive by providing for a private copying exception. That exception applies to reproductions on any medium that a natural person makes for his or her private use, (4) subject to the rightholders receiving fair compensation. By its request for a preliminary ruling, the Landgericht Erfurt (Regional Court, Erfurt) seeks to ascertain whether national law may create a private copying exception with respect to the reproduction of fixations of broadcasts while excluding broadcasting organisations from a right to receive fair compensation. The referring court asks, in particular, whether the exclusion of fair compensation may be justified by the fact that, in their capacity as producers of television programmes, certain broadcasting organisations are entitled to compensation for the private copying of their television programmes produced 'in-house'. (5)

II. Legal framework

A. European Union law

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

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

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

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

4. Article 5, headed 'Exceptions and limitations', states:

'…

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 …'

B. German law

5. Paragraph 53(1) of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965, (6) in the version applicable to the dispute in the main proceedings ('the UrhG'), is found in Section 6 of Part 1 of the UrhG and provides that:

'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 a model that has obviously been unlawfully produced or made publicly accessible. 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.'

6. Under Paragraph 54(1) of the UrhG:

'If the nature of the work gives rise to an expectation of reproduction permitted under Paragraph 53(1) or (2) or Paragraphs 60a to 60f, the author of the work shall have a claim to payment of fair remuneration against the producer of devices and of storage media of the type used, alone or in combination with other devices, storage media or accessories, to make such reproductions.'

7. Under Paragraph 87 of the UrhG:

'(1) Broadcasting organisations have the exclusive right to,

1. rebroadcast their broadcast and make it available to the public,

2. make video or audio recordings of their broadcast, take photographs of their broadcast, as well as reproduce and distribute the video and audio recordings or photographs, with the exception of the rental right,

…

(4) Paragraph 10(1) and the provisions of Section 6 of Part 1, with the exception of the second sentence of Paragraph 47(2), and Paragraph 54(1), shall apply mutatis mutandis.

…'

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

8. The applicant contends that the defendant must enforce the applicant's right under the contract to a 'blank media levy' as compensation for harm caused by private copying pursuant to the exception under Paragraph 53(1) of the UrhG. The applicant claims that it is 'significantly affected' by private copying, in particular, by the recording of its channel by means of (online) video recorders. The defendant's response is that it cannot comply with the applicant's claim because Paragraph 87(4) of the UrhG excludes broadcasting organisations from the blank media levy that Paragraph 54(1) of the UrhG provides for.

9. The referring court states that, by virtue of Article 2(e) of Directive 2001/29 and Paragraph 87(1)(2) of the UrhG, broadcasting organisations have an exclusive reproduction right in fixations of their broadcasts. Paragraph 87(4) and Paragraph 53(1) of the UrhG limit that reproduction right by the application of a private copying exception without providing for any right to compensation. Paragraph 87(4) of the UrhG (7) may, for this reason, be incompatible with Article 2(e) and Article 5(2)(b) of Directive 2001/29. The referring court cites the case-law of the Court of Justice, according to which a private copying exception adopted pursuant to national law may limit the exclusive reproduction right only if the rightholder is paid fair compensation. (8) If the exclusion of the right to fair compensation under national law is compatible with Directive 2001/29, a 'blank media levy' is not due under the contract and the referring court should dismiss the action before it. If that exclusion is incompatible with Directive 2001/29, however, the applicant is entitled to succeed in its action since, under the contract, the defendant is required to collect the blank media levy on the applicant's behalf.

10. The referring court is thus of the view that the exclusion of broadcasting organisations from the right to fair compensation is unjustified. The fact that broadcasting organisations may be entitled to fair compensation in their capacity as film producers pursuant to Article 2(d) of Directive 2001/29 does not justify that exclusion. The referring court observes that many television channels of private broadcasting organisations consist primarily of commissioned productions and that the film producer's right usually belongs to the production companies rather than to the broadcasting organisations. In any event, radio broadcasting organisations do not produce films. In addition, the referring court considers that the exclusion of broadcasting organisations from the blank media levy may be contrary to the principle of equal treatment under Article 20 of the Charter of Fundamental Rights of the

European Union ('the Charter'). The issue as to whether that exclusion is contrary to Article 11 of the Charter on the right to freedom of expression, as it limits the freedom to broadcast, also arises.

