

Court of Justice EU, 16 June 2011, *Thuiskopie v Opus*



COPYRIGHT & RELATED RIGHTS

Fair compensation for reproduction on a private basis

- [Final user is responsible for paying fair compensation for reproduction on a private basis](#)

that Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation provided for in Article 5(2)(b).

- [System of private copying levy open to Member States since able to pass on that levy in price paid by final user](#)

However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

- [With system of private copying levies it is for the Member State to ensure authors actually receive fair compensation](#)

that it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm.

- [Place of establishment of seller has no bearing on obligation to achieve result](#)

In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result.

- [Interpretation of national law to allow recovery from person acting on a commercial basis, if recovery from purchaser is impossible, permitted](#)

It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow re-

covery of that compensation from the person responsible for payment who is acting on a commercial basis.

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Court of Justice EU, 16 June 2011

(K. Lenaerts, R. Silva de Lapuerta, G. Arestis, J. Malenovský (rapporteur) en T. von Danwitz)

Approximation of laws – Copyright and related rights – Directive 2001/29/EC – Reproduction right – Exceptions and limitations – Exception of copying for private use – Article 5(2)(b) and (5) – Fair compensation – Person responsible for paying the levy earmarked for financing of that compensation – Distance selling between two persons resident in different Member States
In Case C- 462/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 20 November 2009, received at the Court on 25 November 2009, in the proceedings

Stichting de Thuiskopie

v

Opus Supplies Deutschland GmbH,

Mijndert van der Lee,

Hananja van der Lee,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2010,

after considering the observations submitted on behalf of:

– the Stichting de Thuiskopie, by T. Cohen Jehoram and V. Rörsch, advocaten,

– Opus Supplies Deutschland GmbH and Mr and Mrs van der Lee, by D. Visser and A. Quaedvlieg, advocaten,

– the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

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

– the Lithuanian Government, by D. Kriauciūnas and L. Liubertaitė, acting as Agents,

– the Austrian Government, by E. Riedl and G. Kunert, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the European Commission, by A. Nijenhuis and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(2)(b) and (5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of cer-

tain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The reference has been made in proceedings between the Stichting de Thuiskopie ('the Stichting'), on the one hand, and Opus Supplies Deutschland GmbH ('Opus') and Mr and Mrs van der Lee, two managing directors of Opus, on the other hand, concerning payment by Opus of the levy intended to finance the fair compensation paid to copyright holders on the basis of the exception for copying for private use ('private copying levy').

Legal context

Directive 2001/29

3 Recitals 9, 10, 31, 32, 35 and 38 in the preamble to Directive 2001/29 are worded as follows:

'(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.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ...

...

(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. ...

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

...

(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 levy, 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. ...'

4 Under Article 2 of Directive 2001/29, headed 'Reproduction right':

'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 Directive 2001/29, entitled 'Exceptions and limitations', states in subparagraph 2(b):

'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.'

6 Article 5(5) of that directive provides:

'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.'

National legislation

7 According to Article 16c(1) to (3) of the Law on copyright (Auteurswet, Staatsblad 2008, No 538):

'1. The reproduction of a literary, scientific or artistic work on an item designed for the reproduction of a work shall not be regarded as an infringement of the copyright in that work if the reproduction is made for ends that are neither directly nor indirectly commercial and serves exclusively for the own practice, study or use of the natural person making the reproduction.

2. Payment of a fair remuneration in respect of the reproduction referred to in paragraph 1 shall be due to the maker of the work or his legal successor. The manufacturer or importer of the items referred to in paragraph 1 shall be liable for payment of the remuneration.

3. The manufacturer's payment obligation arises when the items manufactured by him are put on the market.

The importer's obligation arises at the time of importation.'

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

8 As is apparent from Article 16c(1) of the Law on copyright, the Kingdom of the Netherlands has introduced an exception into its national law for copying for private use. According to Article 16(2) of that law, the manufacturer or importer of the item used for reproduction is responsible for paying the private copying levy.

9 The Stichting is the Netherlands body responsible for the recovery of the private copying levy.

10 Opus is a company based in Germany which sells, via the internet, blank media. Its operations are focused in particular on the Netherlands by means of Dutch-language websites which target Netherlands consumers.

11 The contract of sale established by Opus provides that, where a Netherlands consumer makes an order online, that order is processed in Germany and the goods are delivered from Germany to the Netherlands, on behalf of and in the name of the customer, by a carrier, that carrier however in fact being engaged by Opus.

