Court of Justice EU, 9 June 2016, EGEDA v Estado

COPYRIGHT

Financing fair compensation from the General State Budget is nog allowed

- **In those circumstances and as the referring court points out in the very question referred, such a scheme for financing the fair compensation from the General State Budget of the Member State concerned is not such as to guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.**

39. In the present case, it is clear from the order for reference that, taking account of the fact that there is no definite allocation of revenue — such as revenue from a specific levy — to particular expenditure, the budgetary item intended for the payment of the fair compensation must be regarded as being financed from all the budget resources of the General State Budget and therefore also from all taxpayers, including legal persons.

40. Moreover, there is nothing in the file submitted to the Court to suggest that there is, in the present case, a particular measure allowing legal persons, which do not in any event fall within Article 5(2)(b) of Directive 2001/29, to request to be exempted from contributing to the financing of that compensation or, at least, to seek reimbursement (see, in that regard, judgments of **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraphs 25 to 31 and 37, and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 45) under the detailed rules that it is solely for the Member States to establish.

41. In those circumstances and as the referring court points out in the very question referred, such a scheme for financing the fair compensation from the General State Budget of the Member State concerned is not such as to guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.

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Court of Justice EU, 9 June 2016
(J. Malenovský (Rapporteur), M. Safjan, A. Prechal, S. Rodin and K. Jürimäe)
JUDGMENT OF THE COURT (Fourth Chamber)
9 June 2016 (*)

(Reference for a preliminary ruling — Intellectual and industrial property — Copyright and related rights — Directive 2001/29/EC — Article 5(2)(b) — Reproduction right — Exceptions and limitations — Private copying — Fair compensation — Financing from the General State Budget — Whether permissible — Conditions)

In Case C‑470/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 10 September 2014, received at the Court on 14 October 2014, in the proceedings

Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA),
Derechos de Autor de Medios Audiovisuales (DAMA),
Visual Entidad de Gestión de Artistas Plásticos (VEGAP)
v
Administración del Estado,
Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic),
intervening parties:
Artistas Intérpretes, Sociedad de Gestión (AISGE),
Centro Español de Derechos Reprográficos (CEDRO),
Asociación de Gestión de Derechos Intelectuales (AGEDI),
Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE),
Sociedad General de Autores y Editores (SGAE),
THE COURT (Fourth Chamber),
composed of J. Malenovský (Rapporteur), acting as President of the Chamber, M. Safjan, A. Prechal, S. Rodin and K. Jürimäe, Judges,
Advocate General: M. Szpunar,
Registrar: M. Ferreira, Administrator,
having regard to the written procedure and further to the hearing on 1 October 2015,
after considering the observations submitted on behalf of:

– Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA) and Visual Entidad de Gestión de Artistas Plásticos (VEGAP), by J. Suárez Lozano, abogado,
– Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic), by A. González García and D. Sarmiento Ramirez-Escudero, abogados,
– Artistas Intérpretes, Sociedad de Gestión (AISGE), by J. Montes Relazón, abogado,
– Centro Español de Derechos Reprográficos (CEDRO), by S. Vázquez Senin, procuradora, and by I. Aramburu Muñoz and J. de Fuentes Bardají, abogados,
– Asociación de Gestión de Derechos Intelectuales (AGEDI), Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) and

Sociedad General de Autores y Editores (SGAE), by J. Marín López and R. Blanco Martínez, abogados,
– the Spanish Government, by M. Sampol Pucurull, acting as Agent,
– the Greek Government, by A. Magrippi and S. Charitaki, acting as Agents,
– the French Government, by D. Colas and D. Segoin, acting as Agents,
– the Finnish Government, by J. Heliskoski, acting as Agent, and L. Holopainen and M. Grönroos, experts,
– the Norwegian Government, by E. Leonhardsen and M. Schei, acting as Agents,
– the European Commission, by É. Gippini Fournier and J. Samnadda, acting as Agents,
after hearing **the Opinion of the Advocate General** at the sitting on 19 January 2016,
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, on the one hand, Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA) and Visual Entidad de Gestión de Artistas Plásticos (VEGAP), and, on the other hand, the Administración del Estado (State Administration, Spain) and the Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic) in connection with national legislation relating to a scheme for fair compensation for private copying financed from the General State Budget.

Legal context

EU 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. ...

...

(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. Article 2 of that directive, entitled 'Reproduction right', provides, inter alia:

'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;

... '

5. Article 5 of that directive, entitled 'Exceptions and limitations', provides, inter alia, in paragraph 2:

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

...

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

... '

Spanish law

6. The Real Decreto-Ley 20/2011 sobre medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público (Royal Decree-Law 20/2011 concerning urgent budgetary, taxation and financial measures for correcting the public deficit) of 31 December 2011 (BOE No 315 of 31 December 2011, p. 146 574) contains a Tenth Additional Provision, entitled 'Modification of the fair compensation scheme for private copying' ('the Tenth Additional Provision'), which provides, inter alia:

'1. The fair compensation for private copying, provided for under Article 25 of the [Texto Refundido de la Ley de Propiedad Intelectual (consolidated text of the Intellectual Property Law)], approved by the [Real Decreto Legislativo 1/1996 (Royal Legislative Decree 1/1996)] of 12 April 1996, and the limits of which are defined in Article 31(2) of that law, is abolished.

2. The government shall establish, by legislative act, the procedure for payment to tax collectors of the fair compensation financed by the General State Budget.

...'

7. The Real Decreto 1657/2012 que regula el procedimiento para el pago de la compensación por copia privada con cargo a los Presupuestos Generales del Estado (Royal Decree 1657/2012 regulating the procedure for paying fair compensation in respect of private copying from the General State Budget) of 7 December 2012 (BOE No 295 of 8 December 2012, p. 84 141) seeks to implement the Tenth Additional Provision.

8. Article 1 of that royal decree, entitled 'Purpose', provides:

'The purpose of the present Royal Decree is to regulate:

(a) the procedure and objective criteria for determining the annual amount of fair compensation for private copying based on the harm caused;

(b) the procedure for the calculation and payment to the beneficiaries of fair compensation for private copying financed by the General State Budget.'

9. Article 3 of that royal decree, entitled 'Amount of Compensation', provides, inter alia, in paragraph 1:

'The appropriate amount to compensate for the harm to copyright holders resulting from the introduction of the private copying exception defined in Article 31 of the consolidated text of the Intellectual Property Law, approved by Royal Legislative Decree 1/1996 of 12 April 1996, is to be determined, within the budgetary limits established for each financial year, by order of the Minister for Education, Culture and Sport, in accordance with the procedure laid down in Article 4.'

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

10. The applicants in the main proceedings are intellectual property rights collecting societies which are entitled to collect the fair compensation due to copyright holders in situations of private copying of their protected works or subject matter.

11. On 7 February 2013 they brought an action for annulment of Royal Decree 1657/2012 before the Tribunal Supremo (Supreme Court, Spain) sitting as a court with jurisdiction in administrative disputes.

12. That court subsequently authorised Artistas Intérpretes, Sociedad de Gestión (AISGE), Centro Español de Derechos Reprográficos (CEDRO), Asociación de Gestión de Derechos Intelectuales (AGEDI), Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) and Sociedad General de Autores y Editores (SGAE) to intervene in the proceedings. A number of those other intellectual property rights collecting societies brought their own actions against Royal Decree 1657/2012.