11. In those circumstances, the Landgericht Erfurt (Regional Court, Erfurt) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Directive [2001/29] be interpreted as meaning that broadcasting organisations are entitled, directly and originally, to the right to the fair compensation provided for under the "private copying" exception, in accordance with Article 5(2)(b) of Directive [2001/29]?

(2) Having regard to their right under Article 2(e) of Directive [2001/29], can broadcasting organisations be excluded from the right to fair compensation under Article 5(2)(b) of Directive [2001/29] because they may also be entitled to fair compensation in their capacity as film producers under that provision?

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

Is the general exclusion of broadcasting organisations permissible even though, depending on their specific programming, they sometimes acquire film producers' rights only to a very small extent (in particular in the case of television channels with a high proportion of programmes licensed from third parties) and they sometimes acquire no film producers' rights at all (in particular in the case of radio broadcasters)?'

IV. The procedure before the Court

12. The applicant, the German, Italian and Austrian Governments, and the European Commission submitted written observations. The applicant, the defendant, the German and Austrian Governments and the Commission presented oral argument and replied to questions put by the Court at the hearing on 29 March 2023.

V. Analysis

13. The referring court's questions seek to ascertain whether Article 2(e) and Article 5(2)(b) of Directive 2001/29 preclude a Member State from providing a private copying exception to the exclusive reproduction right of broadcasting organisations in fixations of their broadcasts while excluding a right to fair compensation in respect of that copying.

A. Summary of the observations submitted

14. The applicant, the defendant and the Commission submit that broadcasting organisations may not be excluded from the right to fair compensation pursuant to Article 5(2)(b) of Directive 2001/29 because private copying causes them more than minimal harm. The applicant and the defendant observe that private copying of broadcasts using fixed devices and online services is widespread and generates considerable harm for broadcasting organisations. Consultation services for media libraries that broadcasting organisations or their commercial licensees offer are less attractive since users can use their private copies without payment. Broadcasting organisations also forgo advertising revenue since viewers who record broadcasts often do not watch them live. The applicant and the defendant indicated at the hearing that German law excludes no other category of rightholder from the right to receive fair compensation. Nor are rightholders who are paid compensation required to demonstrate the existence of harm in monetary terms or to quantify that harm. The defendant adds that, in its view, private copying per se harms broadcasting organisations.

15. The applicant considers that the reproduction right of producers, pursuant to Article 2(d) of Directive 2001/29, and that of broadcasting organisations, pursuant to Article 2(e) thereof, are distinct. In many instances broadcasting organisations, in particular radio broadcasters, do not produce films. The fact that in rare instances broadcasting organisations also produce films does not warrant the exclusion of a right to compensation for the private copying of broadcasts. The exclusion of broadcasting organisations from the private media levy thus constitutes unjustified discrimination. It also infringes the freedom of expression and information that Article 11 of the Charter recognises and the right to property that Article 17 of the Charter protects.

16. The German and Austrian Governments contend that a category of rightholder may be excluded from the right to compensation for private copying if, due to the inherent characteristics of the members of that category or the manner in which those rights are exploited, rightholders suffer minimal harm. (9) They emphasise that Article 2(e) of Directive 2001/29 protects the 'technical and organisational performance, embodied in the broadcast' and that the content of broadcasts is not the subject matter of the broadcasting organisations' right pursuant to that provision. The reproduction of that content must, therefore, be distinguished from the reproduction of the broadcast or the signal by which it is transmitted. (10) According to those governments, the core activity or traditional commercial model of broadcasting organisations is to make available to the public fixations of their broadcasts. They submit that broadcasting organisations do not suffer direct economic loss from the copying of broadcasts, as such copying does not limit the reception of broadcasts and thus their advertising impact. They also consider that there is no credible evidence of direct harm to the media library services that broadcasting organisations provide. The Austrian Government claimed at the hearing that, with the advent of streaming services, the level of copying of broadcasts has fallen.