12 Opus does not pay a private copying levy in respect of the media delivered to its customers in the Netherlands, either in that Member State or in Germany. In addition, the referring court states that the cost of the reproduction media thus sold by Opus does not include the private copying levy.

13 Arguing that Opus had to be regarded as the 'importer' and, consequently, responsible for paying the private copying levy, the Stichting brought an action against Opus before the Netherlands courts, seeking payment of that levy.

14 Referring to the provisions of the sales contract, Opus denied that it could be classified as an importer into the Netherlands of the reproduction media sold by it. It argues that it is the Netherlands purchasers, that is, individual consumers, who must be classified as importers.

15 That argument relied upon by Opus in its defence was accepted by the Netherlands courts at first instance and then on appeal, which dismissed the Stichting's action for payment. The Stichting then pursued an appeal in cassation before the referring court.

16 The referring court questions whether the solution proposed by those courts to the dispute in the main proceedings is compatible with Directive 2001/29. According to it, to consider the purchaser, that is the individual consumer, to be the importer and, therefore, the person responsible for paying the private copying levy, is tantamount to admitting that that levy cannot in fact be recovered, since the individual purchaser cannot in practice easily be identified. It then raises the question whether the concept of 'importer' should not be defined in a broader manner than that resulting from the purely linguistic meaning of the word, also taking into account the final use of the media, which is also clear to the commercial seller.

17 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to

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

'(1) Does Directive [2001/29], in particular Article 5(2)(b) and (5) thereof, provide any assistance in determining who should be regarded under national law as owing the "fair compensation" referred to in Article 5(2)(b)? If so, what assistance does it provide?

(2) In a case of distance selling in which the buyer is established in a different Member State to that of the seller, does Article 5(5) of Directive [2001/29] require national law to be interpreted so broadly that a person owing the "fair compensation" referred to in Article 5(2)(b) of the directive who is acting on a commercial basis owes such compensation in at least one of the Member States involved in the distance selling?'

Consideration of the questions referred

The first question

18 By its first question, the referring court asks whether the provisions of Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as containing criteria which make it possible to determine who must be regarded as responsible for paying fair compensation on the basis of the exception of copying for private use.

19 As a preliminary point, it must be recalled that, under Article 2 of Directive 2001/29, Member States grant, in principle, to authors the exclusive right to authorise or prohibit direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of their works.

20 However, under Article 5(2)(b) of that directive, Member States may provide for an exception to the author's reproduction right in relation to his work in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial (so-called 'private copying' exception).

21 Article 5(5) of Directive 2001/29 nevertheless makes the introduction of the private copying exception subject to three conditions, that is, first, that the exception applies only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.

22 Thus, with regard to that last condition, the Member States, if they decide to introduce the private copying exception into their national law, are, in particular, required to provide, in application of Article 5(2)(b) of Directive 2001/29, for the payment of 'fair compensation' to rightholders ([see, also, Case C-467/08 Padawan \[2010\] ECR I-0000, paragraph 30](#)).

23 With regard to the answer to the question of the identification of the person who must be regarded as responsible for paying the fair compensation, the provisions of Directive 2001/29 do not expressly address the issue of who is to pay that compensation, meaning that the Member States enjoy broad discretion when determining who must discharge that obligation.

24 That being the case, the Court has already held that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction

for private use of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by the author ([Padawan](#), paragraph 40).

25 In addition, as is apparent from recital 31 in the preamble to Directive 2001/29 and from paragraph 43 of [Padawan](#), a ‘fair balance’ must be maintained between the rights and interests of the authors, who are to receive the fair compensation, on one hand, and those of the users of protected works, on the other.

26 Since the person who has caused the harm to the holder of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm related to that copying by financing the compensation which will be paid to that rightholder ([Padawan](#), paragraph 45).

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

28 The Court has again pointed out that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the ‘fair balance’ between the interests of authors and those of the users of the protected subject-matter ([Padawan](#), paragraphs 48 and 49).

29 In the light of the foregoing considerations, the answer to the first question is that Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation provided for in Article 5(2)(b). However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

The second question

30 By its second question, the referring court asks, in essence, whether, in a case of distance selling between a purchaser and a commercial seller of reproduction equipment, devices and media, who are established in different Member States, Directive 2001/29 requires

national law to be interpreted so that fair compensation can be recovered from the person responsible for payment who is acting on a commercial basis.

