Court of Justice EU, 24 March 2022, Austro-Mechana v Strato

COPYRIGHT

Private copying: Article 5(2)(b) of the Copyright Directive

The expression 'reproductions on any medium'

- **covers the saving for private purposes by the provider of a cloud computing**

Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the expression 'reproductions on any medium', referred to in that provision, covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud computing service.

29 In those circumstances, it is not necessary, in terms of functionality, to make a distinction, for the purpose of applying Article 5(2)(b) of Directive 2001/29, according to whether the reproduction of a protected work is carried out on a server on which storage space has been made available to a user by the provider of a cloud computing service or whether such a reproduction is made on a physical recording medium belonging to that user.

[...]

31 That finding is not called into question by the argument advanced by the European Commission that the saving of a copy in the cloud is not separable from possible acts of communication, with the result that such an act, on the basis of the case-law derived from the **judgments of 29 November 2017, VCAST, (C-265/16, EU:C:2017:913**), and of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers (C-263/18, EU:C:2019:1111), should come under Article 3(1) of Directive 2001/29 […].

32 In any event, any communication that would result from the sharing of a work by the user of a cloud storage service would constitute an act of exploitation that is distinct from the reproduction act referred to in Article 2(a) of Directive 2001/29, which may come within the scope of Article 3(1) of that directive, if the conditions for the application of that provision are satisfied.

National legislation that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation is not precluded

- **in so far as that legislation provides for the payment of fair compensation to the rightholders**

in recital 35 of Directive 2001/29.

In the light of those considerations, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial, in so far as that legislation provides for the payment of fair compensation to the rightholders.

46 It follows that, as EU law currently stands, the introduction of a system of fair compensation, in which the producer or importer of the servers by means of which the cloud computing services are offered to private persons is required to pay the private copying levy, that levy being passed on economically to the purchaser of such servers, combined with the introduction of a private copying levy on the media that are integrated into the connected devices that make it possible to make copies of protected subject matter in a cloud computing storage space, such as mobile telephones, computers and tablets, falls within the discretion allowed to the national legislature for defining the various elements of the fair compensation system, as recalled in paragraph 41 above.

[...]

48 As regards the provision of storage services in the context of cloud computing, it must be held in that regard, as the Danish Government in essence stated, that such difficulties may arise from the dematerialised nature of such services, which may be offered from Member States other than that concerned or from third countries, which generally include the possibility for the user to alter as he or she wishes, in an evolving and dynamic manner, the size of the storage space that may be used for private copying.

[...]

51 In the present case, as has been noted in paragraph 17 of the present judgment, the copying of protected works in storage space in the context of cloud computing requires the carrying out of several acts of reproduction, which may be effected from a number of connected terminals.

[...]

53 In that context, while it is open to the Member States to take account, when setting the private copying levy, of the fact that certain devices and media may be used for the purpose of private copying in connection with cloud computing, they must ensure that the levy thus paid, in so far as it affects several devices and media in that single process, does not exceed the possible harm to the rightholders resulting from the act in question, as stated in recital 35 of Directive 2001/29.

Source: **ECLI:EU:C:2022:217**

Court of Justice EU, 24 March 2022
(A. Arabadjiev, I. Ziemele, T. von Danwitz, P. G. Xuereb en A. Kumin)
JUDGMENT OF THE COURT (Second Chamber)
24 March 2022 (*)

(Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction – Article 5(2)(b) – Private copying exception – Concept of 'any medium' – Servers owned by third parties made available to natural persons for private use – Fair compensation – National legislation that does not make the providers of cloud computing services subject to the private copying levy)

In Case C-433/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), made by decision of 7 September 2020, received at the Court on 15 September 2020, in the proceedings

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

v

Strato AG,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2021,

after considering the observations submitted on behalf of:

– Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, by M. Walter, Rechtsanwalt,

– Strato AG, by A. Anderl and B. Heinzl, Rechtsanwälte,

– the Austrian Government, by J. Schmoll, G. Kunnert and M. Reiter, acting as Agents,

– the Danish Government, by M. Wolff, V. Jørgensen and J. Nymann-Lindegren, acting as Agents,

– the French Government, by E. de Moustier, A. Daniel and A.-L. Desjonquères, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the European Commission, by T. Scharf, G. von Rintelen and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

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 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana'), a copyright collecting society, and Strato AG, a provider of cloud storage services, concerning the remuneration for copyright payable by Strato in respect of the provision of that service.

Legal context

European Union law

3 Recitals 2, 5, 21, 31, 35 and 38 of Directive 2001/29 state:

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

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

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(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 trans-border exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where

rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.'

4 Article 2 of Directive 2001/29, entitled *'Reproduction right', provides:*

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

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

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

5 *Article 3(1) of that directive provides:*

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

6 Article 5 of that directive, entitled 'Exceptions and limitations', states:

'1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and the sole purpose of which is to enable:

(a) a transmission in a network between third parties by an intermediary,

or

(b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

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

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

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

...'

Austrian law

7 Paragraph 42b of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the main proceedings, provides:

'(1) If a work which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium ..., the author shall be entitled to equitable remuneration (remuneration in respect of storage media) in the case where storage media of any kind which are suitable for making such reproductions are, in the course of a commercial activity, placed on the market in national territory.

...

(3) The following persons shall be required to pay the remuneration:

1. as regards remuneration in respect of storage media and devices, the person who, acting on a commercial basis, is first to place the storage media or reproduction device on the market from a place located on national territory or abroad ...; however, any person who, over a six-month period, acquires storage media with a recording time that does not exceed 10 000 hours, or is a small business, shall be exempt from any liability ...'

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

8 Austro-Mechana is a copyright collecting society which, acting in its own name but in a fiduciary capacity in the interest and on behalf of the rightholders, exercises, inter alia, the statutory rights to the remuneration that is due under Paragraph 42b(1) of the Law on Copyright, in the version applicable to the dispute in the main proceedings.

9 Austro-Mechana applied to the Handelsgericht Wien (Commercial Court, Vienna, Austria) for an order to allow it to invoice for, and take payment of remuneration in respect of, 'storage media of any kind', on the ground that Strato provides its business and private customers with a service known as 'HiDrive', by which it makes cloud computing storage space available to them.

10 Strato contested the application on the ground that no remuneration was due in respect of cloud computing services. That company stated that it had already paid the required copyright fee in Germany, the Member State in which its servers are hosted, that fee having been incorporated in the price of the servers by their manufacturer or importer. It added that users in Austria had also already paid a levy for the making of private copies ('the private copying levy') on the terminal equipment necessary to upload content to the cloud.

11 By judgment of 25 February 2020, the Handelsgericht Wien (Commercial Court, Vienna) dismissed Austro-Mechana's application, holding that Strato does not make storage media available to its customers, but provides them with an online storage service.

12 Austro-Mechana appealed against that judgment to the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which observes, referring to the **judgment of 29 November 2017, VCAST (C-265/16, EU:C:2017:913)**, that it is not entirely clear whether the storage of content in the context of cloud computing comes within the scope of Article 5(2)(b) of Directive 2001/29.

13 In those circumstances, the Oberlandesgericht Wien, (Higher Regional Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the expression "on any medium" in Article 5(2)(b) of Directive [2001/29] to be interpreted as meaning that it also includes servers owned by third parties which make available to natural persons (customers) for private use (and for ends that are neither directly nor indirectly commercial) storage space on those servers which those customers use for reproduction by storage ("cloud computing")?

(2) If so: is the provision cited in Question 1 to be interpreted as meaning that it is applicable to national legislation under which the author is entitled to equitable remuneration (remuneration for exploitation of the right of reproduction on storage media), in the case:

– *where a work (which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes) is by its nature likely to be reproduced for personal or private use by being stored "on a storage medium of any kind which is suitable for such reproduction and, in the course of a commercial activity, is placed on the* market in national territory",

– and where the storage method used in that context is that described in Question 1?'

Consideration of the questions referred

The first question

14 By its first question, the referring court asks, in essence, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the expression 'reproductions on any medium' referred to in that provision covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud computing service.

15 It should first be noted that, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 of that directive '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'.

16 As regards, in the first place, the question whether the saving of copies in a cloud storage space constitutes a 'reproduction', for the purposes of Article 5(2)(b) of Directive 2001/29, it should be noted that the concept of 'reproduction' must be construed broadly, in the light both of the requirement expressed in recital 21 of that directive that the acts covered by the reproduction right are to benefit from a broad definition in order to ensure legal certainty within the internal market, and of the wording of Article 2 of that directive, which uses expressions such as 'direct or indirect', 'temporary or permanent', 'by any means' and 'in any form'. In addition, the scope of such protection of the acts covered by the reproduction right also follows from the main objective of that directive, which is to introduce a high level of protection, in particular for authors (see, to that effect, **judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraphs 40 to 43**).

17 In the present case, it must be stated that the upload of a work from a user's connected terminal to a cloud storage space made available to that user in the context of a cloud computing service involves making a reproduction of that work, since that service consists of, inter alia, storing a copy of that work in the cloud. Moreover, other reproductions of that work may also be made, in particular where the user accesses the cloud by means of a connected terminal in order to download onto that terminal a work that was previously uploaded to the cloud.

18 It follows that the saving of a copy of a work in storage space made available to a user in connection with a cloud computing service constitutes a reproduction of that work, for the purposes of Article 5(2)(b) of Directive 2001/29.

19 In the second place, as regards the question whether the concept of 'any medium', referred to in that provision, covers a server in which storage space is made available to a user by the provider of a cloud computing service for the saving of copies of works protected by copyright, it must be noted that that concept is not defined in that directive and does not refer to the law of the Member States in order to define its scope.