17. The Italian Government observes that the exclusion of broadcasting organisations from the right to fair compensation where they provide no creative input in the development of an original work is not discriminatory and may be justified by reference to recitals 9 and 35, and Articles 2 and 3, of Directive 2001/29. That government nevertheless considers that compensation is payable where broadcasting organisations, notwithstanding the absence of any creative input, play a decisive role in stimulating the production of an audiovisual work, particularly by financing its production. By contrast, where broadcasting organisations acquire reproduction rights by negotiation, fair compensation is not due as they do

not provide a decisive contribution to the creation of a work.

B. Article 2(e) of Directive 2001/29 – Exclusive right of reproduction

18. Article 2 of Directive 2001/29 requires Member States to grant authors and the holders of certain identified related rights the exclusive right to authorise or to prohibit reproduction of their protected works or other subject matter. (11) As is evident from its title, Directive 2001/29 harmonises certain aspects of copyright stricto sensu and related rights in order, inter alia, to protect and to stimulate the development and marketing of new products and services in the information society. (12)

19. In accordance with Article 2(e) of Directive 2001/29, Member States must provide for the exclusive right of broadcasting organisations to authorise or prohibit the reproduction of fixations of their broadcasts. The exclusive reproduction right under Article 2(e) of Directive 2001/29 protects 'fixations', not the content, of broadcasts. In that regard, the Court held in the judgment in Football Association Premier League and Others (13) that authors can rely on their copyright in works exploited within the framework of broadcasts. (14) The broadcasting organisations' right in respect of reproductions of fixations of their broadcasts pursuant to Article 2(e) of Directive 2001/29 must also be distinguished from their exclusive right to authorise or prohibit the fixation of their broadcasts (15) pursuant to Article 7(2) of Directive 2006/115/EC. (16) In addition, as the Commission observed at the hearing, the broadcasting organisations' reproduction right under Article 2(e) of Directive 2001/29 is separate and distinct from their right to make available to the public fixations of their broadcasts pursuant to Article 3(2)(d) of that directive.

20. It follows that all of these rights coexist in parallel and that a limitation or exception to one right does not necessarily imply a limitation to another. (17) By way of example, the private copy exception pursuant to Article 5(2)(b) of Directive 2001/29 does not apply to the right of broadcasting organisations to make fixations of their broadcasts available to the public. (18)

21. According to the referring court, Paragraph 87(1)(2) of the UrhG transposes broadcasting organisations' exclusive right of reproduction in fixations of their broadcasts pursuant to Article 2(e) of Directive 2001/29. The correctness of that transposition and the application of that national provision are not at issue in the present proceedings, which instead focus on the transposition into German law of the exception in Article 5(2)(b) of Directive 2001/29 to the exclusive right of reproduction that Article 2(e) thereof provides for. Paragraph 54(1) of the UrhG provides for the payment of 'fair remuneration' in the form of a 'private media levy' payable by the producers of devices and storage media used to make reproductions which are permitted pursuant, inter alia, to Paragraph 53(1) of the UrhG. (19) As previously indicated, Paragraph 53(1) of the UrhG provides for a private copying exception in respect, inter alia, of fixations of broadcasts. Paragraph 87(4) of the UrhG, however, excludes broadcasting organisations from the right to fair remuneration.

C. Article 5(2)(b) of Directive 2001/29 – Exclusion of broadcasting organisations from the right to fair compensation

22. In accordance with Article 5(2)(b) of Directive 2001/29, Member States may provide for an exception or limitation to the exclusive reproduction rights in Article 2 of that directive for reproductions made by natural persons for private use on the condition that the holders of that exclusive right receive fair compensation. This is often described as the 'private copying exception'.

23. It is settled case-law that, although Article 5(2)(b) of Directive 2001/29 is optional, where Member States choose to implement it they must guarantee rightholders the effective recovery of fair compensation. (20) Article 5(2)(b) of Directive 2001/29 provides that the private copying exception applies 'on condition that the rightholders receive fair compensation'. That provision does not distinguish between the five categories of rightholders (21) described in Article 2 of Directive 2001/29. (22) A literal interpretation of Article 5(2)(b) of Directive 2001/29 results in the right to fair compensation benefiting all of the five categories of rightholders listed in Article 2 thereof without making any distinction between them.