31 In that regard, it must be noted that Article 5(5) of Directive 2001/29, which lays down the cumulative conditions for the application, inter alia, of the private copying exception, does not contain, as such, any specific statement such as to allow a particular interpretation with regard to the person to be regarded as responsible for paying the fair compensation owed to the authors on the basis of the private copying exception in the context of a distance selling arrangement such as that at issue in the main proceedings.

32 It should however be recalled that, according to recital 9 in the preamble to Directive 2001/29, the European Union legislature expressed its desire for a high level of protection to be guaranteed for copyright and related rights, since they 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. Thus, according to recital 10 in the preamble to Directive 2001/29, if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work.

33 In particular, it is apparent from Article 5(2)(b) of and recital 35 in the preamble to Directive 2001/29 that, in those Member States which have introduced the private copying exception, rightholders must receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter without their permission. Furthermore, in accordance with Article 5(5) of Directive 2001/29, the introduction of the private copying exception may not unreasonably prejudice the legitimate interests of the copyright holder.

34 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 into its national law an obligation to achieve a certain result, meaning that it must guarantee, within the framework of its competences, the effective recovery of the fair compensation intended to compensate the authors harmed by the prejudice sustained, in particular if that harm arose on the territory of that Member State.

35 Since, as stated in paragraph 26 of the present judgment, it is in principle for the final users who, for their private use, reproduce a protected work without seeking prior authorisation from the rightholder, thereby causing him harm, to make good that harm, it can be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which those final users reside.

36 It follows from the foregoing that, if a Member State has introduced an exception for private copying into its national law and if the final users who, on a private basis, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair

compensation for the harm suffered by the authors on the territory of that State.

37 With regard to the case in the main proceedings, it is agreed that the harm suffered by the authors arose on the territory of the Netherlands, since the purchasers as final users, on a private basis, of the protected works reside there. It is also common ground that the Kingdom of the Netherlands has chosen to introduce a system of recovery of fair compensation, owed on the basis of the private copying exception, from the manufacturer or importer of the media intended for reproduction of the protected works.

38 According to the information contained in the order for reference, in relation to contracts such as those at issue in the main proceedings, it appears to be impossible, in practice, to recover such compensation from the final users as importers of those media in the Netherlands.

39 If that is the case, and in the light of the fact that the system of recovery chosen by the Member State concerned cannot relieve that Member State of the obligation to achieve the certain result of ensuring that the authors who have suffered harm actually receive payment of fair compensation for the prejudice which arose on its territory, it is for the authorities, in particular the courts, of that Member State to seek an interpretation of national law which is consistent with that obligation to achieve a certain result and guarantees the recovery of that compensation from the seller who contributed to the importation of those media by making them available to the final users.

40 In that regard, in circumstances such as those stated in particular in paragraph 12 of the present judgment, it is of no bearing on that obligation on the said Member State that, in the case of distance selling arrangements such as those at issue in the main proceedings, the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, is established in another Member State.

41 In the light of the foregoing considerations, the answer to the second question is that Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

Costs

42 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 (Third Chamber) hereby rules:

1. 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, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation provided for in Article 5(2)(b). However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

2. Directive 2001/29, in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

Opinion of Advocate General Jääskinen

delivered on 10 March 2011 (1)

Case C- 462/09

Stichting de ThuisKopie

v

Mijndert van der Lee

Hananja van der Lee

Opus Supplies Deutschland GmbH

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(*Copyright – Directive 2001/29/EC – Article 5(2)(b) – Article 5(5) – Reproduction rights – Fair compensation – Distance selling*)

1. This case concerns the analysis of ‘fair compensation’ used in Article 5(2)(b) of Directive 2001/29/EC.
(2) Whilst the definition of who is liable to pay such

compensation has recently been dealt with in [Padawan](#), (3) the present preliminary reference differs from that case since it contains a cross-border element. Thus, the novel question it asks is whether, as a result of Article 5(5) of Directive 2001/29, national legislation implementing that directive must be given an interpretation obliging a company involved in a distance selling arrangement whereby it sells goods via the internet to customers in a Member State which provides for fair compensation in its national law, to pay that compensation in one of the two Member States.

I – Legal framework

EU law (4)

2. Article 17(2) of the Charter of Fundamental Rights of the European Union states that intellectual property shall be protected. (5)

3. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect. Article 30 EC contains justifications to such restrictions and explicitly allows for a justification based on the protection of industrial and commercial property.