20 In accordance with settled case-law of the Court, it follows from the need for a uniform application of EU law that, where a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an autonomous and uniform interpretation throughout the European Union which must take into account the context of the provision and the objective pursued by the

legislation in question (**judgment of 8 March 2018, DOCERAM, C-395/16, EU:C:2018:172, paragraph 20 and the case-law cited**).

21 First, it should be observed that, in their broad sense, the words 'any medium' refer to all media on which a protected work may be reproduced, including servers such as those used in cloud computing.

22 Since the wording of Article 5(2)(b) of Directive 2001/29 does not in any way specify the characteristics of the devices by or with the aid of which copies for private use are made, it must be held that the EU legislature did not consider these to be relevant, in the light of the objective which it pursued by its measure of partial harmonisation (see, to that effect, **judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraphs 86 and 88**).

23 Accordingly, the fact that the storage space is made available to a user on a server belonging to a third party is not decisive in that regard (see, to that effect, **judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 89**). It follows that Article 5(2)(b) of Directive 2001/29 may also apply to reproductions made by a natural person with the aid of a device which belongs to a third party.

24 Second, that broad interpretation of the concept of 'any medium' is supported by the context of that provision and, in particular, by comparing the wording of the exception referred to in Article 5(2)(b) of Directive 2001/29, which does not in any way specify the characteristics of devices by or with the aid of which copies for private use are made, with that of the exception to the reproduction right laid down in Article 5(2)(a) of that directive. Whereas the latter applies to 'reproductions on paper or any similar medium', the private copying exception is applicable to 'reproductions on any medium' (see, to that effect, **judgments of 27 June 2013, VG Wort and Others, C-457/11 to C-460/11, EU:C:2013:426, paragraph 65**, and of **5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraphs 85 and 86**).

25 Third, as regards the objectives of the legislation at issue, it is clear from recitals 2 and 5 of Directive 2001/29 that that directive seeks to create a general and flexible framework at EU level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of exploiting protected works (judgment of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers, C-263/18, EU:C:2019:1111, paragraph 47 and the case-law cited).

26 In that regard, the Court has already pointed out, in the light of the mandatory exception referred to in Article 5(1) of Directive 2001/29, that the exemption provided for in that provision must allow and ensure the development and operation of new technologies, and must safeguard a fair balance between the rights and interests of rightholders and of users of protected works who wish to avail themselves of those technologies (**judgment of 5 June 2014, Public Relations Consultants Association, C-360/13, EU:C:2014:1195, paragraph 24 and the case-law cited**).

27 Such an interpretation, which is consistent with the principle of technological neutrality, according to which the law must specify the rights and obligations of persons in a generic manner, so as not to favour the use of one technology to the detriment of another (see, to that effect, judgment of 15 April 2021, Eutelsat, C-515/19, EU:C:2021:273, paragraph 48), must also be accepted with regard to the optional exception referred to in Article 5(2)(b) of Directive 2011/29, as the Advocate General observed, in essence, in point 36 of his Opinion.

28 The achievement of the objective, recalled in paragraph 25 of the present judgment, of preventing copyright protection in the European Union from becoming outdated or obsolete as a result of technological developments and the emergence of new forms of exploitation of copyright-protected content, which follows from recital 5 of Directive 2001/29, would be undermined if the exceptions and limitations to the protection of copyright which, according to recital 31 of that directive, were adopted in the light of the new electronic environment, were interpreted in such a way as to have the effect of excluding similar account being taken of those technological developments and of the emergence in particular of digital media and cloud computing services.

29 In those circumstances, it is not necessary, in terms of functionality, to make a distinction, for the purpose of applying Article 5(2)(b) of Directive 2001/29, according to whether the reproduction of a protected work is carried out on a server on which storage space has been made available to a user by the provider of a cloud computing service or whether such a reproduction is made on a physical recording medium belonging to that user.

30 Consequently, it must be held that the concept of 'any medium', referred to in Article 5(2)(b) of Directive 2001/29, includes a server on which storage space has been made available to a user by the provider of a cloud computing service.

31 That finding is not called into question by the argument advanced by the European Commission that the saving of a copy in the cloud is not separable from possible acts of communication, with the result that such an act, on the basis of the case-law derived from the **judgments of 29 November 2017, VCAST, (C-265/16, EU:C:2017:913**), and of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers (C-263/18, EU:C:2019:1111), should come under Article 3(1) of Directive 2001/29. In fact, the case in the main proceedings is to be distinguished from those that gave rise to the judgments relied on by the Commission. First, the case that gave rise to the **judgment of 29 November 2017, VCAST (C-265/16, EU:C:2017:913**), concerned a service with a dual functionality, namely not only reproduction in the cloud, but also, simultaneously or almost simultaneously, communication to the public. Secondly, the case that gave rise to the judgment of 19 December 2019,

Nederlands Uitgeversverbond and Groep Algemene Uitgevers (C-263/18, EU:C:2019:1111), concerned the provision by a club of an online service consisting of a virtual market for 'second-hand' electronic books, in which protected works were made available to any person who registered on that club's website, with such persons being able to access the site from a place and at a time individually chosen by them, such a service having to be regarded as communication to the public, within the meaning of Article 3(1) of that directive.

32 In any event, any communication that would result from the sharing of a work by the user of a cloud storage service would constitute an act of exploitation that is distinct from the reproduction act referred to in Article 2(a) of Directive 2001/29, which may come within the scope of Article 3(1) of that directive, if the conditions for the application of that provision are satisfied.

33 In the light of the foregoing considerations, the answer to the first question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the expression 'reproductions on any medium', referred to in that provision, covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud computing service.

The second question

34 As a preliminary point, it should be noted that, while it is apparent from the wording of the second question that, in formal terms, it relates to the issue of whether Article 5(2)(b) of Directive 2001/29 'is applicable' to national legislation such as that at issue in the main proceedings, it must be stated, in the light of the grounds of the request for a preliminary ruling, that the referring court seeks, in essence, to determine whether that provision precludes legislation that implements the private copying exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation.

35 Accordingly, by its second question, the referring court asks, in essence, whether Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial.

36 It was observed in paragraph 15 of the present judgment that, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive in the case of reproductions on any medium made by natural persons for private use and for ends that are neither directly nor indirectly commercial, on the condition that the holders of that exclusive right receive fair compensation, taking account of the technological measures referred to in Article 6 of that directive.

37 As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) thereof 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 (judgment of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 26 and the case-law cited).

38 It follows that, when 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 (**judgment of 9 June 2016, EGEDA and Others, C-470/14, EU:C:2016:418, paragraph 20 and the case-law cited**). As is apparent from the Court's case-law, a Member State which has introduced such an exception into its national law has, in that regard, an obligation to achieve a certain result, in the sense that that State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction owing to the reproduction of protected works by end users who reside on the territory of that State (see, to that effect, **judgment of 21 April 2016, Austro-Mechana, C-572/14, EU:C:2016:286, paragraph 20 and the case-law cited)**.

39 The copying by natural persons acting in a private capacity, without seeking the prior consent of the holder of the exclusive right of reproduction of a protected work, must, indeed, be regarded as an act likely to cause harm to that rightholder (see, to that effect, judgments of 16 June 2011, Stichting de Thuiskopie, C-462/09, EU:C:2011:397, paragraph 26, and of **5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 22 and the case-law cited**).

40 Accordingly, in so far as, first, as is apparent from the answer to the first question, the expression 'reproductions on any medium', referred to in Article 5(2)(b) of Directive 2001/29, covers the saving, for private purposes, of copies of works protected by copyright on a server in which storage space is made available to a user by the provider of a cloud computing service and, second, the reproductions at issue are made by a natural person for private use and for ends that are neither directly nor indirectly commercial, this being a matter which it is for the referring court to determine, it must be held that Member States which implement the exception referred to in that provision are obliged to provide for a system of fair compensation intended to compensate rightholders, in accordance with that provision.

41 According to the Court's settled case-law, since the provisions of Directive 2001/29 do not provide any further details concerning the various elements of the fair compensation system, the Member States enjoy broad discretion in that regard. It is for the Member States to determine, inter alia, who must pay that compensation and to establish the form, detailed arrangements for collection and the level of that

compensation (**judgments of 21 April 2016, Austro-Mechana, C-572/14, EU:C:2016:286, paragraph 18**, and of **22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 27 and the case-law cited**).

42 As stated in recital 35 of Directive 2001/29, Member States must, when making that determination, take account of the particular circumstances of each case (**judgment of 11 July 2013, Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 22)**.

43 As regards, in the first place, the person liable for the fair compensation, the Court has already held that it is, in principle, for the person carrying out private copying to make good the harm connected with that copying by financing the compensation that will be paid to the copyright holder (**judgments of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 45**; of **5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 22**; and of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 30). Accordingly, as regards the provision of cloud computing storage services, it is, in principle, for the user of those services to finance the compensation paid to that holder.

44 The Court has, however, ruled that, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and may therefore not give rise to an obligation for payment, 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 digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or provide copying services for them. Under such a system, it is the persons having that equipment who must pay the private copying levy (see, to that effect, judgments of **21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 46**; of **5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 23**; and of **22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 31**).

45 The Court has pointed out in this regard 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 manner consistent with the 'fair balance', referred to in recital 31 of Directive 2001/29, between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject matter (**judgment of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 33**).

46 It follows that, as EU law currently stands, the introduction of a system of fair compensation, in which the producer or importer of the servers by means of which the cloud computing services are offered to private persons is required to pay the private copying levy, that levy being passed on economically to the purchaser of such servers, combined with the introduction of a private copying levy on the media that are integrated into the connected devices that make it possible to make copies of protected subject matter in a cloud computing storage space, such as mobile telephones, computers and tablets, falls within the discretion allowed to the national legislature for defining the various elements of the fair compensation system, as recalled in paragraph 41 above.