24. Article 5(2)(b) of Directive 2001/29 does not, however, establish the parameters (23) for the payment of fair compensation and the Member States enjoy a broad discretion in creating such parameters.(24) As is apparent from recitals 35 and 38 of Directive 2001/29, (25) it is nevertheless the case that, as a matter of principle, the existence of harm to rightholders triggers a right to compensation. (26) Article 5(5) of Directive 2001/29 also states that the introduction of the private copying exception may not prejudice unreasonably the rightholder's legitimate interests. (27) Compensation that overestimates (28) or underestimates the harm caused to rightholders by private copying is thus incompatible with the fair balance that is to be maintained between the interests of rightholders, guaranteed by Article 17(2) of the Charter, and the interests and fundamental rights of users of protected subject matter, in particular the freedom of expression and information that Article 11 of the Charter protects, together with the public interest. (29) Member States are not required to ensure the availability of compensation where the harm to rightholders is minimal. (30) The requirement to pay and the level of fair compensation is thus intrinsically linked to the existence and the degree of harm that private copying causes the rightholder. (31)

25. It is thus settled case-law that the person carrying out private copying must, in principle, compensate for harm caused to the rightholder. In accordance, moreover, with Article 3(h) of Directive 2014/26/EU (32), income deriving from a right to compensation that a collective management organisation collects on behalf of rightholders constitutes copyright revenue or related rights revenue.

26. While the Court accepts that remuneration systems for private copying may be imprecise (33) and that compensation may be provided in an indirect form, (34) that does not justify the exclusion of an entire category of rightholder from the right to fair compensation if those rightholders suffer harm. (35) The existence and quantum of such harm is a question of fact which cannot, in principle, be excluded or disregarded by operation of law unless there is cogent evidence that that category of rightholder suffers no more than minimal harm as a result of private copying. It is for the referring court to verify whether broadcasting organisations, such as the applicant, in fact suffer harm from the private copying of fixations of their broadcasts.

27. The applicant and the defendant claim that broadcasting organisations suffer harm, inter alia, from private copying as they face unfair competition in the market for their media library services and their advertising revenue is affected. (36) The German and Austrian Governments strongly dispute that contention. In that regard, it must be emphasised that, contrary to those governments' claims, the assessment of harm to broadcasting organisations is not limited to the so-called 'core activity' of making available to the public fixations of their broadcasts protected by Article 3(2)(d) of Directive 2001/29. While broadcasting organisations may have a 'core activity' when viewed from a commercial perspective, they nonetheless enjoy the full range of rights Directive 2001/29 affords them subject always to the exceptions and limitations in Article 5 thereof. Broadcasting organisations enjoy distinct rights under Article 2(e) and Article 3(2)(d) of Directive 2001/29 respectively. Given the express will of the EU legislature to provide for these separate, standalone rights, it is not possible to blur the distinction between them.

28. The unequivocal terms by which Article 2(e) of Directive 2001/29 grants rights cannot be altered or undermined by an incorrect application or extension (37) of the exception in Article 5(2)(b) of that directive. (38) Nor can the right to fair compensation for broadcasting organisations be undermined by artificially classifying or delimiting the manner whereby those organisations exploit the rights Article 2(e) of Directive 2001/29 grants to them.

29. Contrary to the Italian Government's observations, Article 5(2)(b) of Directive 2001/29 does not make the payment of fair compensation conditional upon the 'originality' or 'creativity' of the subject matter that Article 2 of that directive protects. (39) Fair compensation is conditional on both the permitted private copying of subject matter protected under Article 2 of Directive 2001/29 and the existence of harm to the rightholder. The reproduction right of authors in their works under Article 2(a) of Directive 2001/29 requires that the subject matter concerned be original and that it be the expression of the author's own intellectual creation. (40) No such requirement is imposed in respect of the related rights of broadcasting organisations pursuant to Article 2(e) of Directive 2001/29 or on phonogram producers or film producers pursuant to Article 2(c) and (d) thereof. Article 5(2)(b) of Directive 2001/29 thus falls to be applied in a manner consistent with the principle of equal treatment, enshrined in Article 20 of the Charter, according to which comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. (41)