4. Recitals 35, 38 and 39 in the preamble to Directive 2001/29 state:

‘(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.

(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.’

5. Article 2 of Directive 2001/29 sets out the general rule with respect to reproduction rights. It states:

‘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.’

6. Article 5 sets out the exceptions and limitations. It states in the relevant parts:

‘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.’

National law

7. Article 16c of the Law on Copyright (*Auteurswet*) states as follows:

‘1. The reproduction of a literary, scientific or artistic work on an item designed for ... the reproduction of a work ... shall not be regarded as an infringement of the copyright in that work if the reproduction is made for ends that are neither directly nor indirectly commercial and serves exclusively for the own practice, study or use of the natural person making the reproduction.

2. Payment of a fair remuneration in respect of the reproduction referred to in paragraph 1 shall be due to the maker of the work or his legal successor. The manufacturer or importer of the items referred to in paragraph 1 shall be liable for payment of the remuneration.

3. The manufacturer’s payment obligation arises when the items manufactured by him are put on the market. The importer’s obligation arises at the time of importation.

...’

8. Under Article 16d of the Auteurswet Stichting de ThuisKopie ('ThuisKopie') is responsible for the recovery of fair remuneration provided for under Article 16c(2) of the Auteurswet.

II – Facts and questions referred

9. Opus GmbH is established in Germany, and offers for sale blank media, inter alia, via Dutch-language websites and websites aimed at the Netherlands. Its general terms of business, which can be viewed on its websites, state:

'Orders are placed by the customer directly with Opus Supplies Deutschland GmbH in Heinsberg, Germany.

...

Prices do not include Levy, Auvibel, ThuisKopie, GE-MA or other charges. Goods are dispatched by order of the customer via TPG Post or DHL Express and always in the name of the customer. Accordingly, you may be regarded in your own country as the importer ...'

10. Since the end of 2003 Opus GmbH has been offering blank media at prices which, according to the referring court, do not include remuneration for private copying since the prices are generally below the amount fixed in the Netherlands for the remuneration for private copying in respect of the relevant category of media.

11. Orders received via the websites are confirmed by Opus GmbH by email to the customer. The order is processed in Germany, and the goods are delivered by post to, inter alia, the Netherlands, via carriers engaged by Opus GmbH.

12. The purchase of the media via websites occurs without the consumer being required to acknowledge the general terms of business posted on Opus GmbH's website. Payment can be made into a Netherlands bank account, and goods can be returned to an address in the Netherlands.

13. No remuneration is paid by Opus GmbH nor by the customers in the Netherlands to the ThuisKopie in respect of that media. Opus GmbH does not pay any comparable remuneration for private copying in Germany either in relation to the blank media sold to customers in the Netherlands.

14. In addition to Opus GmbH, the other parties to the proceedings are Opus Supplies BV, which was engaged in the sale of blank media to customers in the Netherlands, and Mijndert and Hananja van der Lee, who are indirectly managing directors of the two companies.

15. On 26 July 2005, ThuisKopie applied to the Rechtbank 's-Gravenhage (District Court, The Hague) for an interim order against all three parties. The judge responsible dismissed the application by order of 16 September 2005. ThuisKopie appealed to the Gerechtshof 's-Gravenhage (Regional Court of Appeal, The Hague). By judgment of 12 July 2007, the Gerechtshof upheld the order of the judge responsible for hearing applications for interim measures. ThuisKopie brought an appeal in cassation to the Hoge Raad der Nederlanden against the judgment of the Gerechtshof, which made a reference to this Court.

16. In motivating its request for a preliminary reference the Hoge Raad explains that, under the contract, the

delivery takes place upon the transfer of possession and that according to the contract this occurs in Germany as the customer is responsible for the transport of goods. Since the Netherlands legislation states that it is the importer that is responsible for paying the fair compensation, this means that the obligation in the present case is placed on the customer in the Netherlands and not on Opus GmbH. The referring court therefore wishes to know whether Directive 2001/29 requires the term 'importer' used in national legislation to be interpreted in a manner contrary to its normal meaning.

17. In those circumstances the Hoge Raad requests the Court of Justice to make a preliminary ruling on the following questions:

'(1) Does [Directive 2001/29], in particular Article 5(2)(b) and (5) thereof, provide any assistance in determining who should be regarded under national law as owing the "fair compensation" referred to in Article 5(2)(b)? If so, what assistance does it provide?