47 It is, however, for the national court to ensure, in accordance with the case-law of the Court, having regard to the particular circumstances of the national system and the limits imposed by Directive 2001/29, that the establishment of such a system is justified by practical difficulties in identifying the final users or other similar difficulties and that the persons responsible for payment have a right to reimbursement of that levy in cases where it is not due (see, to that effect, **judgment of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraphs 34 and 35 and the case-law cited**).

48 As regards the provision of storage services in the context of cloud computing, it must be held in that regard, as the Danish Government in essence stated, that such difficulties may arise from the dematerialised nature of such services, which may be offered from Member States other than that concerned or from third countries, which generally include the possibility for the user to alter as he or she wishes, in an evolving and dynamic manner, the size of the storage space that may be used for private copying.

49 In the second place, as regards the form, detailed arrangements and level of fair compensation, the Court has already held that that compensation and, therefore, the system on which it is based, as well as the level of compensation, must be linked to the harm resulting for the rightholders from the making of copies for private use **(judgments of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 21, and of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 28 and the case-law cited).**

50 Any fair compensation that is not be linked to the harm caused to rightholders as a result of such copying would not be compatible with the requirement, set out in recital 31 of Directive 2001/29, that a fair balance must be safeguarded between the rightholders and the users of protected subject matter (**judgments of 12 November 2015, Hewlett-Packard Belgium, C-572/13, EU:C:2015:750, paragraph 86**, and **of 22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717, paragraph 54)**.

51 In the present case, as has been noted in paragraph 17 of the present judgment, the copying of protected works in storage space in the context of cloud computing

requires the carrying out of several acts of reproduction, which may be effected from a number of connected terminals.

52 As the Advocate General stated in point 71 of his Opinion, in so far as the uploading and downloading of copyright-protected content during the use of storage services in the context of cloud computing may be classified as a single process for the purposes of private copying, it is open to the Member States, in the light of the broad discretion which they enjoy, as recalled in paragraphs 41 and 46 of the present judgment, to put in place a system in which fair compensation is paid solely in respect of the devices or media which form a necessary part of that process, provided that such compensation may reasonably be regarded as reflecting the possible harm to the copyright holder (see, to that effect**, judgment of 27 June 2013, VG Wort and Others, C-457/11 to C-460/11, EU:C:2013:426, paragraph 78**).

53 In that context, while it is open to the Member States to take account, when setting the private copying levy, of the fact that certain devices and media may be used for the purpose of private copying in connection with cloud computing, they must ensure that the levy thus paid, in so far as it affects several devices and media in that single process, does not exceed the possible harm to the rightholders resulting from the act in question, as stated in recital 35 of Directive 2001/29.

54 In the light of those considerations, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial, in so far as that legislation provides for the payment of fair compensation to the rightholders.

Costs

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

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

1. Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the expression ‘reproductions on any medium’, referred to in that provision, covers the saving, for private purposes, of copies of works protected by copyright on a server in which storage space is made available to a user by the provider of a cloud computing service.

2. Article 5(2)(b) of Directive 2001/29 must be interpreted as not precluding national legislation that has transposed the exception referred to in that provision and that does not make the providers of storage services in the context of cloud computing subject to the payment of fair compensation in respect of the unauthorised saving of copies of copyright-protected works by natural persons, who are users of those services, for private use and for ends that are neither directly nor indirectly commercial, in so far as that legislation provides for the payment of fair compensation to the rightholders.

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 23 September 2021(1)
Case C-433/20
Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH
v
Strato AG
(Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria))
(Request for a preliminary reference – Approximation of laws – Copyright and related rights – Directive 2001/29/EC – Article 2 – Reproduction right – Article 5(2)(b) – Private copying exception – Servers owned by third parties made available to natural persons for private use – Provision of a cloud computing service – Interpretation of terms ‘on any medium’ – Fair compensation)

I. Introduction

1. The advent of the commercial photocopier from the late 1950s onwards was perhaps just the first in a series of technological developments which posed a challenge to traditional understandings of copyright and related rights and, in particular, to the exceptions and limitations thereto. The arrival of the photocopier meant that copyright material could easily be reproduced in a manner which was all but impossible to police or detect. The digital revolution, which has been ongoing since the emergence of the internet and the worldwide web in the early 1990s, has posed ever greater challenges to these traditional understandings.

2. This request for a preliminary reference presents another aspect of this emerging problem. Is a natural person who is lawfully in possession of copyrighted material entitled to make a copy of that material for their own purely private purposes and, on payment of a fee, to store it on a commercial server using cloud computing techniques and, if so, what, if any, payment is then due to the copyright owner? This, in essence, is the issue presented in this reference for a preliminary ruling by the Oberlandesgericht Wien, (Higher Regional Court, Vienna, Austria), which was lodged at the Registry of the Court of Justice of the European Union on 15 September 2020. The reference 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. (2)

3. The reference has been made in proceedings between the Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana'), a copyright collecting society, on the one hand, and Strato AG ('Strato'), a company established in Germany which provides a service for the storage of data in the cloud, on the other hand. The proceedings before the referring court concern the issue of whether compensation for the exploitation of the right of reproduction is due by Strato in respect of cloud-based storage capacity provided by it in Austria to natural persons for private use.

4. The present request for a preliminary ruling provides the Court with an opportunity to examine the issue of copying by natural persons for private use in the digital environment and, more specifically, the reproduction or storage in the cloud (3) of copyright-protected content.

5. It is important to stress that where a 'private copying' exception to the exclusive right of reproduction provided in Article 2 of Directive 2001/29 has been adopted by a Member State pursuant to Article 5(2)(b) of that directive, such copying is then lawful provided that what is described as fair compensation is paid to the rightholder. In the event, of course, that the Member State in question does not avail of the Article 5(2)(b) exemption, then such reproduction of copyright material without the consent of the rightholder would be plainly unlawful as contrary to Article 2. (4)

6. In the present case, the Court is required first to examine whether and, if so, to what extent the private copying exception also applies in respect of reproductions in the cloud made by natural persons for private use of copyright-protected content. In the event that the Court were to consider that the private copying exception also applies in respect of such reproductions, the Court would then have to examine the question of what (if any) the 'fair compensation' would be in accordance with the provisions of Article 5(2)(b) of Directive 2001/29 which would be due to rightholders in respect of storage in the cloud made available to natural persons for private use by internet services providers.

7. In particular, given that a levy may already have been paid by natural persons when purchasing devices, media or equipment – such as smartphones, tablets or computers (5) – which permit the storage and thus reproduction of copyright-protected content to the cloud and thus provide (fair) compensation to rightholders for the harm suffered as a result of copying, the question then arises whether an (additional) levy should be paid by internet services providers which make available storage in the cloud for that same content by way of the 'fair compensation' required by Article 5(2)(b) of Directive 2001/29.

8. Prior to examining these questions, however, it is first necessary to set out the legal context in which the present case arises.

II. Legal context

A. Directive 2001/29

9. Recitals 2, 5, 9, 10, 31, 32, 35, 38 and 44 of Directive 2001/29 are worded as follows:

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

…

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

…

(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. …

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject matter.'

10. 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.'

11. Article 3 of Directive 2001/29 entitled 'Right of communication to the public of works and right of making available to the public other subject matter, provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

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

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

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

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

12. 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.'

13. 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.'

B. Austrian law

14. Paragraph 42b(1) of the Austrian Urheberrechtsgesetz (Law on Copyright) (6) ('UrhG'), in the version applicable at the time of the main proceedings, (7) provides:

'(1) If a work … is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium …, the author shall be entitled to equitable remuneration … (remuneration for exploitation of the right of reproduction on storage media) in the case where storage media of any kind which are suitable for making such reproductions are, in the course of a commercial activity, placed on the market in national territory.'

III. The facts of the main proceedings and the reference for a preliminary ruling

15. Austro-Mechana is a copyright collecting society which protects, in a fiduciary capacity, the rights of use and the rights to remuneration in respect of works of music (with and without lyrics) in its own name but in the interest of and on behalf of the beneficiaries of those rights. The interests protected by collecting societies such as Austro-Mechana include, in particular, the statutory rights to remuneration provided for in Paragraph 42b(1) of the UrhG, that is, the right to remuneration in respect of the exploitation of the right of reproduction on storage media.

16. Austro-Mechana brought an action before the Handelsgericht Wien (Commercial Court, Vienna,

Austria) against Strato, a company established in Germany, which provides a service under the name 'HiDrive'. The service in question is described by its supplier as a 'virtual cloud storage solution which is as quick and simple to use as an (external) hard disk'. Strato claims that its storage solution 'offers enough space to store photos, music and films in one central location'.

17. Austro-Mechana sought an order allowing it to invoice for, and subsequently take payment in settlement of, the remuneration owed by Strato under Paragraph 42b(1) of the UrhG for exploitation of the right of reproduction on storage media. It contends that given that the form of words used in Paragraph 42b(1) of the UrhG is itself deliberately framed in general terms, remuneration for exploitation of the right of reproduction on storage media is payable even in the case where storage media of any kind are, in the course of a commercial activity, 'placed on the market' – by whatever means and in whatever form – within national territory, including in situations involving the provision of cloud-based storage space. It says that the descriptive words 'place on the market' do not refer to physical distribution but deliberately leave scope for the inclusion of all processes that have the effect of making storage space available to users in national territory for the purposes of reproduction for (personal or) private use. In addition, Paragraph 42b(3) of the UrhG makes it clear that it is immaterial whether the storage media placed on the market originate in national territory or in other countries.