30. The fact that broadcasting organisations may receive fair compensation in respect of private copying of films they produce is also irrelevant. Each of the exclusive rights under Article 2(d) and (e) of Directive 2001/29 is separate and distinct. Pursuant to Article 5(2)(b) of that directive, fair compensation is, in principle, due in respect of private copying of the subject matter protected by each of those rights. The reproduction of a fixation of a broadcast may thus give rise to different, independent rights to fair compensation for broadcasting organisations pursuant to Article 5(2)(b) of Directive 2001/29. (42)

D. Application of Article 2(e) and Article 5(2)(b) of Directive 2001/29 to the present proceedings – Dispute between two companies – Principles of primacy of EU law and direct effect – Emanations of the State

31. Given that the referring court seeks an interpretation of a directive in the context of a dispute between two private limited liability companies, (43) it is necessary to examine, in the light of the Commission's observations,(44) the applicability of any ruling that the Court may give.

32. The principle of primacy of EU law requires, inter alia, that national courts interpret, to the greatest extent possible, their national law so as to make it conform with EU law. It is thus incumbent on the referring court to examine, in particular, whether Paragraph 87(4) of the UrhG can be given an interpretation that conforms with Article 2(e) and Article 5(2)(b) of Directive 2001/29. That requirement is nevertheless limited by general principles of law, which include the requirement that provisions of national law are not to be interpreted contra legem. (45)

33. Without pre-empting the referring court's ultimate interpretation of its national law, the request for a preliminary ruling states that 'broadcasting organisations are completely excluded from the entitlement to compensation under national copyright law'. It thus seems uncertain that the referring court will be in a position to interpret the relevant national law provisions, notably Paragraph 87(4) of the UrhG, in such a manner as to make them conform with Article 2(e) and Article 5(2)(b) of Directive 2001/29.

34. Where the referring court is unable to adopt a conforming interpretation of national law, the principle of the primacy of EU law requires it, in a pending case, to disapply any provision of national law which is contrary to an applicable provision of Directive 2001/29 that has direct effect. (46)

35. In my view, both Article 2(e) and Article 5(2)(b) of Directive 2001/29 have such direct effect.

36. The reproduction right in Article 2(e) of Directive 2001/29 is defined in clear, unequivocal terms.(47) It is

unqualified and its implementation and effects are neither contingent upon nor subject to Member States adopting measures in any particular form. It follows that Article 2(e) of Directive 2001/29 constitutes a measure of full harmonisation of the broadcasting organisations' exclusive right of reproduction of fixations of their broadcasts and that Member States have no discretion in implementing that provision. (48)

37. Article 5(2)(b) of Directive 2001/29 unequivocally imposes on those Member States that choose to implement the private copying exception thereunder an unconditional and precise obligation to ensure that rightholders receive fair compensation. (49) While Directive 2001/29 does not provide further details concerning the various elements of the system of fair compensation, and the Member States enjoy a broad discretion in that context, the obligation to ensure that rightholders receive fair compensation has direct effect. The holder of the reproduction right must, 'by operation of law, directly and originally, be [entitled] to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the "private copying" exception' and 'must "necessarily" [be paid fair] compensation'. (50)

38. The question that arises in the present case is whether the applicant can rely on Article 2(e) and Article 5(2)(b) of Directive 2001/29 in proceedings against the defendant in order to have national legislation contrary to those provisions set aside. The third paragraph of Article 288 TFEU provides that directives cannot, of themselves, impose obligations on individuals and therefore cannot be relied on as such against individuals before a national court. Even clear, precise and unconditional provisions of a directive, such as those in Article 2(e) and Article 5(2)(b) of Directive 2001/29, do not enable a national court to disapply a provision of its national law that conflicts with them if, were that court to do so, it would impose an additional obligation upon an individual. (51)

39. A directive may nevertheless be relied on against a Member State, regardless of the capacity in which the latter acts. A national court is obliged to set aside a provision of national law that is contrary to a directive where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which a Member State requires to perform a task in the public interest and, for that purpose, possesses special powers beyond those which result from the normal rules applicable to relations between individuals. (52)

40. At the hearing, both the defendant and the German Government confirmed that the defendant is a collective management organisation upon which the law has conferred special powers and that it must act in the public interest. It follows that, should the referring court find itself unable to interpret Paragraph 87(4) of the UrhG so as to conform with Article 2(e) and Article 5(2)(b) of Directive 2001/29, the applicant may rely upon the latter provisions in its dispute with the defendant in order to seek to persuade that court to disapply Paragraph 87(4) of the UrhG.