13. In support of their claims, the applicants in the main proceedings submit that Royal Decree 1657/2012 is incompatible with Article 5(2)(b) of Directive 2001/29 in two respects. First, they submit, in essence, that Article 5(2)(b) of Directive 2001/29 requires that the fair compensation granted to rightholders in situations of private copying is to be borne, at least ultimately, by the natural persons at the origin of the harm to their exclusive right of reproduction caused by such copying, whereas the scheme established by Tenth Additional Provision and by Royal Decree 1657/2012 places the burden of that compensation on the General State Budget, and therefore on all taxpayers. Second, they argue that that scheme does not guarantee the fairness of that compensation.

14. For their part, the defendants in the main proceedings contend that Article 5(2)(b) of Directive 2001/29 does not preclude a Member State from establishing a scheme such as that established by the Tenth Additional Provision and by Royal Decree 1657/2012.

15. After recalling the background which led the Spanish authorities to replace the digital levy scheme in place until 2011 with a scheme for fair compensation for private copying financed from the General State Budget, the referring court notes first of all that, in conformity with the principle that budgetary revenue is not to be assigned to a specific purpose, the new scheme is, unlike that which preceded it, funded by all Spanish taxpayers regardless of whether they may make private copies or not. The referring court then asks in essence whether Directive 2001/29 must be interpreted as meaning that it requires Member States who opt for such a scheme to ensure, in the same way as when they favour implementing a levy, that its cost is borne, either directly or indirectly, solely by the persons deemed to have caused harm to the rightholders on the grounds that they make, or have the capacity to make, private copies. If not, the referring court wishes to know whether the fact that the sum allocated for payment of fair compensation to rightholders is predetermined for each financial year is such as to guarantee the fairness of that compensation.

16. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a scheme for fair compensation for private copying compatible with Article 5(2)(b) of Directive

2001/29 where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?
(2) If the first question is answered in the affirmative, is the scheme compatible with Article 5(2)(b) of Directive 2001/29 where the total amount allocated by the General State Budget to fair compensation for private copying, although it is calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year?'

Consideration of the questions referred

17. By its first question the referring court asks in essence whether Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding a scheme for fair compensation for private copying which, as in the main proceedings, is financed from the General State Budget, and under which it is not possible to guarantee that the cost of that fair compensation is borne by the users of private copies.

18. In the first place, it must be observed in that respect that, in accordance with Article 5(2)(b) of Directive 2001/29, Member States may provide for an exception or limitation to the exclusive reproduction right provided for under Article 2 of that directive in the case of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on the condition that the exclusive rightholders receive fair compensation, taking account of the technological measures referred to in Article 6 of that directive ('the private copying exception').

19. As is apparent from recitals 35 and 38 of Directive 2001/29, that provision reflects the EU legislature's intention to establish a specific compensation scheme which is triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to 'compensate' them (see, to that effect, **judgment of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 41).

20. It follows that, when the Member States decide to implement the private copying exception provided for under that provision in their national law, they are required, in particular, to provide for the payment of fair compensation to rightholders (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 30, and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 19).

21. Furthermore, the Court has already held that, if Article 5(2)(b) of Directive 2001/29 is not to be devoid of all practical effect, that provision must be regarded as imposing an obligation to achieve a certain result upon the Member States which have implemented the private copying exception, in the sense that they must guarantee, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders (see, to that effect, **judgments of 16 June 2011 in Stichting de Thuiskopie, C‑462/09, EU:C:2011:397**, paragraph 34, and **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraph 57).

22. Nonetheless, in so far as that provision is merely optional and does not provide any further details concerning the various parameters of the fair compensation scheme that it requires to be established, the Member States must be considered to enjoy broad discretion in regard to the parameters of their national law (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620,** paragraph 37; **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraph 20; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 20).

23. In particular, it falls to the Member States to determine the persons who have to pay that fair compensation, and to determine the form, detailed arrangements and level thereof, in compliance with Directive 2001/29 and, more generally, with EU law (see, to that effect, **judgments of 16 June 2011 in Stichting de Thuiskopie, C‑462/09, EU:C:2011:397**, paragraph 23; **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraph 21; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 20).

24. Taking account of that broad discretion, and even though the case-law cited at paragraphs 19 to 23 above has been developed in the context of fair compensation schemes financed by a levy, Article 5(2)(b) of Directive 2001/29 cannot be regarded as precluding, in principle, Member States which have decided to introduce the private copying exception from choosing to establish, in that context, a fair compensation scheme financed not by such a levy, but by their General State Budget.

25. Indeed, provided that such an alternative scheme guarantees the payment of fair compensation to rightholders on the one hand, and that its detailed arrangements guarantee actual recovery on the other, it must be regarded as being, in principle, compatible with the essential objective of Directive 2001/29, namely, as is apparent from recitals 4 and 9, to ensure a high level of intellectual property and copyright protection.

26. In the second place, it is clear from recitals 35 and 38 of Directive 2001/29 that the fair compensation provided for in Article 5(2)(b) of that directive is intended to adequately compensate rightholders for the non-authorised use of their protected works or subject matter. In order to determine the level of that compensation, account must be taken, as a useful criterion, of the harm suffered by the rightholder concerned as a result of the act of reproduction at issue (see, to that effect, **judgment of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 39).

27. It follows that it is for the persons who reproduce the protected works or subject matter without the prior authorisation of the rightholder concerned, and who

therefore cause harm to them, to make good that harm by financing the fair compensation provided for that purpose (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 45, and 12 November 2015 in Hewlett-Packard Belgium, C‑572/13, EU:C:2015:750, paragraph 69).

28. In that regard, the Court has made clear that it is not at all necessary for such persons to have actually made private copies. Indeed, where the appliances or reproduction media are made available to them, that availability is sufficient to justify their contribution to the financing of the fair compensation provided to rightholders (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraphs 54 to 56, and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraphs 24, 25 and 64).

29. It follows from the clear terms of Article 5(2)(b) of Directive 2001/29 that the private copying exception is intended exclusively for natural persons making, or having the capacity to make, reproductions of protected works or subject matter for private use and for purposes neither directly nor indirectly commercial (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraphs 43 to 45 and 54 to 56, and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraphs 22 to 25 and 64).

30. It follows that, unlike natural persons who fall within the private copying exception under the conditions specified by Directive 2001/29, legal persons are in any case excluded from benefiting from that exception and thus they are not entitled to make private copies without receiving prior authorisation from the rightholders of the protected works or subject matter concerned.

31. In that regard the Court has already ruled that it is inconsistent with Article 5(2) of Directive 2001/29 to apply a private copying levy, in particular with regard to digital reproduction equipment, devices and media which are acquired by persons other than natural persons for purposes clearly unrelated to such private copying (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 53, and **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraph 28).

32. However, such an interpretation of Article 5(2)(b) of Directive 2001/29 does not preclude legal persons being, where appropriate, under an obligation for the financing of the fair compensation intended for rightholders as compensation for that private copying.

33. The Court has thus accepted that, given the practical difficulties which might arise when implementing such financing, Member States were free to finance that fair compensation by means of a levy imposed, prior to the making of private copies, on persons who have reproduction equipment, devices and media and make them available to natural persons (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 46; **16 June 2011 in Stichting de Thuiskopie, C‑462/09, EU:C:2011:397**, paragraph 27; **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraph 24; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 46).

34. Nothing prevents persons from passing on the private copying levy by including it in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied. Thus, the burden of the levy will ultimately be borne by the private user who pays that price. In those circumstances, the private user for whom the reproduction equipment, devices or media are made available or who benefits from a copying service must be regarded as being, in reality, the 'person indirectly liable to pay' fair compensation, that is to say the person actually liable for payment (see, to that effect, **judgment of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 48).