(2) In a case of distance selling in which the buyer is established in a different Member State to that of the seller, does Article 5(5) of [Directive 2001/29] require national law to be interpreted so broadly that a person owing the "fair compensation" referred to in Article 5(2)(b) of the directive who is acting on a commercial basis owes such compensation in at least one of the Member States involved in the distance selling?'

III – Analysis

A – Question 1

18. By its first question the referring court essentially asks whether Directive 2001/29 stipulates who should be responsible for paying fair compensation in cases where an exemption to the general rule in Article 2 of that directive is applicable.

19. It is true that Directive 2001/29 does not expressly state who fair compensation should be paid by. It merely states the result that is to be achieved by it, namely, that if a Member State decides to grant an exception to the general rule set out in Article 2 of that directive, it must achieve the result of obtaining fair compensation, except where the harm to the rightholder is minimal.

20. Therefore, Member States have a large margin of appreciation when defining who is to pay such compensation.

21. According to the Court's case-law the question of who is liable to pay fair compensation must be interpreted uniformly throughout the EU in order to achieve the aims of Directive 2001/29, namely the harmonisation of certain aspects of copyright law in order to ensure that competition in the internal market is not distorted. (6)

22. This must be done with due regard to the aim of the directive and provision in question. The aim of the fair compensation provision in Article 5(2)(b) of Directive 2001/29 is to compensate authors adequately for the use made of their protected works without their authorisation and the harm they suffer as a result. (7)

23. Very recently, in *Padawan* the Court addressed the question of who should be liable to pay compensation. The Court stated that in general, the person who has caused the harm to the holder of the exclusive repro-

duction right is the person who reproduced the protected work without seeking prior authorisation, and therefore the one that should make good the harm. (8) However, the Court also accepted that, considering the practical difficulties in identifying private users, it was permissible for Member States to provide that those who have the digital reproduction equipment, devices and media and who make it available to private users could also be liable to pay fair compensation. (9)

24. Therefore, from that judgment it seems clear that fair compensation may in principle be owed by both the private individual as well as the company selling the product in question which causes or is likely to cause harm to the rightholder.

25. A Member State cannot allow private copying and impose the obligation of compensation on private individuals unless they establish systems that effectively ensure that the compensation is paid. The effect utile of Articles 2 and 5(2) of Directive 2001/29 could not otherwise be achieved. Moreover, the rightholders would be deprived of the protection afforded to them by Article 17(2) of the Charter of Fundamental Rights.

26. In my opinion the effect utile of those provisions cannot be achieved in practice unless the Member State creates a system where the rightholders are compensated through a collective arrangement. Bearing in mind the finding of the Court in *Padawan* that it is in principle the individual that should make good the harm, it seems logical that economically the compensation should originate from them. Therefore the system of compensation established by a Member State allowing for the exception provided in Article 5(2)(b) of Directive 2001/29 should ensure that the compensation is collected from the end-users, which in practice means that it should be included in the price these individuals pay when they acquire such media.

27. This conclusion is not affected by the Commission's arguments relating to restrictions of the free movement of goods.

28. The Commission argues that Directive 2001/29 must be interpreted in a way that does not conflict with primary law, (10) that is with Articles 28 EC and 30 EC on free movement of goods. According to it, there are different ways of ensuring that effective compensation is paid, and Directive 2001/29 appears to favour forms of fair compensation that have no link to the goods themselves so that they do not affect cross-border trade. (11) Thus, the question of who should pay fair compensation must not exceed what is necessary for the attainment of the objective that the fair compensation in Article 5(2)(b) of Directive 2001/29 aims to achieve.

29. The first aspect in this respect concerns whether the relevant provisions of Directive 2001/29 are compatible with the EC Treaty provisions on free movement of goods.

30. In my view there cannot be any doubt, as Article 30 EC authorises national restrictions justified in view of protecting intellectual property rights, that the EU legislator is entitled to harmonise the conditions relating to the exercise of such rights in view of ensuring their effective enforcement.

31. The second aspect concerns whether a compensation scheme applying to reproduction media imported from other Member States is compatible with the free movement of goods bearing in mind that allegedly less restrictive means exist in order to achieve the aim of fair compensation. (12)

32. It is true that secondary legislation must be interpreted in accordance with the Treaty. However, this does not mean that Member States are excluded from benefiting from the leeway of transposition afforded to them by the EU legislator unless, by giving such leeway, the directive itself conflicts with the Treaty.