VI. Conclusion

41. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Landgericht Erfurt (Regional Court, Erfurt, Germany) as follows:

Article 2(e) and 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 precluding a Member State from providing a private copying exception to the exclusive reproduction right of broadcasting organisations in fixations of their broadcasts while excluding a right to fair compensation in respect of that copying where it causes them more than minimal harm. The fact that broadcasting organisations may be entitled to fair compensation pursuant to Article 5(2)(b) of Directive 2001/29 in their capacity as film producers is irrelevant.

Sources

1 Original language: English.

2 SAT.1 Gold is a private television channel financed through advertising.

3 Directive 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), as last amended by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92).

4 And for ends that are neither directly nor indirectly commercial.

5 Article 2(d) of Directive 2001/29.

6 BGBl. 1965 I, p. 1273.

7 Which excludes broadcasting organisations from the right to receive fair compensation.

8 Judgments of 21 October 2010, Padawan (C-467/08, EU:C:2010:620, paragraph 36); of 16 June 2011, Stichting de Thuiskopie (C-462/09, EU:C:2011:397, paragraph 34); and of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraph 21).

9 The German Government considers that it is for the Member States to fix that threshold.

10 The German Government considers that 'where a private user records a broadcast, a distinction must therefore be drawn between the recording of the broadcast and the recording of the broadcast content. The broadcaster does not suffer any direct economic loss as a result of the recording of the programme'.

11 Judgment of 27 June 2013, VG Wort and Others (C-457/11 to C-460/11, EU:C:2013:426, paragraph 61).

12 The dichotomy between copyright stricto sensu and related or neighbouring rights is reflected at international level by the separate protection granted, inter alia, under the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971, as amended on 28 September 1979), and the International Convention for the Protection of

Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 ('the Rome Convention'). Article 13(b) of the Rome Convention provides that broadcasting organisations shall enjoy the right to authorise or prohibit the fixation of their broadcasts. Pursuant to Article 13(c)(i) thereof, they enjoy the right to authorise or prohibit the reproduction of fixations, made without their consent, of their broadcasts.

13 Judgment of 4 October 2011 (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 148 to 150).

14 For example, both the principal director, in his or her capacity as author of the cinematographic work, and the producer, as the person responsible for the investment necessary for the production of that work, are holders of the reproduction right in a broadcast film. See Article 2(a) and (d) of Directive 2001/29 and judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraph 92).

15 Whether these broadcasts are transmitted by wire or over the air, including by cable or by satellite.

16 Directive of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28). For an overview of the different related rights of broadcasting organisations in the European Union, see judgment of 8 September 2022, RTL Television (C-716/20, EU:C:2022:643, paragraph 58).

17 Judgment of 29 November 2017, VCAST (C-265/16, EU:C:2017:913, paragraphs 40 and 52). It would appear, subject to verification by the referring court, that Paragraph 87 of the UrhG reflects this distinction. See point 7 of the present Opinion.

18 See, to that effect, Opinion of Advocate General Szpunar in Ocilion IPTV Technologies (C-426/21, EU:C:2022:999, points 42 to 44).

19 Given the practical difficulties in identifying private users and obliging them to compensate rightholders, and the fact that each private use, considered separately, may cause minimal harm and not give rise to an obligation for payment,Member States may establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who make digital reproduction equipment, devices and media available to private users or provide copying services for them. Under such a system, the persons having that equipment pay a private copying levy, which they in turn pass on in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied. The private user thus ultimately bears the burden of the levy. Judgments of 24 March 2022, Austro-Mechana (C-433/20, EU:C:2022:217, paragraph 45), and of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraphs 37 and 38).