35. Financing such as that referred to in paragraph 33 above must therefore be regarded as consistent with the fair balance that is to be struck, in accordance with recital 31 of Directive 2001/29, between the interests of rightholders and the interests of users (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraph 49; **16 June 2011 in Stichting de Thuiskopie, C‑462/09, EU:C:2011:397**, paragraphs 28 and 29; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 53).

36. It follows from that line of case-law that, as EU law currently stands, although Member States are indeed free to establish a scheme under which legal persons are, under certain conditions, liable to pay the levy intended to finance the fair compensation referred to in Article 5(2)(b) of Directive 2001/29, such legal persons should not in any event be the persons ultimately actually liable for payment of that burden.

37. The considerations underlying that case-law apply in all situations in which a Member State has introduced the private copying exception, regardless of whether it has established a fair compensation scheme financed by a levy or, as is the case in the main proceedings, financed by its General State Budget.

38. It should be borne in mind that the concept of fair compensation is not defined by reference to national law, and it must thus be regarded as an autonomous concept of EU law and interpreted uniformly throughout the territory of the European Union (see, to that effect, **judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620**, paragraphs 31 to 33 and 37, and 12 November 2015 in Hewlett-Packard Belgium, C‑572/13, EU:C:2015:750, paragraph 35).

39. In the present case, it is clear from the order for reference that, taking account of the fact that there is no definite allocation of revenue — such as revenue from a specific levy — to particular expenditure, the

budgetary item intended for the payment of the fair compensation must be regarded as being financed from all the budget resources of the General State Budget and therefore also from all taxpayers, including legal persons.

40. Moreover, there is nothing in the file submitted to the Court to suggest that there is, in the present case, a particular measure allowing legal persons, which do not in any event fall within Article 5(2)(b) of Directive 2001/29, to request to be exempted from contributing to the financing of that compensation or, at least, to seek reimbursement (see, in that regard, judgments of **11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515**, paragraphs 25 to 31 and 37, and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 45) under the detailed rules that it is solely for the Member States to establish.

41. In those circumstances and as the referring court points out in the very question referred, such a scheme for financing the fair compensation from the General State Budget of the Member State concerned is not such as to guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.

42. In the light of all those considerations, the answer to the first question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding a scheme for fair compensation for private copying which, like the one at issue in the main proceedings, is financed from the General State Budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

43. In the light of the answer given to the first question, there is no need to answer the second question referred to the Court.

Costs

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

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

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 scheme for fair compensation for private copying which, like the one at issue in the main proceedings, is financed from the General State Budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

[Signatures]

* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL SZPUNAR
delivered on 19 January 2016 (1)
Case C‑470/14
Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA),
Derechos de Autor de Medios Audiovisuales (DAMA) and
Visual Entidad de Gestión de Artistas Plásticos (VEGAP)
v
Administración del Estado
(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))
(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Article 5(2)(b) — Reproduction right — Exceptions and limitations — Private copying — Fair compensation — Financing from the State Budget)

Introduction

1. Under Article 27 of the Universal Declaration of Human Rights: (2)

‘1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

2. This article of the Declaration reflects what is perhaps the chief dilemma with regard to copyright, namely reconciling the requirement to protect authors’, producers’ and performers’ intellectual property with universal, unrestricted access to culture. It is precisely this balance that the legislature, in imposing certain limitations or exceptions on copyright, seeks to maintain. The exception — or limitation — commonly referred to as ‘the private copying exception’, which lies at the heart of this case, is one aspect of this balance. (3)

3. Although the need for and the merits of the exception at issue do not, I believe, raise any doubts as far as concerns copyright, the question of remuneration or compensation for the harm to rightholders that results from it, including the detailed arrangements for financing this compensation, is currently giving rise to vigorous debate in several countries, including a number of Member States of the European Union.

4. The private copying exception is also a known concept within the provisions of EU law on copyright and related rights, and therefore it has formed the subject matter of several judgments of the Court over a period of some years. The present case, while it is a continuation of those cases, also marks a possible turning-point in the development of this case-law. The solution given by the Court in this case will affect the freedom of national legislatures and, indirectly, that of the EU legislature to restructure the EU’s legal framework for the choice of detailed arrangements for financing the compensation owed on the basis of the private copying exception so as to offer alternatives to the model which is currently the dominant one — in continental European legal systems, at least — namely charging a levy on electronic equipment.

Legal framework

EU law

5. In EU law, copyright and related rights (which, for the sake of brevity, I shall refer to as 'copyright') are primarily governed by the provisions 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. (4) Under Article 2, Article 5(2)(b) and Article 5(5) of that directive:

'Article 2

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, of the original and copies of their films;

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

...

Article 5

Exceptions and limitations

...

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 ...

...

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.'

Spanish law

6. In Spanish law, the private copying exception (according to Spanish law, a limitation) is governed by Article 31(2) of the amended text of the Intellectual Property Law (Ley de Propiedad Intelectual), approved by Royal Legislative Decree 1/1996, approving the amended text of the Intellectual Property Law, which sets out, clarifies and harmonises the legislative provisions in force in that area (Real Decreto Legislativo 1/1996 por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia), of 12 April 1996.

7. Compensation for harm to copyright holders resulting from this exception is governed by Article 25 of the Intellectual Property Law. This compensation was initially financed by a levy on certain media and equipment which allow copying of copyright works. That levy was abolished under the Tenth Additional Provision of Royal Decree-Law 20/2011 of 30 December 2011 concerning urgent budgetary, taxation and financial measures for correcting the public deficit (Real Decreto-ley 20/2011 de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público) and was replaced by compensation financed directly from the State Budget, with the detailed arrangements for calculating and paying compensation to rightholders to be laid down by an implementing decree. (5)

8. This delegation of powers was implemented by Royal Decree 1657/2012 regulating the procedure for paying fair compensation in respect of private copying from the General State Budget (Real Decreto 1657/2012, por el que se regula el procedimiento de pago de la compensación equitativa por copia privada con cargo a los Presupuestos Generales del Estado) of 7 December 2012 ('Royal Decree 1657/2012'). Article 3 of that decree provides:

'The appropriate amount to compensate for the harm to copyright holders resulting from the introduction of the private copying exception defined in Article 31 of the consolidated text of the Intellectual Property Law, approved by Royal Legislative Decree 1/1996 of 12 April 1996, is to be determined, within the budgetary limits established for each financial year, by order of the Minister of Education, Culture and Sport, in accordance with the procedure laid down in Article 4.

The amount of compensation is to be determined on the basis of an estimate of the harm actually caused to intellectual property rightholders when natural persons reproduce, on any medium, works which have already been circulated and which they have accessed legally, as provided for in Article 31 of the consolidated text of the Intellectual Property Law.

...'

Facts in the main proceedings, procedure and questions referred for a preliminary ruling

9. The Entidad de Gestión de Derechos de los Productores Audiovisuales (Collecting Society for Audio-Visual Producers, or EGEDA), the Derechos de Autor de Medios Audiovisuales (Collecting Society for Audio-Visual Media Copyright, or DAMA) and the Visual Entidad de Gestión de Artistas Plásticos (Collecting Society for Visual Artists, or VEGAP) are Spanish intellectual property rights collecting societies. On 7 February 2013, they brought an action against Royal Decree 1657/2012 before the Tribunal Supremo (Supreme Court). Other intellectual property rights collecting societies (6) were then given leave to take part in the proceedings.