33. To conclude otherwise would, in my view, contradict the very nature of a directive. There are often many different ways in which a directive may be implemented in national law. In such cases arguments that these alternatives are not equal in view of the principles embodied in the Treaty would be contrary to the express choice of the EU legislator to allow more than a single method of transposition. It would also put into question the constitutional principles governing the exercise of legislative competences of the EU legislature and the division of competences between the Union legislature and the Member States.

34. In my opinion, neither the EC Treaty nor Directive 2001/29 prohibit compensation schemes based on the principle that the sellers of reproduction media pay the compensation to the collecting societies that represent the rightholders. That directive does not provide that imports of reproduction media from other Member States should be exempted from fair compensation, and I doubt whether the EU legislature could have provided so without infringing the international conventions on copyright law that bind also the Union. Hence that cannot be disproportional. Having said that, it has to be emphasised that this preliminary reference only concerns the interpretation of the notion of 'importer' in the case of distant selling, not the principle that compensation fees must be paid for imported reproduction media as well.

35. Thirdly it must be emphasised that Article 2 of Directive 2001/29 provides rightholders with the right to authorise or prohibit reproduction. An exception to that right can only be provided on condition that the rightholders receive fair compensation.

36. It follows that the right of the rightholders to receive such compensation as a matter of EU law cannot be denied only because there may have been better alternatives to implement that right than the one adopted by the Member State concerned. Moreover, Directive 2001/29 does not give any indication that a certain part of the reproduction media marketed in the Member State could be exempted from the scope of the right to fair compensation only because it has been put on the market using a commercial technique not ensuring the payment of the compensation.

B – Question 2

37. The second question concerns the application of the three-step test envisaged in Article 5(5) of Directive 2001/29, and the obligation that this test entails for the referring court when interpreting its national legisla-

tion. It essentially asks whether that test implies that, in a distance selling arrangement, the seller who is established in another Member State, owes fair compensation in at least one of the Member States involved in the distance selling.

38. The referring court assumes by its question that the seller can be required to pay fair compensation in such a situation. Indeed, in *Padawan*, which was decided after the present reference was made, the Court ruled that a company could be liable under Directive 2001/29 for paying fair compensation.⁽¹³⁾ The present case is different, however, because the cross-border element brings up issues of the territoriality of the fair compensation due under Directive 2001/29.

39. According to the referring court, the wording of the Netherlands legislation stipulates that a private buyer is subject, as the importer of the media into the Netherlands, to the obligation to pay the fair compensation. As a result it is, in practice, irrecoverable. The referring court is thus unsure whether this outcome is compatible with Directive 2001/29 or whether the directive requires the term ‘importer’ to be interpreted more broadly than its meaning pursuant to national law would suggest, by also taking into account the ultimate use of the media, a use which is also evident to commercial sellers.

40. It is true that, according to established case-law, the national court must, as far as possible, interpret the national legislation so that the aims of the pertinent directive are achieved. ⁽¹⁴⁾ They are not, however, obliged to interpret national law *contra legem*. ⁽¹⁵⁾

1. The applicability of the three-step test to the present case

41. The three-step test is, in general, aimed at national legislatures, which are to respect compliance with it when drafting into national law exceptions and limitations foreseen by Article 5 of Directive 2001/29. ⁽¹⁶⁾

42. However, when interpreting national provisions, national judges will have to do so in light of that test, to the extent that national laws are ambiguous or leave room for different results. Hence, though being primarily a norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that directive.

2. Does Directive 2001/29 require that the seller in a distance selling arrangement pays fair compensation in at least one of the Member States?

43. First it should be noted that Directive 2001/29 does not allow for any exceptions to the protection of the rightholders’ rights in respect of distance selling arrangements.

44. Article 5 of Directive 2001/29 is particular in that it provides for only a partially harmonised system. Under that system, Member States have a choice of whether they introduce an exception to the general rule by allowing private copying of protected works and other subject-matter without authorisation of the rightholders.

45. Once they do so they are, of course, obliged to ensure that fair compensation is paid, unless the harm is minimal, in which case no obligation for payment may arise. ⁽¹⁷⁾ However, bearing in mind the partially-harmonised nature of Article 5 of Directive 2001/29, it is questionable whether and under what circumstances a company established in another Member State should be liable to pay such compensation.