18. Strato contested the application. It claimed that the applicable version of the UrhG does not provide for remuneration for cloud services and that the legislature, being cognisant of the technical possibilities available, made a deliberate choice not to take up that option. According to Strato, cloud services and physical storage media are not comparable. An interpretation that includes cloud services is not possible as storage media is not placed on the market; storage space is simply made available. Strato claimed that it does not sell or lease physical storage media to Austria but merely offers online storage space on its servers hosted in Germany. Strato also stated that it has already indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer). In addition, Austrian users had already paid a copyright fee for the devices without which content cannot even be uploaded to the cloud in the first place. The imposition of an additional charge by way of remuneration for exploitation of the right of reproduction on storage media, for cloud storage, would, according to Strato, have the effect of doubling or even tripling the obligation to pay a fee.

19. The Handelsgericht Wien (Commercial Court, Vienna) dismissed the action. It held essentially, that holders of copyright and related rights ('rightholders') are entitled to equitable remuneration in the case where storage media (from a location in national territory or another country) are, in the course of a commercial activity, placed on the market in the national territory, if an object requiring protection is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium (in a manner permitted in accordance with Paragraph 42(2) to (7) of the UrhG), that is to say, in relation to storage media of any kind that are suitable for making such reproductions.

20. The Handelsgericht Wien (Commercial Court, Vienna) stated that Paragraph 42b(1) of the UrhG, which expressly refers to 'storage media of any kind', includes – internal and external – computer hard disks. It also stated that cloud services exist in the most diverse forms. The core of any such service is the assurance that the user has a certain storage capacity, but this does not include the right for the user to have his or her content stored on a particular server or on particular servers, his or her entitlement being limited to being able to access his or her storage capacity 'somewhere in the [supplier's] cloud'. According to that court, Strato does not therefore provide its customers with storage media but makes storage capacity available – as a service – online. It noted that in the course of the procedure for peer review of the draft of the Urh-Nov, (8) an express call was made for account to be taken of cloud storage and proposed forms of words were put forward for that purpose. However, the legislature deliberately chose not to include such a provision.

21. Austro-Mechana appealed against that judgment before the referring court. The referring court considers that the question whether Article 5(2)(b) of Directive 2001/29 covers the storage of copyright-protected content in the cloud is not entirely clear. In that regard, the referring court notes that in the judgment of **29 November 2017, VCAST (C-265/16, EU:C:2017:913; 'the VCAST judgment')**, the Court stated that the storage of protected content in a cloud is to be treated as an exploitation of rights in which the author alone may engage.

22. In the light of the above considerations, the Oberlandesgericht Wien, (Higher Regional Court, Vienna) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the expression "on any medium" in Article 5(2)(b) of Directive [2001/29] to be interpreted as meaning that it also includes servers owned by third parties which make available to natural persons (customers) for private use (and for ends that are neither directly nor indirectly commercial) storage space on … those servers which those customers use for reproduction by storage ("cloud computing")?

(2) If so: is the provision cited in Question 1 to be interpreted as meaning that it is applicable to national legislation under which the author is entitled to equitable remuneration (remuneration for exploitation of the right of reproduction on storage media), in the case:

– where a work (which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes) is by its nature likely to be reproduced for personal or private use by being stored "on a storage medium of any kind which is suitable for such reproduction and, in the course of a

commercial activity, is placed on the market in national territory",

– and where the storage method used in that context is that described in Question 1?'

IV. Procedure before the Court

23. Written observations were submitted by Austro-Mechana, Strato, the Danish, French, Netherlands and Austrian Governments and the European Commission.

24. At the hearing of the Court on 7 July 2021, they all presented oral observations save for the Danish Government.

V. Analysis

A. First question

25. By its first question, the referring court seeks to ascertain whether the private copy exception contained in Article 5(2)(b) of Directive 2001/29 refers to reproductions made by natural persons for private use on storage space or capacity (in the cloud) made available or provided by a third party who is an internet service provider. That court asks, in essence, whether the terms 'reproductions on any medium' contained in Article 5(2)(b) of Directive 2001/29 includes reproduction based on cloud computing services provided by a third party.

26. It follows from the file before the Court that the first question referred arose due, inter alia, to the use of the terms 'placed on the market in the national territory' in Paragraph 42b(1) of UrhG. Strato has argued both before the referring court and this Court that the Austrian legislature clearly intended by the use of those terms to put in place a model for compensation of rightholders which focuses exclusively on the marketing of physical recording media/substrate and thus to exclude the use of cloud computing services provided by third parties. (9)

27. It would also appear from the request for a preliminary ruling that the referring court seeks clarification of the VCAST judgment and, in particular, the extent to which that judgment may be applied to the facts and the dispute in the main proceedings.

28. It must be noted that unlike the exception contained in Article 5(1) of Directive 2001/29 which is compulsory in nature, the exceptions or limitations contained in Article 5(2) and (3) of that directive in respect of the reproduction right are simply optional on the part of the Member States. (10)

29. In her Opinion in Joined Cases VG Wort (C-457/11 to C-460/11, EU:C:2013:34, points 35 to 37), Advocate General Sharpston noted that the optional nature of the exceptions or limitations gives Member States a certain freedom of action in this area. She thus considered that a Member State could introduce a measure which does not go as far as the provisions in question. For example, according to Advocate General Sharpston, a Member State may on the basis of Article 5(2)(b) of Directive 2001/29, lay down an exception for reproductions made by a natural person only when they are made on paper and exclusively for the purpose of private study, since the scope of that exception would be narrower than, but still fully encompassed within, what is authorised.

30. It may be noted, however, that the Court subsequently in its **judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 33)** stated that Member States cannot lay down detailed fair compensation rules which would discriminate, without any justification, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.

31. For my part, I consider that the same approach should apply to services. It may be said more generally that even though Member States do enjoy broad discretion (11) in respect of the manner in which they avail of the Article 5(2)(b) exception in their national laws they nonetheless cannot legislate for this purpose in a manner which would contradict or would be otherwise at variance with the underlying purpose of Directive 2001/29 itself. (12) It would, for example, be important to stress that Member States who elect to avail of the Article 5(2)(b) exception must do so in a technologically neutral (13) fashion.

32. Accordingly, what is in question in the present case is the actual scope of Article 5(2)(b) of Directive 2001/29 rather than the extent to which its scope may be restricted by a Member State when transposing that provision under national law by applying a private copying levy, unjustifiably perhaps, only to certain goods or services. Here the language of Article 5(2)(b) of Directive 2001/29 is quite clear: Member States may provide for an exception 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 (14) for private use and for ends that are neither directly nor indirectly commercial, on the condition that the exclusive rightholders receive fair compensation. (15)

33. According to the settled case-law of the Court, provisions such as Article 5(2)(b) of Directive 2001/29 which derogate from the reproduction right established by Article 2 of that directive must be interpreted restrictively so that it cannot give rise to an interpretation going beyond the cases expressly envisaged. (16) The Court has also held that copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the rightholder concerned, where it is done without seeking prior authorisation from that rightholder. (17) In addition, the Court has held that, while Article 5(2)(b) of Directive 2001/29 must be understood as meaning that the private copying exception prohibits the rightholder from relying on his or her exclusive right to authorise or prohibit reproductions with regard to persons who make private copies of his or her works, that provision must not be understood as requiring, beyond that express limitation, the copyright holder to tolerate infringements of his or her rights which may accompany the making of private copies. (18)

34. The referring court stated in its request for a preliminary ruling that Paragraph 42b(1) of UrhG transposes the private copy exception contained in

Article 5(2)(b) of Directive 2001/29. Article 5(2)(b) of Directive 2001/29 does not, however, employ terms equivalent to the terms 'placed on the market in the national territory' which are contained in Paragraph 42b(1) of the UrhG. Nor is there any indication that the EU legislature intended to limit the scope of Article 5(2)(b) of Directive 2001/29 exclusively to physical media or substrate.

35. One is instead left with the clear impression that the use of the broad and technologically neutral terms – 'reproductions on any medium' (19) – which are contained in Article 5(2)(b) of Directive 2001/29, militate against such an interpretation. (20) A literal interpretation of those terms alone (21) ensures, in my view, that the exception is not restricted to reproductions on physical media or substrate or, indeed, in an analogue or non-digital form. (22) The exception thus covers, inter alia, reproductions in both analogue and digital form (23) and, reproductions on a physical substrate such as paper or CDs/DVDs or in a somewhat more intangible media/substrate such as in the case in the main proceedings storage space or capacity (24) made available in the cloud by an internet service provider. In that regard, the wording of Article 5(2)(b) of Directive 2001/29 must be contrasted with Article 5(2)(a) of that directive, as the latter expressly provides that its scope is limited to 'reproductions on paper or any similar medium'. (25)

36. That conclusion is, moreover, supported by one of the principal objectives pursued by Directive 2001/29, namely, to ensure that copyright protection in the EU did not become outdated and obsolete by virtue of the march of technological development and the emergence of new forms of exploitation of copyright-protected content. (26) That objective would, however, be undermined if the exceptions and limitations to that protection which were, according to recital 31 of Directive 2001/29, adopted in the light of the new electronic environment were interpreted in such a manner as to have the effect of excluding similar account being taken of such technological developments and the emergence in particular of digital media and cloud computing services. (27)

37. My conclusion on this matter is not altered by the fact that copyright-protected content is reproduced on storage space within the cloud made available or provided by a third party who is an internet service provider. In its VCAST judgment, (28) which also concerned cloud computing services – albeit in the different context of facilitating the illegal downloading of copyrighted television material – the Court restated its settled case-law that in order to rely on Article 5(2)(b) of Directive 2001/29 it is not necessary that the natural persons concerned possess reproduction equipment. Devices or copying services may thus be provided by a third party, which is the factual precondition for those natural persons to obtain private copies. (29)