10. The Administración del Estado (State Administration), defendant in the main proceedings, is supported by the Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales

(AMETIC), which is an association of undertakings operating in the IT sector.

11. In support of their claims, the applicants in the main proceedings submit inter alia that Royal Decree 1657/2012 is in two respects incompatible with Article 5(2)(b) of Directive 2001/29 as interpreted in the case-law of the Court. First, they submit, in essence, that Article 5(2)(b) requires that the cost of fair compensation granted to rightholders on the basis of the private copying exception should be borne, at least ultimately, by the persons who cause harm to their exclusive reproduction right as a result of this exception, whereas the scheme established by the Tenth Additional Provision of Royal Decree-Law 20/2011 and by Royal Decree 1657/2012 charges it to the State Budget, and therefore to all taxpayers. Secondly, they argue, in the alternative and in essence, that the fairness of this compensation is not guaranteed by Spanish law, inasmuch as Article 3 of Royal Decree 1657/2012 provides that a cap be imposed ex ante on the annual resources allocated to financing compensation, whereas the harm actually caused to rightholders by private copying can be ascertained only ex post.

12. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a scheme for fair compensation for private copying compatible with Article 5(2)(b) of Directive 2001/29 where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, it thus not being possible to ensure that the cost of that compensation is borne by the users of private copies?

(2) If the first question is answered in the affirmative, is the scheme compatible with Article 5(2)(b) of Directive 2001/29 where the total amount allocated by the General State Budget to fair compensation for private copying, although it is calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year?'

13. The order for reference was received at the Registry of the Court of Justice on 14 October 2014. Written observations were lodged by the applicants in the main proceedings, the interveners in the main proceedings, (7) the Spanish, Greek, Finnish and Norwegian Governments (8) and the European Commission. The same parties, with the exception of the Norwegian Government, were represented at the hearing on 1 October 2015, as was the French Government.

Assessment

14. By its first question, the referring court asks whether, in essence, Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the fair compensation referred to therein may be financed from the General State Budget without it being possible to pass the cost on to the users who make private copies of copyright works. This question requires analysis not only of the provisions of Directive 2001/29 but also of the Court's case-law on compensation for private copying and on the system for financing it. Only if the first question is answered in the affirmative will it be necessary to consider the referring court's second question. I shall begin my assessment with a brief consideration of the role of the private copying exception in the copyright system.

The private copying exception as an institution of copyright law

15. The private copying exception, under various names, is practically as old as the legal protection of copyright in continental Europe. (9) Two reasons are normally given to justify its existence, one axiological and the other practical. First, given the public interest in access to culture, the possibility of copying a work for one's own private use is part of the free enjoyment of culture, which the author cannot prevent without encroaching on the user's rights. (10) Secondly, it is said to be impossible, in practical terms, to control a user's private use of a work and, even if technology has now enabled such control, this would be exercised at the price of unacceptable interference with the fundamental right to private life. Indeed, this second aspect raises doubts about the very nature of the private copying exception: is it really an exception to the author's exclusive right or actually a natural restriction on this right, since copyright in fact relates only to the exploitation of works in the public sphere? (11)

16. It is also commonly accepted that the use of a work in the context of the private copying exception is free of charge. (12) In its initial stages, the private copying exception was not accompanied by any remuneration or compensation for rightholders. The view was taken that it did not harm their substantive rights. The situation changed with the emergence of technical means, available to members of the general public, enabling the automated production of large numbers of copies of copyright works. These technical means — that is, photographic (reprographic), analogue and, recently, digital means — have had an impact on the economic exploitation of works by rightholders. In response to this development, several countries have introduced arrangements into their legal systems for compensation in respect of the private copying exception. (13) Most of these have been based on a levy on recording media and electronic equipment.

17. This, then, is the legal context in which Directive 2001/29 seeks to harmonise the Member States' legislation by introducing, inter alia, an optional private copying exception, (14) accompanied by the condition that fair compensation must be guaranteed to rightholders.

The first question

18. The first question, read against the background of the arguments submitted by the applicants in the main proceedings during the proceedings before the referring court and in the light of the observations submitted before the Court, raises an issue of major importance for the financing of compensation in respect of the private copying exception in European law. This is the issue of whether this compensation, not only in the light of the wording of Article 5(2)(b) of Directive 2001/29 — which, all in all, is extremely brief — but

also in terms of its underlying logic as developed in the case-law of the Court, (15) may take forms other than that of a levy which is borne — in any event, potentially and ultimately — by the users of equipment which allows private copying.

19. The applicants in the main proceedings, the parties intervening in support of them, the Greek Government and the French Government propose that this question should be answered in the negative. They rely primarily on the case-law of the Court, from which they infer that it is the user who makes private copies who must ultimately finance, as the person responsible for payment, fair compensation in respect of the private copying exception. They argue, therefore, that this principle is incompatible with any compensation scheme financed from the State Budget.

20. I must state from the outset that I do not agree with this analysis for three reasons, which relate, first, to the wording of the provisions of Directive 2001/29, secondly, to the analysis of the relevant case-law of the Court and, thirdly, to considerations of a practical nature concerning the operation of levy-based schemes in the current technological context.

The interpretation of Directive 2001/29

21. As I have stated above, Directive 2001/29 did not arise in a legal vacuum. Rather, copyright legislation in the Member States has a long, rich history. Directive 2001/29 seeks to harmonise this legislation. However, it must be said that this harmonisation is confined to certain general rules. Besides its technical provisions, Directive 2001/29 contains three main substantive provisions, obliging the Member States to acknowledge three types of rights enjoyed by authors: the reproduction right (Article 2), the right of communication and of making available (Article 3) and the distribution right (Article 4). These rights are then accompanied by approximately 20 exceptions and limitations (Article 5) which, apart from the one relating to transient or incidental reproduction in a computer network (Article 5(1)), are optional.

22. The private copying exception is, rightly, one of these optional exceptions and limitations. Its introduction by the Member States is conditional on their introducing fair compensation for rightholders. Directive 2001/29 does not determine the form this compensation should take, the detailed arrangements for calculating it, or how it should be financed. (16) Therefore it is the Member State which must, if it decides to introduce a private copying exception into its national law (or, more likely in practice, to retain an existing one), provide for compensation for the harm to rightholders which may result from this exception. Directive 2001/29 also does not specify who will be responsible for paying the compensation; it identifies only those who will receive it. Thus, it merely requires, in Article 5(2)(b), that 'the rightholders receive compensation'. (17)

23. Recital 35 of Directive 2001/29 states, it is true, that the level of compensation in respect of certain cases of exceptions should be calculated taking into account the harm caused to rightholders. However, so far as concerns the private copying exception, this harm takes the form of a prospective loss of profits (lucrum cessans), since private copying potentially restricts the number of copies of a work sold. (18) In addition, this harm cannot be established with certainty on an individual level for each rightholder concerned; it is estimated in the aggregate, on the basis of the potential loss of profit for all rightholders. As the Commission rightly points out in its observations, there is not, therefore — and cannot be — a direct link between acts of private copying and compensation for the harm caused to particular rightholders.

24. The compensation provided for by Directive 2001/29 is also not remuneration, since use of a work in the context of private copying is, theoretically, free of charge. In my view, the legislature has quite deliberately used the term 'compensation', rather than 'remuneration' which appeared in Directive 2006/115/EC. (19)

25. In addition, recital 31 of Directive 2001/29 states that 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. This recital explains, in the first place, the reasons which led the EU legislature to seek a certain degree of harmonisation between the exceptions and limitations to copyright which may be provided for in the national law of Member States. Subsequently, at the stage when Directive 2001/29 is transposed into domestic legal systems, it is for the national legislatures to balance the various interests at stake. Thus, national legislatures have the power to determine the amount of compensation, which varies considerably from one Member State to another, how it is to be financed and the detailed arrangements for distributing it between the various rightholders. However, recital 31 of Directive 2001/29 cannot be construed as an additional provision of this directive, with independent legal force.