20 Judgments of 16 June 2011, Stichting de Thuiskopie (C-462/09, EU:C:2011:397, paragraph 34), and of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraph 69 and the case-law cited).

21 It is also settled case-law that the different exceptions and limitations to the reproduction right provided for in Article 5(2) of Directive 2001/29 must, as derogations, be interpreted strictly. Judgment of 10 April 2014, ACI Adam and Others (C-435/12, EU:C:2014:254, paragraphs 21 and 22).

22 See judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraphs 17 and 18). See, by analogy, judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraphs 90 to 94).

23 Such as the form of, arrangements for and level of such compensation.

24 Judgments of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraphs 21 and 22 and the case-law cited), and of 24 March 2022, Austro-Mechana (C-433/20, EU:C:2022:217, paragraphs 36 to 38).

25 Recital 35 of Directive 2001/29 provides that '[i]n 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. … In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise'. Recital 38 of Directive 2001/29 provides that 'Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. …'.

26 Judgment of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraph 26 and the case-law cited).

27 Article 5(5) of Directive 2001/29 applies to rightholders in general. It does not distinguish between copyright holders and holders of related rights.

28 Compensation should not exceed the possible harm to the rightholders and may not be claimed in respect of copies made for commercial purposes. See, by analogy, judgment of 24 March 2022, Austro-Mechana (C-433/20, EU:C:2022:217, paragraphs 50 and 53). See also judgment of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraphs 39 to 43).

29 Recital 3 of Directive 2001/29 states that 'harmonisation … relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest'. According to recital 31 of Directive 2001/29, '[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories

of rightholders and users of protected subject-matter must be safeguarded …'.

30 Judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 59). See, by analogy, judgment of 9 March 2021, VG Bild-Kunst (C-392/19, EU:C:2021:181, paragraph 54 and the case-law cited).

31 Judgment of 21 October 2010, Padawan (C-467/08, EU:C:2010:620, paragraphs 39 to 42). In paragraph 42 of that judgment, the Court stated that 'fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception'. Recital 35 of Directive 2001/29 also refers.

32 Directive of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72). See also judgment of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraph 46).

33 The Austrian Government indicated at the hearing that fair compensation is generally regulated in an abstract manner, as compensation cannot be assessed in every single case. The Court has stated that Article 5(2)(b) of Directive 2001/29 does not preclude a rebuttable presumption that blank or recording media are used for private purposes where they are marketed to natural persons, provided that the presumption does not result in the imposition of the private copying levy in cases where the final use of those media is for clearly commercial purposes. See, to that effect, judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraph 45).

34 Judgment of 11 July 2013, Amazon.com International Sales and Others(C-521/11, EU:C:2013:515, paragraphs 49 and 51).

35 Which exceeds minimal harm.

36 Advocate General Szpunar indicated that 'recording a television programme makes it possible, first, to watch that programme outside [its scheduled time slot and], second, to keep a copy in order to watch it again or to transfer it to equipment other than the television set, such as a mobile device. This therefore constitutes an additional service in relation to the initial broadcasting. Television organisations might wish to provide a service of this kind themselves, thereby exploiting works in which they hold the rights and generating additional revenue from them'. Private broadcasting organisations are, moreover, mainly financed by advertising revenue. That revenue is reduced by private copying. See to that effect, Opinion in VCAST (C-265/16, EU:C:2017:649, points 67 and 68). The defendant emphasised that private broadcasters, unlike public broadcasters, have no other source of compensation for private copying since they obtain no benefit from licence fees levied on viewers.

37 Failure to pay fair compensation when it is due extends the scope of the exception in Article 5(2)(b) of Directive 2001/29 and limits the rights Article 2 thereof grants in a manner that the EU legislature could not have foreseen.

38 Article 5(2)(b) of Directive 2001/29 cannot extend beyond its express terms. The exception to the reproduction right does not, therefore, include the right to fair compensation and the exclusive rightholder cannot waive that right: judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraph 105). Notwithstanding the EU legislature's express intention to allow Member States to derogate from the exclusive reproduction right, to do so in a manner other than that provided for in Article 5 thereof would endanger the effectiveness of the harmonisation of copyright and related rights to which that directive gives effect, as well as the objective of legal certainty that it pursues. See, by analogy, judgment of 29 July 2019, Pelham and Others (C-476/17, EU:C:2019:624, paragraphs 60 to 63).