38. As I have just indicated, in the case giving rise to the VCAST judgment, cloud technology was used by VCAST to provide access on a commercial basis to (copyright protected) television programmes produced by Italian television organisations. In that case, VCAST unlawfully made available to its customers via the internet a video recording system using storage space within the cloud for this purpose. (30) By contrast, the case in the main proceedings simply concerns the making available of storage capacity in the cloud and the potential storage by natural persons for private use of lawfully acquired copyrighted material in the computers/servers of the service provider. These modern technological advances should nevertheless not obscure the fact that, viewed from a legal standpoint, this may be equivalent to photocopying the entirety of a book or 'burning' a copy of a CD onto the hard drive of a computer where, in the examples given, the book and the CD have both been purchased by the consumer in question. (31)

39. The copyright infringement disclosed in the VCAST judgment was admittedly more egregious and harmful to the rightholder than that potentially disclosed by the facts of the present case, as the communication to the public in that case took the form of an illegal broadcast which had not been authorised by the rightholder. The fact remains that both cases would involve the act of reproduction by a natural person of the copyright-protected content on a 'medium'. It is thus clear from the VCAST judgment (and, indeed, the earlier case-law) that the Court has already implicitly accepted that that case-law and Article 5(2)(b) of Directive 2001/29 applies to such reproductions of copyright-protected content in the cloud. (32) Again, one must also not overlook the fact that in those instances where a Member State avails of the Article 5(2)(b) option, then the act of reproduction by a natural person for their own private purposes is not unlawful, (33) save that in that event fair compensation is payable.

40. The provider of such reproduction devices or copying services may not, however, make available copyright-protected content without the authorisation of the rightholder. Article 5(2)(b) of Directive 2001/29 thus implies that the rightholder is not otherwise deprived of his or her right to prohibit or authorise access to the protected content which natural persons may wish to copy for private use in accordance with its provisions. (34) Indeed, in its judgment of 10 April 2014, ACI Adam and Others (C-435/12, EU:C:2014:254, paragraph 41), the Court stated that Article 5(2)(b) of Directive 2001/29 must be interpreted as not covering the case of private copies made from an unlawful source. (35)

41. In accordance with Article 5(2)(b) of Directive 2001/29, the exception or limitation provided therein relates exclusively to the reproduction right provided for in Article 2 of that directive. (36) It does not extend, inter alia, to the right of communication to the public of works and right of making available to the public other subject matter referred to in Article 3 of that directive.

42. It is clear from the facts in the VCAST judgment that in that case the internet service provider had provided two services which consisted of the reproduction and the making available of the works and the subject matter concerned which were then saved in a cloud data storage space which was purchased by the

user from another provider. (37) As I have already indicated, there is no indication in the facts presented by the referring court that Strato provided any services to natural persons for private use other than storage capacity in the cloud.

43. In the light of the foregoing considerations I consider that the terms 'reproductions on any medium' in Article 5(2)(b) of Directive 2001/29 includes reproduction based on cloud computing services provided by a third party.

B. Second question

44. In the light of my conclusion on the first question referred, it is necessary to answer the second question posed by the referring court. By that question, the referring court, in substance, seeks to ascertain whether Article 5(2)(b) of Directive 2001/29 requires national legislation on private copying such as Paragraph 42b(1) of the UrhG to provide for the payment of fair compensation to rightholders in respect of storage capacity in the cloud made available by third parties to natural persons for private use. This question was posed in the light of the fact that Paragraph 42b(1) of the UrhG does not provide for the payment of levies in respect of cloud services. That provision does, however, provide for levies in respect of a range of media.

45. In that regard, it must be recalled that Strato claimed before the referring court that it had 'indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer), and (Austrian) users too have already paid a copyright fee for the devices without which content cannot even be uploaded to the cloud in the first place. The imposition of an additional charge by way of remuneration for exploitation of the right of reproduction on storage media, for cloud storage, would have the effect of doubling or even tripling the obligation to pay a fee'.

1. Arguments

46. Austro-Mechana considers that reproductions in the cloud cause harm to rightholders in a similar manner to the distribution of recording media or reproduction devices or the provision of reproduction services and must thus be subject to fair compensation. It considers therefore that Paragraph 42b(1) of the UrhG must be interpreted in conformity with Article 5(2)(b) of Directive 2001/29 as meaning that the fair compensation provided for therein is due in respect of the provision of services for reproduction in the cloud.

47. Strato considers that cloud computing services were specifically excluded from Paragraph 42b(1) of the UrhG by the Austrian legislature in order to avoid the payment of double or indeed triple levies. In that regard, it notes that in order to avail of cloud computing services, the protected material must be on a storage medium before it can be loaded into the cloud. Under Austrian law, a copyright levy must be paid for the storage medium – mobile phone, computer, tablet – by means of which the private copy is made. In addition, according to Strato, the user pays a royalty in order to access the original. Moreover, Strato claims that the user cannot do much with the simple recording itself of the private copy in the cloud. Rather, the private user uses the cloud to consult the downloaded content on other terminal equipment or to save it on them. However, such equipment have their own storage media which is subject to a levy. Thus, according to Strato, on the user side alone, rightholders have up to three sources of revenue: first, the initial acquisition of the work, secondly, storage on the terminal equipment used for loading, which is subject to a levy, and thirdly, storage on the terminal equipment used for downloading, which is also subject to a levy. Strato also considers, by analogy with **the judgment of 27 June 2013, VG Wort and Others (C-457/11 to C-460/11, EU:C:2013:426, paragraph 78**), that where a chain of devices is used to create a private copy, the requirement of fair compensation may be imposed on one device in the chain.

48. The Austrian Government considers that a server through which cloud computing services are offered to private persons constitutes a recording medium in respect of which the producer or importer is obliged to pay remuneration. This remuneration is passed on to the provider of the cloud computing services. An additional claim for remuneration against the cloud service provider is therefore unnecessary and risks giving rise to overcompensation.

49. The Danish Government considers that cloud computing services cannot be equated with the making available of digital reproduction equipment, devices and media to private persons or the provision of a reproduction service to them. It therefore considers that the the Padawan judgment which applies to physical storage media such as CDs and DVDs and which predates cloud computing is not transposable to the facts in the present case. According to the Danish Government, cloud computing is not necessary for natural persons to acquire private copies. A cloud computing service is only a digital storage space for digital content, and the content stored in this way can only be accessed by private persons via the types of storage media that are used to initiate the storage in the first place, namely smartphones or computers. It is therefore these initial storage media – and not the cloud computing service – that are the necessary precondition for individuals to come into possession of a private copy. A system in which cloud computing services are subject to a levy therefore does not seem to be in line with the 'fair balance' requirement in recital 31 of Directive 2001/29. The Danish Government considers that there may be a non-negligible risk of overcompensation, consisting of paying several times for the same private copy. This may occur in particular in cases where two levies are paid for the storage medium on which the copy is made and for the subsequent service consisting of its storage (for example, a cloud computing service).

50. The French Government notes that servers used by service providers, even if subject to the payment of a private copying levy, are not necessarily put into circulation and acquired in the territory of the Member State concerned by the private copying. Therefore, the fact that double compensation cannot be ruled out should

not lead to the exclusion of the possibility for Member States to make cloud storage service providers who provide services to users residing on their territory subject to levies. Otherwise effective compensation for the loss resulting from private copies made in this context could be inexistent. (38) In any event, private copying levies paid in the Member State concerned on the devices necessary to upload content from a cloud service do not constitute a double payment in relation to the remuneration that should be paid by the operator of that service. Reproductions made on these devices which give rise to the private copy levy constitute acts of private copying that are distinct from those made on the cloud service. Each of these acts of reproduction gives rise to a distinct harm in the Member State concerned and requires the payment of fair compensation.

2. The Padawan judgment

51. As this entire issue of private copying and fair compensation was first considered by the Court in the Padawan judgment, it may be convenient to consider this decision in a little detail.

52. In this case a Spanish copyright collection agency sought to recover what was described as a private copying levy provided for by Spanish law from an entity which marketed CD, DVD and MP3 players. This was objected to on the ground that the application of that levy to digital media, indiscriminately and regardless of the purpose for which they were intended was incompatible with Directive 2001/29.

53. The Court first observed that copying 'by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned'. (39) While it recognised that it was in principle for that person to make good 'the harm related to that copying by financing the compensation which will be paid to the rightholder', (40) it also drew attention to the considerable practical difficulties in identifying the infringements of private users, together with the fact that the harm caused by such individual infringements might simply be de minimis and thus not give rise to a payment obligation.