26. Thus, Directive 2001/29 contains no legally binding requirement that the abovementioned fair balance should necessarily involve the financing of fair compensation in respect of the private copying exception by users who make or may make private copies. Indeed, in my view, it would be illogical to take the view that this Directive, which does not create a duty to introduce or not introduce the private copying exception, regulates the way in which compensation in respect of this exception should be financed. If Directive 2001/29 leaves the more general, more significant decision on introduction of the exception to Member States' discretion, then it must, a fortiori, allow them the power to regulate freely the more detailed, technical issue of how to finance compensation. The only requirement imposed by Directive 2001/29 is that a State which has a private copying exception should provide for compensation for rightholders, on the basis of the fair balance referred to in recital 31 of the directive.

The case-law of the Court

27. According to the applicants and the parties intervening in support of them in the main proceedings, whose opinion is shared in these proceedings by the Greek Government and the French Government, it follows from the Court's case-law on fair compensation in respect of the private copying exception that a compensation scheme financed from the State Budget is incompatible with Article 5(2)(b) of Directive 2001/29, since that provision, read in the light of the recitals of that directive and as interpreted by the Court, requires that it is the user who makes or may make a private copy, and only that user, who should finance this compensation.
28. These parties base their argument primarily on the passages of the judgment in Padawan in which the Court, having held, on the basis of recitals 35 and 38 of Directive 2001/29, that the purpose of fair compensation is to compensate for the possible harm to rightholders resulting from private copying, found, on the basis of recital 31 of the directive, that a fair balance between the various interests at stake requires that the user who may potentially make private copies — that is, in practice, any purchaser of equipment which can be used to make such copies — must finance the compensation. (20) This reasoning was subsequently confirmed in the judgment in Stichting de Thuiskopie, (21) and then reiterated by the Court in later judgments.
29. However, I do not consider that this reading of the case-law takes account either of the context of these judgments or of the broad logic of the Court's reasoning in its entirety. If we wish to rely, in order to resolve a point of law, on the Court's previous decisions, we should not resort to finding isolated passages in this case-law which may support one argument or another. (22) Rather, we should identify a coherent, clear line of case-law, taking into account its development, and then establish whether this line can provide a basis for solutions in new cases.
30. In that regard, it should be borne in mind that — as AMETIC, the Spanish, Danish and Norwegian Governments and the Commission have correctly pointed out — the Court's previous judgments in cases concerning compensation in respect of the private copying exception have been delivered in connection with systems for financing this compensation by charging a levy on equipment which can be used to make such copies and have aimed to resolve problems related to the operation of such a system.
31. In the judgment in Padawan, in which the Court set out this reasoning for the first time, the question concerned whether a levy can be applied to equipment which, because it is intended solely for professional use, cannot be used for the purpose of private copying. (23) In order to resolve this issue, the referring court in Padawan asked a series of questions which led the Court to undertake an exercise in deconstructing the rationale of the system for financing compensation by a levy in respect of electronic equipment. Thus, in Padawan, the Court did not simply designate the potential user as being the person responsible for paying compensation, which was assimilated to the levy, but continued its line of reasoning by accepting that, in practice, it is not users who directly discharge the levy/compensation, but the manufacturers or sellers of electronic equipment, who then pass the corresponding charge on to the purchasers/users. (24)
32. In my opinion, that section of the judgment is crucial to determining whether the 'user pays' principle is generally applicable to every system for financing fair compensation, or actually only applicable to levy-based schemes.
33. Prima facie, the Court's acceptance of a scheme in which a levy is collected from persons who make equipment available to users, that is to say manufacturers, importers or traders, may appear to be a concession made for practical reasons and to the detriment of the legal purity of the system. However, in my view, that is a false impression.
34. As I stated briefly in points 15 and 16 above, in copyright law, the private copying exception is much older than any idea of compensation in respect of this exception, and use of a work in this context is theoretically free of charge. It has been only with the advent of technical means allowing private individuals to make large numbers of copies of copyright works at minimal cost (mainly, reprography and recording, not only of sound but also of images, on magnetic tape) that the problem has arisen of harm to rightholders resulting from private copying on a large scale.
35. This problem cannot be solved by imposing a direct levy on users, not only because effective monitoring of the private use of copyright works is impossible but also because of the protected status of private life on the basis of fundamental rights. Moreover, such a levy would make the private copying exception redundant. If the rightholder could demand a payment, of whatever kind, from the user, this situation would no longer be one involving an exception from the rightholder's monopoly, but would be a case of the normal exploitation of this monopoly.
36. Therefore several States have introduced levy-based schemes in respect of media and equipment which allow copying of copyright works. This is not merely a question of simplification, for practical reasons, of a system for collecting payment from users so that they can benefit from the private copying exception, but of an entirely separate system, designed to remedy the consequences of the large-scale increase in this type of copying, which are harmful to the interests of rightholders.
37. The Court has found that this system is, in principle, consistent with Article 5(2)(b) of Directive 2001/29, provided that the economic burden of the levy can be passed on to the purchaser of the equipment. However, although, in order to arrive at this finding, the Court referred to the principle that it is the user who may make private copies — that is, a natural person who has acquired equipment which allows such copying — who must be regarded as the person responsible for paying compensation, this was only as a

theoretical basis for a levy-based scheme in respect of the equipment at issue.

38. This interpretation is supported by the actual wording of the 'user pays' rule as set out and applied by the Court. According to this rule, the user must 'in principle' be regarded as the person responsible for paying compensation. (25) The reservation 'in principle' clearly shows, in my opinion, that this is a theoretical principle which, 'in practice', is always implemented in connection with a levy-based scheme in respect of electronic equipment.

39. This theoretical basis then allowed the Court to lay down certain rules relating to the operation of levy-based schemes. Thus, in the judgment in Padawan, the Court ruled out the possibility that this levy could be applied to equipment which cannot be used for private copying. In the judgment in Stichting de Thuiskopie, the Court inferred the rule that the levy must be paid in the Member State of residence of the final user of the equipment. In the judgment in Copydan Båndkopi, it accepted the collection of the levy in respect of copies made on equipment belonging to a third party. (26)

40. However, given that the principle that the user is the person responsible for paying compensation cannot be applied literally, for the reasons stated in point 35 above, it cannot have inherent legal force. It can operate only in connection with a system for financing compensation in respect of the private copying exception by charging a levy on equipment which can be used to make private copies, under Article 5(2)(b) of Directive 2001/29 as interpreted by the Court. Moreover, reading the relevant case-law of the Court reveals that this principle always appears not as a wholly separate legal finding, but as one element in a line of reasoning which culminates in the use of levy-based schemes being upheld. Any reading of this case-law which attributes more general scope to this principle, thus precluding other systems for financing compensation, would be contrary to the logic of the Court's reasoning and would go beyond the parameters of the questions which were referred for a preliminary ruling.

41. Thus, I do not consider that it may be legitimately inferred from the Court's case-law on the private copying exception that there is a general principle in EU law, and more precisely, under Article 5(2)(b) of Directive 2001/29, that compensation in respect of this exception must necessarily be financed by the users who benefit from it, meaning that, in practice, the only possible system for financing this compensation is to charge a levy on electronic equipment. In any event, in my opinion, establishing this levy as the only system of financing is no longer desirable, for practical reasons related to the current stage of technological development.