46. In my view, there is no requirement under Directive 2001/29 to pay a fair compensation fee in all distance selling arrangements involving various Member States, particularly since they may target customers in Member States not allowing private copying.

47. Firstly, such a conclusion would threaten to distort competition in the internal market. For example, there are practical problems in identifying all the companies selling the blank media to customers in the Netherlands. Without the possibility of identifying all the Member State companies selling reproduction media in the Member State where the fair compensation is due, this distinction would take place on an arbitrary basis and would be contrary to the very objective of Directive 2001/29, which aims to ensure that competition in the internal market is not distorted. ⁽¹⁸⁾

48. Furthermore, it is not in my view necessary to require that all companies engaged in distance selling pay the fair compensation due in the Member State where the customers are located, since the harm in those cases may be minimal. Factors such as language differences, the use of different domain names with which consumers are unfamiliar and higher shipment costs will mean that consumers in one Member State will buy from companies established in other Member States in a limited number of cases. In the cases where a company is not targeting the consumers in a particular Member State and where the harm is minimal, practical problems also arise in terms of having to collect minimal sums from a company which has only sold one or two items to a customer in that Member State.

49. In addition, the sale of goods over the internet raises many issues in terms of the obligations of companies whose products are available online. Since the internet makes goods instantly available all over the EU the question arises in what circumstances the company should be liable. In my view some restrictions must necessarily exist, otherwise a company will be liable in all the jurisdictions of the world. Council Regulation (EC) No 44/2001 ⁽¹⁹⁾ expressly aims to regulate such a situation by providing that it is only in cases where a company is targeting a particular territory that jurisdiction should exist.

50. Although that regulation aims to regulate a different area of law to that of Directive 2001/29, it is appropriate to consider its interpretation since the nature of the problem is similar, namely, under what circumstances a company in another Member State may be liable or, in the present case under what circumstances it may be subjected to a fee, for goods it sells over the internet to a consumer in another Member State.

51. The issues of distance selling combined with the partial harmonisation envisaged in Directive 2001/29,

means that it is only in situations where a company in another Member State is targeting the consumers of the referring court's Member State that it should be liable to pay fair compensation.

52. It is in this situation, furthermore, that the harm is likely to be greatest, and that the imposition of fair compensation is merited. In the present case, for instance, *Thuiskopie* has stated, without being contradicted on the point, that *Opus GmbH*'s sales amount to about one third of all blank media sold in the Netherlands.

53. Concerning the criteria for determining whether a company is targeting a particular Member State's market, inspiration can be drawn from the Court's recent interpretation of the meaning of activities 'directed to' the Member State of the consumer's domicile within the meaning of Regulation No 44/2001, mindful of the fact that Directive 2001/29 does not use that term.

54. In that respect the Court in *Pammer and Hotel Alpenhof* set out a non-exhaustive list of criteria capable of constituting evidence that a trader's activity was directed at a particular Member State. According to that case it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile. The criteria to be taken into account which are particularly relevant for the present case include (i) the use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established, (ii) the possibility of making and confirming the reservation in that other language, (iii) mention of telephone numbers with an international code, (iv) outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, (v) use of a top-level domain name other than that of the Member State in which the trader is established, and (vi) mention of international clientele composed of customers domiciled in various Member States. (20)

55. In my opinion it should also be noted that a company should not be obliged to pay fair compensation if it has already done so in another Member State. Thus, if a Member State where the company is established requires fair compensation to be paid and the company pays that compensation, then the rightholders' rights under Directive 2001/29 are being sufficiently protected. This also applies if the seller has paid the compensation in its home State on a voluntary basis, thereby leaving it up to the receiving collecting organisation representing the rightholders in that State to distribute to organisations of the targeted countries. To provide otherwise would amount to the payment of double compensation, which would not be required to fulfil the aims of that directive.

56. Finally, it is important to emphasise that a company cannot contract out of its mandatory EU law obligations.

57. In the present case *Opus GmbH* and their clients are using their freedom of contract in order to stipulate that the contract is executed outside the Netherlands with the effect that the 'importer' liable to pay the compensation fee according to *Auteurswet* is not the seller but the buyer. It seems that this solution rests on the rather unusual construction where the seller arranges the transportation of the goods to the consumer as the agent of the latter and not on its own behalf.