54. The Court then stated that '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. It is true that in such a system it is not the users of the protected subject matter who are the persons liable to finance fair compensation, contrary to what recital 31 in the preamble to the directive appears to require. However, it should be observed, first, that the activity of the persons liable to finance the fair compensation, namely, the making available to private users of reproduction equipment, devices and media, or their supply of copying services, is the factual precondition for natural persons to obtain private copies. Second, nothing prevents those liable to pay the compensation from passing on 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. 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 benefit from a copying service must be regarded in fact as the person indirectly liable to pay fair compensation'. (41)

55. The Court then concluded that since the levy system enables the person liable to pay compensation to the collecting societies acting on behalf of the rightholders to recoup that cost from private users upon the purchase of, for example, recording equipment, such a system must be regarded as being in principle consistent with the fair balance required as between the interests of rightholders and others. (42)

56. The Court also held that there was a necessary link between the application of the levy to private consumers and the possible harm which might be caused to rightholders by private copying. As those consumers are presumed to benefit from and to take 'full advantage of the functions associated with that equipment, including copying', it followed that the fact that such equipment or devices are able to make copies 'is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users'. (43)

3. Analysis

57. As we have seen, Article 5(2)(b) of Directive 2001/29 provides that Member States who elect to establish a 'private use' exception are obliged to ensure, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders. (44) Given that Article 5(2)(b) of Directive 2001/29 is optional and does not provide any further details concerning the various parameters of the fair compensation scheme that it requires to be established, it is clear that the Member States necessarily enjoy broad discretion in regard to the parameters of their national law. (45) Member States may accordingly determine the persons who have to pay that fair compensation, (46) and to determine the form, detailed arrangements and level thereof, in compliance with Directive 2001/29 and, more generally, with EU law, even if, as this Court has already held, the issue of fair compensation is itself an autonomous EU law term. (47) As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) thereof reflects the EU legislature's intention to establish a specific compensation scheme which is triggered by a rebuttable presumption in certain circumstances of the existence of harm caused to rightholders, and which gives rise, in principle, to the obligation by users to compensate them. (48)

58. Given that the potential for copying – particularly in the digital environment – is ubiquitous and, all-pervasive, the EU legislature introduced the private copying exception in Article 5(2)(b) of Directive

2001/29 as a means of ensuring that rightholders do not unduly suffer from the harm (49) caused by such copying. (50) When Member States opt to implement the private copying exception provided for under Article 5(2)(b) of Directive 2001/29 in their national law, they are required, in particular, to provide for the payment of fair compensation to the rightholder.

59. Fair compensation is compensation which does not over or under compensate (51) the rightholders for the harm caused by private copying. It must be noted in that regard, that the requirement of fair compensation in respect of such copying laid down in Article 5(2)(b) of Directive 2001/29 is by its very nature a proxy for or an approximation of the harm caused to rightholders. Given the private nature of such copying, it is difficult – indeed, virtually impossible – to police or detect, the Court has thus allowed the Member States to adopt within their margin of discretion certain rebuttable presumptions as regards private copying. (52)

60. As the Court noted at paragraph 51 of the judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515), remuneration systems for private copying are at present necessarily imprecise with regard to most recording media, in that it is impossible in practice to determine which work was reproduced by which user and on which medium. (53) The Court has stated with regard to digital reproduction equipment, devices and media that it is understood that the amount of a levy of that kind which is fixed in advance cannot be fixed on the basis of the criterion of actual harm suffered, as the extent of that harm remains unknown at the moment at which the devices concerned are put into circulation on national territory. Accordingly, that levy must necessarily be set as a lump sum. (54)

61. Recital 35 of Directive 2001/29 also makes it clear that in those 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. (55) There may thus be instances, as recital 35 of Directive 2001/29 makes clear, where the 'prejudice to the rightholder would be minimal, no obligation for payment may arise'. I would note also that in accordance with Article 6 of Directive 2001/29, as interpreted by the Court in its judgment of **5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 72**), the Member State concerned may make the actual level of compensation owed to rightholders dependent on whether or not technological measures are applied, so that rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception.

62. Moreover, at paragraph 78 of the **judgment of 27 June 2013, VG Wort and Others (C-457/11 to C-460/11, EU:C:2013:426**), the Court stated that 'where the reproductions at issue have been made by means of a single process, with the use of a chain of devices, it is likewise open to the Member States to go back to the stages before the copying stage and put in place, where appropriate, a system in which fair compensation is paid by the persons in possession of a device forming part of that chain which contributes to that process in a non-autonomous manner, in so far as those persons have the possibility of passing on the cost of the levy to their customers. Nevertheless, the overall amount of fair compensation owed as recompense for the harm suffered by the rightholders at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device'.

63. In passing, I cannot help thinking that the EU legislature might with advantage reconsider this aspect of Article 5(2)(b) of Directive 2001/29. (56) The term 'fair compensation' is so broad and open-ended that some degree of subjective assessment is inevitable. Aside from the guidance provided by Article 5(5) of Directive 2001/29 and certain recitals of that directive, in particular, recitals 31 and 35 thereof, there are few other legal standards which can usefully guide either national courts or this Court as to what compensation (if, indeed, any) might be considered 'fair' in the present context. (57)

64. In that regard, Article 5(5) of Directive 2001/29 provides in substance that the exception or limitation in Article 5(2)(b) of that directive may not conflict with a normal exploitation (58) of the work or other subject matter and do not unreasonably prejudice the legitimate interests (59) of the rightholder.

4. The application of these principles to the present case

65. Turning now to the present case, it is necessary to assess the extent to which (if at all) rightholders have a right to receive (additional) compensation in respect of storage capacity in the cloud made available to natural persons for private use (60) given that, as in this case, national legislation would appear to already provide for the payment of levies in respect of a very wide range of specified media.

66. Each step in the process of uploading and downloading copyright-protected content to the cloud from devices or media such as smartphones constitutes a reproduction of that content which is, in principle, in breach of Article 2 of Directive 2001/29 unless such reproduction is justified by virtue of an exception or limitation pursuant to Article 5 of that directive. Given that Article 5(2)(b) and Article 5(5) of Directive 2001/29 equally strive to avoid both under and over compensation of the rightholder and thus to achieve a fair balance between the private user and the rightholder, the question which arises is whether a separate levy must be paid in respect of each step in this sequence of copies, including the reproduction/storage in the cloud, given that an adequate levy may have already been paid by the user on devices and media used by it in the sequence. (6

67. At the hearing on 7 July 2021, both Austro-Mechana and the Austrian Government stated that a private copy levy is not payable in Austria on devices but only in respect of media. It would appear, subject to verification by the referring court, that this statement is confirmed by the Private Copying Global Study 2020. (62) It must be noted however (63) that according to that study, levies are payable in respect of a very wide range

of media. (64) Thus a levy would appear to be payable, inter alia, on integrated memory in mobile phones with music and/or video playback, integrated memory in a range of computers and tablets, smartwatches with integrated memory, DVDs, USB sticks, etc. No levy is payable in respect of the provision of storage capacity in the cloud. (65) It was also stated in that study in respect of Austria in the section entitled 'Explanation on Developments' that 'there is, however, a significant decrease in sales of physical media with the exception of mobile phones. People are more and more relying on the cloud for private copying and/or streaming services. A levy for cloud private copying is therefore the immediate strategic aim of Austro-Mechana'.

68. It would thus appear from the file before the Court, subject to verification by the referring court, that the private copying behaviour of natural persons (66) is evolving, with greater reliance being placed on a limited number of devices and media such as smartphones and tablets in conjunction with cloud computing services rather than on a wide range of devices and media alone. In addition, it would appear, subject to verification by the referring court, that devices and media are the target of levies rather than cloud computing services.

69. The right to fair compensation pursuant to Article 5(2)(b) of Directive 2001/29 is triggered by the rebuttable presumption in certain circumstances of the existence of harm caused to rightholders and gives rise, in principle, to the obligation by users to compensate them. In that regard, when assessing the harm to rightholders there is, in particular, a rebuttable presumption that natural persons take full advantage of the reproduction and storage capacity of electronic devices or media made available to them. (67) Moreover, it is assumed that the harm to the rightholder due to private copying arises in the Member State in which the final user resides. (68)

70. In my view, given the necessarily imprecise nature of lump sum levies on devices or media, caution must be exercised before combining such lump sum levies with other remuneration systems or grafting on to them other levies in respect of cloud services without conducting in advance an empirical study on the matter – and, in particular, without determining whether additional harm is caused to rightholders by the combined use of such devices/media and services – as this may give rise to overcompensation and upset the fair balance between rightholders and users referred to in recital 31 of Directive 2001/29.

71. If reproduction/storage in the cloud is not taken into account, there may be a risk of undercompensating the rightholder for harm. Nonetheless, as the uploading and downloading copyright-protected content to the cloud using devices or media could be classified as a single process for the purposes of private copying, it is open to the Member States in the light of the broad discretion which they enjoy to put in place, where appropriate, a system in which fair compensation is paid solely in respect of devices or media which form a necessary part of that process provided that this reflects the harm caused to the rightholder from the process in question.

72. In summary, therefore, a separate levy or fee is not payable in respect of the reproduction by a natural person for their own personal purposes based on cloud computing services provided by a third party provided that the levies paid in respect of devices/media in the Member State in question also reflects the harm caused to the rightholder by such reproduction. If a Member State has, in fact, elected to provide for a levy system in respect of devices/media, the referring court is in principle entitled to assume that this in itself constitutes 'fair compensation' in the sense of Article 5(2)(b) of Directive 2001/29, unless the rightholder (or their representative) can clearly demonstrate that such payment would in the circumstances of the case at hand be inadequate.

73. This assessment – which requires considerable economic expertise and a knowledge of a range of industries – is one which must be carried out at national level by the referring court.

VI. Conclusion

74. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Oberlandesgericht Wien, (Higher Regional Court, Vienna, Austria) as follows:

The terms 'reproductions on any medium' in 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 includes reproduction based on cloud computing services provided by a third party.

A separate levy or fee is not payable in respect of the reproduction by a natural person for their own personal purposes based on cloud computing services provided by a third party provided that the levies paid in respect of devices/media in the Member State in question also reflects the harm caused to the rightholder by such reproduction. If a Member State has, in fact, elected to provide for a levy system in respect of devices/media, the referring court is in principle entitled to assume that this in itself constitutes 'fair compensation' in the sense of Article 5(2)(b) of Directive 2001/29, unless the rightholder (or their representative) can clearly demonstrate that such payment would in the circumstances of the case at hand be inadequate.

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1 Original language: English.