The operation of levy-based schemes and the challenge posed by the digital environment

42. The introduction of levy-based schemes was founded on the premiss that users who had acquired recording media and electronic equipment were actually making use of them for copying in connection with private use of the works concerned. In the analogue age, this premiss was close to the truth. (27) The burden of the levy intended to finance compensation in respect of the private copying exception was in fact more or less borne by those who benefited from the exception.

43. The emergence of digital technology has changed the landscape dramatically. First, digital technology means that formats have converged. Everything — text, sound, images — is now presented in the same digital format and can therefore be recorded using the same equipment and on the same medium. Thus, a computer and a CD-ROM can be used to record not only private documents, family photos or a database containing personal information, but also a book in digital format, recorded music or a cinematographic work. Secondly, miniaturisation and lower prices for electronic equipment, coupled with the development of the Internet, have led to significant growth in the production of private content, which is not within the scope of copyright, and to such content being very widely distributed.

44. Thus, at a time when every item of electronic equipment is in point of fact a computer, equipped with functions for creating and recording audio-visual and textual content, as well as many other functions, the premiss that the purchaser of such equipment is likely to reproduce copyright works is seriously called into question. It is true that levy-based schemes are justified on the basis of the legal fiction that someone who acquires electronic equipment is deemed to be making use of all the functions of that equipment, including those for copying content which may be copyright. The Court itself has said as much. (28) However, anyone who makes use of modern electronic equipment knows how far this presumption fails to reflect the real situation and is indeed a fiction.

45. In point of fact, having acquired a piece of equipment encumbered with the private copying levy, the user may equally well make a large number of private copies or never make a single one, instead using the equipment either to produce, record and disseminate content which is not within the scope of copyright or for purposes completely unrelated to any form of intellectual creation. So it is impossible to forecast the actual use that a real user will make of a given piece of equipment. What is more, we should question whether we are capable of assessing the likelihood that some equipment of a given type will be used for private copying and of apportioning the levy across the whole of this category of equipment on the basis of that assessment. Thus, a levy-based compensation scheme is more akin to a mutualisation scheme, in which all purchasers of such equipment bear the burden of a relatively small levy which is then used to finance compensation for harm caused by only some of these purchasers. (29) This mutualisation is also equally apparent on the rightholders' side. Revenue from all the levies is paid in centrally, at the level of the collecting societies, and then distributed between all those entitled, according to a formula defined by the

societies (or, in some States, by legislation). This scheme is therefore far removed from a classic civil-law system of compensation by the person who has caused the harm.

46. Furthermore, levy-based schemes do not guarantee perfect consistency within the internal market. First, as the private copying exception is merely optional, some Member States do not provide for one in their legal systems, while others have not introduced a compensation scheme. (30) Secondly, even where a levy is provided for, it is not collected in a harmonised manner across all the Member States concerned. As to the rate of the levy, this can vary by a factor of 50 for equipment of a similar type. (31) The same is true of the assessment basis for this levy, since it is charged on different categories of equipment in different Member States.

47. Increasingly rapid technological development means that levy-based schemes in respect of the private copying exception are faced with new challenges. (32) A levy on equipment which can be used to copy copyright works, which is intended to finance compensation for the harm to rightholders resulting from this copying, is a specific solution corresponding to a certain stage of technological development. (33) Since this stage has now been passed, the legitimacy and the effectiveness of levy-based schemes have been called into question in many Member States, and thought is being given to finding alternatives. (34) I do not believe it is desirable to restrict this thought process, or even go so far as to prevent it, on the basis of the 'user pays' principle — which, in any event, as I have shown above, is, given the current state of technological development, purely a legal fiction.

Financing compensation from the State Budget

48. Another solution which may be contemplated is to finance compensation in respect of the private copying exception directly from the State Budget. According to information given by the Commission in its observations, this method of financing has been adopted not only in Spain, but also in Estonia, Finland and Norway.

49. Any assessment of whether such a system complies with Article 5(2)(b) of Directive 2001/29, as interpreted by the Court, should not regard it as a variation on levy-based schemes, in which the levy chargeable only to persons who may make private copies is simply replaced by a contribution from all taxpayers, including from legal persons, who do not benefit from the private copying exception, and from persons who have never acquired any equipment covered by this levy.

50. State budget revenues, it is true, come largely from direct and indirect taxes paid by all taxpayers. These taxes are collected by the State on the basis of an entitlement which has always been one of the principal powers of public authorities. Under the same entitlement, deriving from its sovereignty, the State then decides how to allocate the funds it has collected. Therefore it is true to say that all taxpayers contribute to financing all State expenditure. However, there is no direct link between the tax paid by a particular taxpayer and a given budgetary expenditure, since it is precisely the existence of the budget as an intermediate stage which breaks the link. There is simply tax collection on the one hand and budgetary expenditure on the other. The various budgetary revenues are not apportioned to specific expenditures and, in the same way, a taxpayer cannot object to 'his' money being allocated to financing one specific expenditure.

51. As regards this case in particular, there is therefore no link between the taxes paid by taxpayers — including by those, like legal entities, who cannot benefit from the private copying exception — and the financing of compensation in respect of the exception from the General State Budget. The situation would be different only if a specific tax or duty were introduced for the purpose of this financing; but that is not the case with the Spanish system at issue in the main proceedings.

52. In my opinion, financing the compensation from the General State Budget is therefore not contrary to the principles laid down by the Court in the judgment in Padawan, (35) since this is not a matter of extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale. Similarly, I do not see in what respect this system could be at odds with the wording of Directive 2001/29. The directive does not regulate the way in which compensation in respect of the private copying exception is financed, provided only that this compensation is fair. I shall deal with this last point in my assessment of the second question referred for a preliminary ruling.

Answer to the first question

53. In the light of the foregoing, I propose that the answer to the first question should be that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding financing of the fair compensation referred to therein from the General State Budget.

The second question

54. By its second question, the referring court asks whether, in essence, Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation. The national legal and factual context of this question is as follows.

55. First, as regards the legal context, Royal Decree-Law 20/2011 (36) and Royal Decree 1657/2012 (37) provide that compensation in respect of the private copying exception is to be calculated on the basis of an estimate of the harm caused to rightholders. However, also according to Royal Decree 1657/2012, (38) is to be determined, within the budgetary limits established for each financial year, by order of the Minister the amount of compensation is to be determined by ministerial order 'within the budgetary limits established for each financial year'. It should be remembered that it is specifically Royal Decree 1657/2012 which is the subject of the action for annulment in the main proceedings. Therefore I do not share the doubt which

the Commission seems to harbour regarding the relevance of the second question to the outcome of the main proceedings. Although the referring court must assess the validity of Royal Decree 1657/2012, it must do so not only in the light of national law — an issue which is not within the scope of this Opinion — but also in the light of EU law.

56. Secondly, as far as the factual context is concerned, the applicants in the main proceedings have stated that, in the years following the introduction of compensation financed from the State Budget, the amounts allocated for this compensation were a little over EUR 8.6 million for the financial year 2013 and EUR 5 million for the financial year 2014, while the harm to rightholders was estimated at EUR 18.7 million and EUR 15.2 million respectively.

57. Therefore it is appropriate to assess whether, under Directive 2001/29, a Member State which decides to introduce the private copying exception and to finance compensation in respect of that exception from the State Budget is entitled to limit the amount of that compensation with the result that it does not cover the whole, nor even most, of the estimated harm to rightholders resulting from the exception.