58. In my opinion the right to fair compensation provided for in Article 5(2)(b) of Directive 2001/29 cannot be contracted out between sellers of the media and their customers. Such agreements aim at eluding the effects of EU law. In consequence, the national legislation implementing Directive 2001/29 applied together with the national provisions relating to contracts cannot be given an interpretation that leads to such an outcome.

3. Does the three-step test require that the seller in a distance selling arrangement pays fair compensation in at least one of the Member States?

59. National law must be interpreted in a way which ensures that the three-step test is observed, meaning that the exception remains limited, does not conflict with the normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.

60. In the present case the first two criteria point to the conclusion that fair compensation should be due in all distance selling arrangements in at least one Member State. In relation to the first criteria, the issue of fair compensation does not affect the limits of the exception, but merely refers to the remedy stemming from the exception. In relation to the second criteria, if fair compensation is not due it certainly will conflict with the normal exploitation of the work since the rightholder will not have his right to authorise reproductions and use of his work, but will not get the right to compensation either.

61. However, in my view, unless the consumers of the Member State in question are being targeted, there is no unreasonable prejudice to the legitimate interests of the rightholders since, as discussed above, the harm suffered by them is minimal.

62. For those reasons the three-step test does not, in my view, require that fair compensation is paid by all companies engaged in cross-border distance selling of reproduction media between the Member States, but merely by companies that are targeting the Member State's consumers in question.

IV – Conclusion

63. In conclusion I propose to the Court to give a single answer to the two preliminary questions as follows: Articles 5(2)(b) and 5(5) 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 do not impose on the Member States a single solution as to how the payment of fair compensation to the rightholders is ensured in the case where the Member State has availed itself of the option to allow for private copying of copyright protected works and other protected sub-

ject-matter. These provisions do exclude any interpretation of the relevant national legislation that does not ensure effective payment of such fair compensation by a distant seller of media for reproducing such works or other protected subject-matter that targets customers in that Member State unless the seller has already paid comparable compensation in the Member State where the transaction takes place.

1 – Original language: English.

2 – 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).

3 – Case C-467/08 [2010] ECR I-0000.

4 – Since the reference in the present case was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

5 – OJ 2000 C 364, p. 1.

6 – Padawan, cited in footnote 3, paragraphs 32, 33 and 35.

7 – Padawan, *ibid.*, paragraphs 39 and 40.

8 – Padawan, *ibid.*, paragraphs 44 and 45.

9 – Padawan, *ibid.*, paragraph 46.

10 – Case C-135/93 *Commission v Spain* [1995] ECR-I 1651, paragraph 37.

11 – In support of this see recitals 1, 3 and 6 in the preamble to Directive 2001/29 which state that (i) harmonisation of copyright laws contributes to the achievement of the internal market, (ii) Directive 2001/29 will help to implement the four freedoms and ensure compliance with the fundamental principles of law, and (iii) harmonisation will ensure that there is no fragmentation of the internal market as a result of significant differences in protection between the Member States.

12 – *Opus GmbH* has referred to the possibility of establishing a compensation fund in favour of the rightholders as a less restrictive alternative for the free movement of goods. In so far as such a fund would be funded by the domestic manufacturers or traders only it seems problematic from the point of view of non-discrimination. If it were funded by the taxpayers, there seems to be an issue in terms of State aid law since a selective aid scheme would thus be established in favour of economic operators which are marketing reproduction media which would not have to include in the prices of such products compensation for the harm caused by the buyers being able to use them for private copying of protected works and other subject-matter.

13 – Padawan, *ibid.*, paragraphs 46 to 49.

14 – Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 108; Case C- 555/07 *Kücükdeveci* [2010] ECR I- 0000, paragraph 48.

15 – Case C-98/09 *Sorge* [2010] ECR I- 0000, paragraph 52 and case-law cited there.

16 – Walter, M., *European Copyright Law: A commentary*, OUP, 2010, at 11.5.79.

17 – Last sentence of recital 35 in the preamble to Directive 2001/29. See also Padawan, cited in footnote 3, paragraphs 39 and 46.

18 – Padawan, cited in footnote 3, paragraph 35. See also Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraphs 26, 31 to 34.

19 – Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

20 – Cases C-585/08 and C-144/09 *Pammerand Hotel Alpelhof* [2010] ECR I-0000, paragraphs 75 to 76, 80 to 81, and 84.