2 OJ 2001 L 167, p. 10.

3 For a description of cloud computing, Opinion of Advocate General Szpunar in VCAST (C-265/16, EU:C:2017:649, points 1 to 3). The essence of the concept of cloud computing was defined by the US National Institute of Standards and Technology (NIST) in September 2011 as 'a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal

management effort or service provider interaction. …' Available at https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf. The authors of that definition noted that 'cloud computing is an evolving paradigm'. There would appear to be no universally accepted legal definition of cloud computing or cloud-based services. This is undoubtedly due to the ubiquitous nature and rapid evolution of that technology and related services. I consider, however, that the concept of 'cloud storage' is aptly described by Michael Muchmore & Jill Duffy in their article 'The Best Cloud Storage and File-Sharing Services for 2021', as referring 'to storing your files somewhere other than your computer's hard drive, usually on the provider's servers. As one tech pundit put it: "There is no Cloud. It's just someone else's computer." Having data in the cloud gives you the ability to access those files through the internet'. Available at https://www.pcmag.com/picks/the-best-cloud-storage-and-file-sharing-services.

4 Unless one of the other exceptions or limitations laid down in Article 5 of Directive 2001/29 is applicable.

5 In the past, the media of choice were tangible 'blank' storage items such as audio and video cassettes, then CDs and DVDs and more recently USB sticks. Devices such as computers, smartphones and external hard drives are also used today alongside cloud computing storage services.

6 9 April 1936 (BGBI. Nr.111/1936).

7 16 August 2018 (BGBI. I Nr.63/2018). In its request for a preliminary ruling, the referring court stated that in the Urheberrechtsgesetznovelle (Amendment to the Law on Copyright) 1980, BGBl. Nr. 321/1980, the Austrian legislature provided for a right to equitable remuneration enforceable against all those who, in the course of a commercial activity, place on the market within the national territory certain media intended for reproduction and storage. That legislation has since been adapted in order to bring it into line with changes of circumstances and with the requirements of EU law, in the form of the Urheberrechts-Novelle (Amendment to Copyright Legislation) ('Urh-Nov') 2015, BGBl. I Nr. 99/2015, which, in particular, brought computer hard disks within the scope of that legislation inasmuch as they constitute 'storage media of any kind'.

8 Before it was presented to the Austrian Parliament as a draft law.

9 I would note at the outset that I consider that the storage of copyright-protected content in the cloud constitutes a reproduction of that content. The Danish Government stated that 'cloud storage is achieved by a user sending, from a storage medium with internet access and built-in memory, such as a smartphone or computer, their selected content to be stored on the cloud service server. By doing so, the user is simultaneously making a digital reproduction of the selected content because the content is now stored on both the user's storage medium and the cloud service server. Subsequently, the user can either keep the content on their own storage medium or delete it, for example to free up storage space on their own storage medium, so that it only appears in the cloud service. The user can then access the content on the cloud service server from any device that can connect to the cloud service, which is usually from one of the user's own storage media and very often, in all likelihood, from the storage media that the user originally used to set up the cloud storage'. Emphasis added.

10 In its judgment of 10 April 2014, ACI Adam and Others (C-435/12, EU:C:2014:254, paragraph 21), the Court stated that Article 2 of Directive 2001/29 provides that Member States are to grant authors the exclusive right to authorise or to prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of their works, while reserving to those Member States the option, under Article 5(2) of that directive, of providing for exceptions and limitations to that right.

11 Judgment of **5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 20 and the case-law cited**).

12 See also Article 5(5) of Directive 2001/29.

13 The principle of technological neutrality requires that the interpretation of the provisions of Directive 2001/29 does not hold back innovation and technological progress. See by analogy, judgment of 15 April 2021, Eutelsat (C-515/19, EU:C:2021:273, paragraph 48).

14 Legal persons are excluded from benefiting from that exception and are not entitled to make private copies without receiving prior authorisation from the rightholders of the protected works or subject matter concerned. The Court has thus 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. Judgment of 9 June 2016, EGEDA and Others(C-470/14, EU:C:2016:418, paragraphs 30 and 31).However, in its judgment of 11 July 2013, Amazon.com International Sales and Others(C-521/11, EU:C:2013:515, paragraph 37), the Court held that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that it does not preclude legislation of a Member State which indiscriminately applies a private copying levy on the first placing on the market in national territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in that provision, where, having regard to the particular circumstances of each national system and the limits imposed by Directive 2001/29, practical difficulties justify such a system of financing fair compensation and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult.

15 Judgment of 21 October 2010, Padawan (C-467/08, EU:C:2010:620, 'the Padawan judgment', paragraph 30).

16 **Judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 87 and the case-law cited)**.

17 The Padawan judgment, paragraph 45.

18 See to that effect, the VCAST judgment, paragraphs 32 to 34 and the case-law cited. See also by analogy, judgment of 10 November 2016, Vereniging Openbare Bibliotheken (C-174/15, EU:C:2016:856, paragraph 70).

19 Emphasis added.

20 It must be noted that Article 5(2)(b) of Directive 2001/29 makes no express reference to the law of the Member States. In that regard, it is settled case-law that the need for uniform application of EU law and the principle of equality require that where provisions of EU law make no express reference to the law of the Member States for the purpose of determining their meaning and scope they must normally be given an autonomous and uniform interpretation throughout the Union. See by analogy, the Padawan judgment, paragraphs 31 to 33, concerning the concept of 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29. I therefore consider that the terms 'reproductions on any medium' must be given an autonomous and uniform interpretation throughout the Union.

21 See by contrast, judgment of 19 December 2019, Nederlands Uitgeversverbond and Groep Algemene Uitgevers (C-263/18, EU:C:2019:1111, paragraph 37). In that case the Court stated that it was unclear from the wording, inter alia, of Article 4 of Directive 2001/29 or any other provision of that directive whether the supply by downloading, for permanent use, of an e-book constitutes a communication to the public pursuant to Article 3 of that directive, in particular a making available to the public of a work in such a way that members of the public may access it from a place and at a time individually chosen by them, or an act of distribution for the purposes of Article 4 of that directive. After taking account, inter alia, of the objectives pursued by Articles 3 and 4 of Directive 2001/29, the WIPO Copyright Treaty ('the WCT') in Geneva on 20 December 1996, a treaty which was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6) and which entered into force with respect to the European Union on 14 March 2010 (OJ 2010 L 32, p. 1) and the legislative history of Directive 2001/29, the Court held that the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' within the meaning of Article 3(1) of that directive.

22 While the exception in Article 5(2)(b) of Directive 2001/29 must be interpreted strictly, the terms of that provision nonetheless largely mirror the corresponding broadly defined and technologically neutral exclusive reproduction right in Article 2 of Directive 2001/29. That provision states that Member States must provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form. See also Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979.

23 In its **judgment of 27 June 2013, VG Wort and Others (C-457/11 to C-460/11, EU:C:2013:426, paragraph 67)**, the Court excluded from the scope of Article 5(2)(a) of Directive 2001/29, all non-analogue mediums of reproduction, namely, in particular, digital mediums, as, in order to be similar to paper as a medium for reproduction, a substrate must be capable of bearing a physical representation capable of perception by human senses. See by contrast, **judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 25**), in which the Court found that making available digital reproduction equipment, devices and media which is able to make copies to natural person as private users is sufficient in itself to justify the application of the private copying levy.

24 The words 'somewhat more intangible media' are, admittedly, deliberately imprecise. Even in the case of cloud computing and cloud-based or internet storage services, the data in question – which may or may not include copyright-protected content – is ultimately stored in digital format by the cloud computing service provider on physical media/substrates such as servers.

25 Emphasis added. In its **judgment of 27 June 2013, VG Wort and Others (C-457/11 to C-460/11, EU:C:2013:426, paragraphs 65 and 66**), the Court stated that it follows from the wording of Article 5(2)(a) of Directive 2001/29, which specifically refers to paper, that mediums which do not have comparable and equivalent qualities to those of paper do not come within the scope of the exception referred to in that provision. If it were otherwise, the effectiveness of that exception could not be ensured, particularly in the light of the exception referred to in Article 5(2)(b) of Directive 2001/29, which concerns 'reproductions on any medium'. In her Opinion in **Joined Cases VG Wort (C-457/11 to C-460/11, EU:C:2013:34, point 39),** Advocate General Sharpston noted that while the definition in Article 5(2)(a) is circumscribed only in terms of the means of reproduction and the medium used, that in Article 5(2)(b) refers exclusively to the identity of the person making the reproduction and the purposes for which it is made. For an assessment of the difference in scope of Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29, see also, Opinion of Advocate General Cruz Villalón in **Hewlett-Packard Belgium (C-572/13, EU:C:2015:389, points 35 to 54).** See also judgment **of 12 November 2015, Hewlett-Packard Belgium (C-572/13, EU:C:2015:750, paragraphs 28 to 43)** on the overlap between the respective ambits of Article 5(2)(a) and (b) of Directive 2001/29.

26 See recital 5 of Directive 2001/29.

27 Recital 31 of Directive 2001/29 specifically refers to the fact that 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. In that regard, the Court in its judgment of 4 October 2011, Football Association Premier League and Others (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 161 to 164) stated in relation to the

mandatory exception to the reproduction right provided in Article 5(1) of Directive 2001/29 that the interpretation of the conditions laid down in that provision must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 of that directive. The Court further stated that 'in accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other'. See also, judgment of 5 June 2014, Public Relations Consultants Association (C-360/13, EU:C:2014:1195, paragraph 24). I see no reason to depart from that approach in the present case despite the optional nature of the exception contained in Article 5(2)(b) of Directive 2001/29 and the requirement to interpret its scope strictly.