39 While the recitals of Directive 2001/29 refer in certain instances to the need to promote creativity, they refer equally to the need to ensure that rightholders are rewarded and receive a return on their investment. See recitals 4, 10 and 11 of Directive 2001/29.

40 Judgments of 13 November 2018, Levola Hengelo (C-310/17, EU:C:2018:899, paragraphs 36 and 37), and of 11 June 2020, Brompton Bicycle (C-833/18, EU:C:2020:461, paragraphs 21 and 22). See also judgment of 16 July 2009, Infopaq International(C5/08, EU:C:2009:465, paragraphs 33 to 35).

41 See, to that effect, judgment of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraph 56 and the case-law cited). Member States must apply the exception contained in Article 5(2)(b) of Directive 2001/29 consistently. That requirement would be undermined were Member States free to provide a private copying exception that does not comply with the express terms of that provision to the effect that rightholders must receive fair compensation.

42 The defendant stated at the hearing that broadcasting organisations produce only 1% of the content that they broadcast. Radio broadcasters are not film producers and do not have a right to fair compensation in that capacity. It thus appears, subject to verification by the referring court, that the issues at the heart of its second question are of little or no practical relevance for the determination of the proceedings before it.

43 Gesellschaft mit beschränkter Haftung (GmbH).

44 The Commission submits that the referring court must first examine whether Paragraph 87(4) of the UrhG can be interpreted in conformity with Article 5(2)(b) of Directive 2001/29. If this is not possible, the Commission considers that unconditional and sufficiently precise provisions of a directive may be relied upon against organisations or bodies that have special powers beyond those that result from the normal rules applicable to relations between individuals. While it is ultimately a matter for the referring court, the defendant – the collective management organisation – appears to have special powers such that the applicant can rely on unconditional and sufficiently precise

provisions of Directive 2001/29 against it in these proceedings.

45 Judgment of 18 January 2022, Thelen Technopark Berlin (C-261/20, EU:C:2022:33, paragraphs 25, 27 and 28 and the case-law cited).

46 Ibid., paragraphs 28 to 30 and the case-law cited.

47 Recital 21 of Directive 2001/29 states that acts covered by the reproduction right must be given a broad definition. That requirement is evident from the text of Article 2 of Directive 2001/29 and the use of expressions such as 'direct or indirect', 'temporary or permanent', 'by any means' and 'in any form' therein. Judgment of 16 July 2009, Infopaq International (C-5/08, EU:C:2009:465, paragraphs 40 to 42).

48 See, by analogy, judgment of 29 July 2019, Pelham and Others (C-476/17, EU:C:2019:624, paragraphs 83 to 85 and the case-law cited). See also judgment of 29 July 2019, Funke Medien NRW (C-469/17, EU:C:2019:623, paragraphs 35 to 38).

49 See, by analogy, judgment of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraph 20).

50 See, to that effect, judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraphs 95 to 109). See also judgment of 21 October 2010, Padawan (C-467/08, EU:C:2010:620, paragraph 37). The Court held that the concept of 'fair compensation' within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of EU law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of their discretion to determine the detailed arrangements for, and the level of, that compensation.

51 Judgment of 18 January 2022, Thelen Technopark Berlin (C-261/20, EU:C:2022:33, paragraphs 31 and 32 and the case-law cited). See also judgments of 27 March 2019, Pawlak (C-545/17, EU:C:2019:260, paragraphs 89 and 90), and of 30 April 2020, D. Z. – Airline Management Solutions (C-584/18, EU:C:2020:324, paragraph 81).

52 Judgment of 7 August 2018, Smith (C-122/17, EU:C:2018:631, paragraph 45). See also judgment of 2 March 2021, Commission v Italy and Others (C-425/19 P, EU:C:2021:154, paragraph 77). The condition that the organisation be subject to the control of the State or possess special powers beyond those which result from the normal rules applicable to relations between individuals is not conjunctive. Judgment of 10 October 2017, Farrell (C-413/15, EU:C:2017:745, paragraph