58. In answering this question, I shall not hesitate to refer to the Court's case-law on the private copying exception. (39) It is true — in my view, which I set out in connection with my assessment of the first question — that this case-law, in so far as it concerns the method of financing compensation in respect of the private copying exception, is relevant only where the method is a levy-based one. However, the case-law principles relating to the outcome — that is, to the effect the legislature intends to achieve through compensation — are unconnected with the way in which the compensation is financed and therefore can be transposed to compensation financed by other means.

59. It is apparent from that case-law, first, 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. (40) Therefore the two words which make up this concept must both be interpreted consistently in all the Member States. In particular, as far as concerns the word 'fair', a Member State is not entitled to regard compensation as fair if it does not satisfy certain criteria laid down, inter alia, in the case-law of the Court on the interpretation of the abovementioned provision of Directive 2001/29.

60. Secondly, the Court has held that the private copying exception must include a system 'to compensate for the prejudice to rightholders' resulting from this exception. (41) Therefore, fair compensation must be regarded as recompense for the harm suffered by rightholders and must be calculated on the basis of the criterion of the harm caused. (42)

61. Finally, thirdly, the obligation to provide compensation for the prejudice sustained as a result of the private copying exception is an obligation to achieve a certain result, imposed on the Member State which has introduced that exception. (43)

62. Therefore, such a Member State does not fulfil its obligation arising from Article 5(2)(b) of Directive 2001/29 unless it provides for a scheme which actually compensates the harm to rightholders resulting from private copying, in the full amount estimated according to the relevant rules in force in the Member State. So this compensation must necessarily be calculated on the basis of the estimated harm and cannot be capped a priori at a lower level.

63. Where there is a levy-based scheme in respect of equipment which can be used for private copying, the view may be taken that the harm to rightholders is, at least in part, a function of the number of pieces of such equipment sold. Variations in the amount collected through the levy therefore do not call into question the fairness, as provided for in Directive 2001/29, of the compensation, since they reflect variations in the amount of harm caused.

64. In a scheme where compensation is financed directly from the State Budget, this automatic variation does not operate. The amount of compensation paid to rightholders should therefore, in principle, correspond to the estimated amount of the harm caused to rightholders resulting from the private copying exception.

65. In this regard, I am not convinced by the Spanish Government's arguments that the limitation of funds provided for paying compensation for private copying to less than the estimated amount of harm to rightholders is inherent in the system of budget planning.

66. First, in a modern State, most budget expenditures result from statutory obligations, and so the exact amount of these expenditures cannot be foreseen at the time of adoption of the annual budget legislation. However, as a matter of law, it is impossible not to make such payments, and a budget system includes techniques which allow these obligations to be met.

67. Secondly, although budget expenditure must be provided for in advance, the forecasts involved must be made on the basis of reliable, precise data. For that purpose, it is possible, inter alia, to take the amount of similar expenditure in the previous budget year as a basis. (44)

68. Next, so far as concerns the Spanish Government's argument relating to the principle of sound budgetary policy, it is sufficient to note that this very principle requires a budget and economic impact study for any new legislation. If such a study had been carried out before amendment of the system for financing compensation for private copying, the Spanish authorities would have known the amounts necessary to guarantee fair compensation.

69. Therefore it is, in my opinion, perfectly possible to guarantee fair compensation, within the meaning of Article 5(2)(b) of Directive 2001/29, as interpreted by the Court, where this compensation is financed from the General State Budget. However, this compensation cannot be rigidly capped a priori at a level which does not take sufficient account of the amount of harm to rightholders, as estimated according to the relevant

applicable rules in the national law of the Member State concerned.

70. Therefore, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation.

Conclusion

71. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunal Supremo (Supreme Court) for a preliminary ruling as follows:

(1) Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as not precluding financing of the fair compensation referred to therein from the General State Budget.

(2) Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding the amount of the fair compensation referred to therein being set within the budgetary limits established a priori for each financial year without the estimated harm to rightholders being taken into account for the purpose of setting the amount of compensation.

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1 – Original language: French.

2 – Declaration adopted by United Nations General Assembly Resolution 217 A (III) of 10 December 1948 in Paris.

3 – The consistency between Article 27 of the Declaration and the private copying exception has been noted in Marcinkowska, J., Dozwolony użytek w prawie autorskim — Podstawowe zagadnienia, Kraków, 2004. See also, regarding the relationship between the right to culture and copyright law, Matczuk, J., 'Prawo do kultury v. prawo autorskie — nieuchronny konflikt czy nadzieja na koncyliację?', Prace z prawa własności intelektualnej, No 127, 2015, pp. 36-51.

4 – OJ 2001 L 167, p. 10.

5 – On the subject of the replacement, in Spain, of the levy in question by compensation paid from the General State Budget, see, inter alia, Xalabarder, R., 'The abolishment of copyright levies in Spain — A consequence of Padawan?', Tijdschrift voor auteurs-, media- & informatierecht, No 6, 2012, pp. 259-262.

6 – The Artistas Intérpretes, Sociedad de Gestión (AISGE), the Centro Español de Derechos Reprográficos (CEDRO), the Sociedad General de Autores y Editores (SGAE), the Asociación de Gestión de Derechos Intelectuales (AGEDI) and the Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE).

7 – The interveners in support of the applicants and the intervener in support of the defendant.

8 – The Kingdom of Norway, as a Member State of the European Economic Area, is bound by Directive 2001/29.

9 – To take just the example with which I am most familiar, namely that of Polish law, this exception, now referred to as 'permitted private use' ('dozwolony użytek prywatny'), already existed in the copyright legislation which applied in different parts of the Polish State after independence was regained in 1918: the Austrian legislation of 1895, the German laws of 1901 and 1907 and the 1911 Russian legislation. The exception was then included in the Polish copyright legislation of 1926 (Article 18), 1952 (Article 22) and 1994, still in force (Article 23). See Sokołowska, D., 'Dozwolony użytek prywatny utworów — głos w dyskusji na temat zmiany paradygmatu', Prace z prawa własności intelektualnej, No 121, 2013, pp. 20-45.

10 – It goes without saying that here we are discussing only the legitimate use of a work that has been acquired legally.

11 – On the origin and the theoretical aspects of the private copying exception, see, for example, More, K., Les dérogations au droit d'auteur — L'exception de copie privée, Presses Universitaires de Rennes, 2009, p. 33 et seq.; Preussner-Zamorska, J., in: Barta, J. (ed.), System prawa prywatnego. Prawo autorskie, 2nd edition, Warsaw, 2007, p. 381 et seq.; Stanisławska-Kloc, S., in: Flisak, D. (ed.), Prawo autorskie i prawa pokrewne. Komentarz Lex, Warsaw, 2015, p. 343 et seq.; and Vivant, M., and Bruguière, J.-M., Droit d'auteur et droits voisins, 2nd edition, Dalloz, 2013, p. 486 et seq.

12 – Compensation for private copying is usually not part of provisions on the limitations or exceptions to copyright and related rights, but part of the copyright and related rights legislation (see, for example, Articles 25 and 31 of the Spanish Intellectual Property Law, Articles L. 122-5 and L. 311-1 of the French Intellectual Property Code, or Articles 20 and 23 of the Polish Law on copyright and related rights). Therefore, neither payment by the user nor compensation for the rightholder is a requirement for entitlement to this exception. See, to that effect, Preussner-Zamorska, J., op. cit., p. 414.

13 – See, among others, Astier, H., 'La copie privée. Deux ou trois choses que l'on sait d'elle', Revue internationale du droit d'auteur, No 128, 1986, pp. 113-145; Machała, W., 'Dozwolony użytek utworów w prawie europejskim i w ustawie o prawie autorskim', Państwo i prawo, No 12, 2004, pp. 16-33; Marcinkowska, J., op. cit., p. 219 et seq.; and Vivant, M. and Bruguière, J.-M., op. cit., p. 416.

14 – I use the term 'exception' for convenience, but Directive 2001/29 does not alleviate the doubt which I mentioned in point 15 above, since it refers to 'exceptions and limitations' without distinguishing between them.

15 – The relevant case-law of the Court includes, first and foremost, two 'leading' judgments: the judgments in Padawan (C‑467/08, EU:C:2010:620) and Stichting de Thuiskopie (C‑462/09, EU:C:2011:397). These

have subsequently been supplemented by the judgments in VG Wort and Others (C‑457/11 to C‑460/11, EU:C:2013:426); Amazon.com International Sales and Others (C‑521/11, EU:C:2013:515); ACI Adam and Others (C‑435/12, EU:C:2014:254); Copydan Båndkopi (C‑463/12, EU:C:2015:144); and, finally, Hewlett-Packard Belgium (C‑572/13, EU:C:2015:750).

16 – This has also been confirmed by the Court. See, inter alia, judgment in Padawan (C‑467/08, EU:C:2010:620, paragraph 37).

17 – See judgment in Stichting de Thuiskopie (C‑462/09, EU:C:2011:397, paragraph 23). See also, to that effect, Karapapa, S., 'Padawan v SGAE: a right to private copy?', European Intellectual Property Review, Vol. 33, No 4, 2011, pp. 252-259.

18 – See, to that effect, Vivant, M., and Bruguière, J.-M., op. cit., p. 416.

19 – 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).

20 – Judgment in Padawan (C‑467/08, EU:C:2010:620, paragraphs 38 to 45).

21 – C‑462/09, EU:C:2011:397, paragraphs 23 to 29 and point 1 of the operative part of the judgment.

22 – It would be equally possible to find arguments in the case-law which run counter to the submissions of the applicants in the main proceedings, as in paragraph 37 of the judgment in Padawan, according to which, although the concept of fair compensation itself must be interpreted uniformly, Directive 2001/29 acknowledges that all the Member States have 'the power … to determine … the form, detailed arrangements for financing and collection, and the level of that fair compensation', or as in paragraph 23 of the judgment in Stichting de Thuiskopie, according to which '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' (emphasis added).

23 – For a description of the main proceedings and for the doubts expressed by the referring court, see the judgment in Padawan (C‑467/08, EU:C:2010:620, paragraph 17) and the Opinion of Advocate General Trstenjak in that case (C‑467/08, EU:C:2010:264, point 21).

24 – Judgment in Padawan (C‑467/08, EU:C:2010:620, paragraphs 46 to 49).

25 – See, inter alia, the judgments in Padawan (C‑467/08, EU:C:2010:620, paragraph 45) and Stichting de Thuiskopie (C‑462/09, EU:C:2011:397, point 1 of the operative part of the judgment).

26 – Judgment in Copydan Båndkopi (C‑463/12, EU:C:2015:144, point 8 of the operative part).

27 – For example, studies conducted in France in 1982 and 1983, before the introduction of the private copying levy, showed that 90% of blank audio and video cassettes were used to record copies of copyright works (see Astier, H., op. cit., p. 114).

28 – Judgment in Padawan (C‑467/08, EU:C:2010:620, paragraph 55).

29 – See, to that effect, Marino, L., 'La (discutable) logique de la redevance pour copie privée', La Semaine Juridique Edition Générale, No 50, 2010, pp. 2346-2349. According to Lucas, A., 'Les dits et les non-dits de la copie privée', Propriétés intellectuelles, No 43, 2012, pp. 232-239, the principle of mutualisation was called into question by the Court when, in its judgment in Padawan, it ruled out application of the levy to equipment intended for professional purposes. However, even private use of this equipment does not automatically mean that every user is making private copies. Therefore, in my opinion, it is still appropriate to think in terms of a mutualisation scheme.

30 – According to my information, these are the Republic of Bulgaria, Ireland, the Republic of Cyprus, the Grand Duchy of Luxembourg and the Republic of Malta. The United Kingdom of Great Britain and Northern Ireland introduced a private copying exception in 2014 [The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014] with no provision for compensation. The view was taken that the harm caused to rightholders is minimal and so does not give rise to an obligation for compensation under recital 35 of Directive 2001/29. Indeed, these regulations were seen as a matter of legitimising a practice, widespread among consumers, which rightholders have already integrated into the price of published works (see Cameron, A., 'Copyright exceptions for the digital age: new rights of private copying, parody and quotation', Journal of Intellectual Property Law & Practice, Vol. 9, No 12, 2014, pp. 1002-1007).

31 – See, inter alia, Latreille, A., 'La copie privée dans la jurisprudence de la CJUE', Propriétés intellectuelles, No 55, 2015, pp. 156-176, which gives the example of the amount of the levy charged on a blank DVD in various Member States.

32 – It is not my intention to undertake a critique of levy-based schemes, since they are not at issue before the Court in this case. Therefore I shall not go into detail on this topic. The Commission has indicated some of the issues in its observations. There is a large body of literature discussing the many questions raised by levy-based schemes in the digital age. By way of example, see Latreille, A., op. cit.; Majdan, J., and Wikariak, S. (eds), 'Czy można sprawiedliwie obliczyć opłatę za kopiowanie utworów?', Gazeta prawna, 16 September 2015; Sikorski, R., 'Jeśli nie opłata reprograficzna to co?', Gazeta prawna, 30 September 2015; Still, V., 'Is the copyright levy system becoming obsolete? The Finnish experience', Tijdschrift voor auteurs-, media- & informatierecht, No 6, 2012, pp. 250-258; Troianiello, A., 'La rémunération de la copie privée à l'épreuve de la révolution numérique', Revue Lamy Droit de l'immatériel, No 73, 2011, pp. 9-14; and, by the same author, 'Fluctuat nec mergitur?

Réflexions sur les vicissitudes du dispositif de rémunération de la copie privée', Petites affiches, No 228, 2011, p. 5. See also Françoise Castex's Report on Private Copying Levies of 17 February 2014, produced for the European Parliament's Committee on Legal Affairs (2013/2114(INI)).

33 – See points 16 and 41 above.

34 – Still, V., op. cit., gives an account of thinking on this topic in Finland.

35 – C‑467/08, EU:C:2010:620.

36 – Tenth Additional Provision, paragraph 3.

37 – Article 3, second paragraph. See point 8 above.

38 – Article 3, first paragraph. See point 8 above.

39 – See the case-law cited, inter alia, in footnote 15 above.

40 – Judgment in Padawan (C‑467/08, EU:C:2010:620, paragraph 37).

41 – Ibid. (paragraph 39).

42 – Ibid. (paragraphs 40 and 42).

43 – Judgment in Stichting de Thuiskopie (C‑462/09, EU:C:2011:397, paragraphs 34 and 39).

44 – To take the simplest example, if the sum intended to finance compensation for private copying in the Spanish State Budget for 2014 had been calculated on the basis of the estimated harm in 2013 (as we have seen, this was EUR 18.7 million), it would not only have covered the estimated harm in 2014 (EUR 15.2 million), but would even have generated a surplus.