28 See paragraph 35 of the VCAST judgment and the case-law cited.

29 In **judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 86)**, the Court noted that the wording of Article 5(2)(b) of Directive 2001/29 does not specify the characteristics of the devices by or with the aid of which copies for private use are made. In particular, that provision does not contain any reference to the legal nature of the connection, such as the right to property, which may exist between the natural person who makes the reproduction for private use and the device used by that person. The Court further held at paragraph 91 of that judgment that Directive 2001/29 does not preclude national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party.

30 At paragraph 15 of the VCAST judgment the Court stated that 'in practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service provided by that company. The user can specify either a certain programme or a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space is purchased by the user from another provider'. Emphasis added.

31 The French Government noted that a private individual may record his or her legally acquired music or video library on the cloud, so as have easy access to them, without having to use the physical support of these works.

32 In his Opinion in VCAST (C-265/16, EU:C:2017:649, points 23 to 28), Advocate General Szpunar considered that there was nothing to suggest that Article 5(2)(b) of Directive 2001/29 prevents reproduction under the exception provided for in that provision being made in storage space in the cloud. Advocate General Szpunar acknowledged that making reproductions and storing them in the cloud requires the intervention of third persons. He considered, however, that this form of reproduction should not be excluded from the scope of the private copying exception in Article 5(2)(b) of Directive 2001/29 simply by reason of the intervention of a third party which goes beyond simply making available media or equipment. According to Advocate General Szpunar, as long as it is the user who takes the initiative in respect of the reproduction and defines its object and modalities, there is no decisive difference between such an act and a reproduction made by the same user with the aid of equipment which he or she controls directly.

33 Provided they have lawful access to the copyright-protected content.

34 The VCAST judgment, paragraph 39.

35 In its **judgment of 5 March 2015, Copydan Båndkopi (C-463/12, EU:C:2015:144, paragraph 82),** the Court confirmed that Article 5(2)(b) of Directive 2001/29 lays down an exception to the exclusive right of a rightholder to authorise or prohibit the reproduction of the work in question. That necessarily presupposes that the subject matter of the reproduction covered by that provision is a protected work, not a counterfeited or pirated work.

36 See recital 32 of Directive 2001/29 which states, inter alia, that 'some exceptions or limitations only apply to the reproduction right, where appropriate'. The private copying exception in Article 5(2)(b) of Directive 2001/29 applies to the reproduction of works, fixations of performances, phonograms, fixations of films and fixations of broadcasts.

37 VCAST made available to its customers via the internet a video recording system, in storage space within the cloud, for terrestrial programmes of Italian television organisations. The user selected a programme or time slot on the VCAST website. The system operated by VCAST then picked up the television signal and recorded the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space was purchased by the user from another provider. The present case is thus novel as VCAST, unlike Strato, did not itself make data storage available.

38 The French Government cited the judgment 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraphs 64 and 65), which referred to the possibility for a person who has previously paid that levy in a Member State which does not have territorial competence to request its repayment in accordance with its national law.

39 The Padawan judgment, paragraph 44.

40 The Padawan judgment, paragraph 45.

41 The Padawan judgment, paragraph 46-48.

42 The Padawan judgment, paragraph 49. The quest for a fair balance in the copyright context may also bring to the fore the need to reconcile intellectual property rights guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), the freedom of expression and information guaranteed by Article 11 of the Charter and indeed the

public interest. See judgment of 9 March 2021, VG Bild-Kunst (C-392/19, EU:C:2021:181, paragraph 54 and the case-law cited). See also for a general discussion of the nature and complexities of the exceptions and limitations contained in Article 5(2) and (3) of Directive 2001/29, judgment of 29 July 2019, Funke Medien NRW (C-469/17, EU:C:2019:623, paragraphs 34 to 54). In addition, the Court has noted that the exceptions provided for in Article 5 of Directive 2001/29 must be applied in a manner consistent with the principle of equal treatment, affirmed in Article 20 of the Charter, which, according to the Court's established case-law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.Judgment of **22 September 2016, Microsoft Mobile Sales International and Others(C-110/15, EU:C:2016:717, paragraph 44**).

43 The Padawan judgment, paragraphs 55 and 56.

44 Judgment of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraph 21).

45 The scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of the provision in question, the degree of the harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29. Judgment of 29 July 2019, Funke Medien NRW (C-469/17, EU:C:2019:623, paragraph 40).

46 Provided that compensation is ultimately borne by the private users. Given the practical difficulties of collecting fair compensation from private users, the Court has held that Member States are free to finance that fair compensation by means of a levy imposed on persons making reproduction equipment, devices and media available to natural persons. As the private copying levy can be passed on to the private user 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, such a system is acceptable as the burden of the levy is ultimately to be borne by the private user. By contrast, Article 5(2)(b) of Directive 2001/29 precludes a scheme for fair compensation for private copying which 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. See to that effect, **judgment of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraphs 33 to 42).**

47 The Padawan judgment, paragraph 37.

48 See, judgments of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraph 40), and of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraph 26).

49 Article 5(2)(b) of Directive 2001/29 imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, within the framework of its powers, that the fair compensation intended to compensate the holders of the exclusive right of reproduction harmed for the prejudice sustained is actually recovered, especially if that harm arose on the territory of that Member State. In that regard, it is assumed that the harm to the rightholder due to private copying arises in the Member State in which the final user resides. Judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraphs 57 and 58 and the case-law cited).

50 It must be recalled that a private copying exception is only applicable where reproduction for private use is made from a lawful source. A private levy system which does not distinguish between reproductions which are made from a lawful source and those made from an unlawful source was held by the Court in its judgment of 10 April 2014, ACI Adam and Others (C-435/12, EU:C:2014:254) not to respect the fair balance between the rightholder and users.

51 Such situations do not respect the 'fair balance' required by recital 31 of Directive 2001/29. Judgments of **12 November 2015, Hewlett-Packard Belgium (C-572/13, EU:C:2015:750, paragraph 86),** and of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraph 51).

52 Judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraphs 41 to 45 and the case-law cited).

53 See also judgment of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraph 35). It is true therefore that from a purely theoretical standpoint the fact that such a levy is paid is no substitute for an individualised assessment of the harm to the rightholders in each case.

54 **Judgment of 12 November 2015, Hewlett-Packard Belgium (C-572/13, EU:C:2015:750, paragraphs 70 and 71).**

55 In his Opinion in **Copydan Båndkopi (C-463/12, EU:C:2014:2001, points 60 and 61)**, Advocate General Cruz Villalón noted that recital 35 of Directive 2001/29 states that, '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'. He considered that it 'may be inferred from that recital that Directive 2001/29 gives Member States the responsibility for deciding whether it is appropriate to avoid any overcompensation, that is to say, to ensure that users are not placed in a situation of having to pay the private copying levy intended to finance fair compensation twice, the first time on the occasion of the lawful acquisition in the course of trade of the files containing the works and the second time on the occasion of the acquisition of the reproduction media, as it appears might be the case in the main proceedings'.

56 Moreover, the guidelines laid down in the Padawan judgment, must nonetheless be read in context and in the light of the technology and user habits existing in 2010 when it was decided even though the ruling in that judgment has been consistently refined by the Court in subsequent cases.

57 The discretion enjoyed by the Member States in implementing the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 is thus considerable, although it cannot be used so as to compromise the objectives of that directive that consist in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market. Judgment of 29 July 2019, Funke Medien NRW (C-469/17, EU:C:2019:623, paragraph 50 and the case-law cited). In addition, the Court has stated that it is apparent from recital 44 of Directive 2001/29 that the EU legislature envisaged that the scope of exceptions or limitations could be limited even more when it comes to certain new uses of copyright works and other subject matter. See judgment of 10 April 2014, ACI Adam and Others (C-435/12, EU:C:2014:254, paragraph 27).

58 These terms are also undefined.

59 These terms are also undefined.

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

61 The existence of such levies seems to vary considerably as between the Member States since it is possible that a particular device (such as a personal computer or smartphone) may be subject to a levy in one Member State and to none in another. The same may be true of the amounts of any such levy which may vary from one Member State to another. See in that regard, Private Copying Global Study 2020. Available at https://www.irma.asso.fr/IMG/pdf/sg20-1067_private_copying_global_study_2020_2020-11-23_en.pdf. It would appear for example from that study that Ireland has an exception for private copying pursuant to Article 101 of the Copyright and Related Rights Act, 2000 but that no private copying levy is provided for.

62 See pages 286 to 296 of the study.

63 See pages 286 to 296 of the study.

64 In that regard, Strato also annexed to its observations a list of Austro-Mechana's tariffs for storage media put on the market from 1 January 2018. See Annex 12.

65 Strato notes that no Member State currently provides for a private copying levy in respect of cloud-based services. The French Government indicated at the hearing on 7 July 2021, that France provides for a levy in respect of Network Based Personal Video Recorder services.

66 At least in Austria, but I suspect across all Member States.

67 I have some difficulty with such presumptions given that the emergence of online services which license copyright-protected content such as books, music, films may considerably reduce the recourse by natural persons users to copying protected content in breach of Article 2 of Directive 2001/29. I consider that levies must be set to take account of this phenomenon and the fact that devices and media may be increasingly used to store content which simply does not infringe the right to reproduction such as private photos taken by the owner of a device.

68 As regards this latter point, the fact that Strato may have paid levies as it claims on its servers in Germany is largely irrelevant in the context of the present proceedings. If any levies are due in respect of the provision of cloud computing services provided to natural persons residing in Austria, they are due in Austria. In accordance with the judgment of 11 July 2013, Amazon.com International Sales and Others (C-521/11, EU:C:2013:515, paragraph 37), Strato may however be able to seek reimbursement of (part of) the levies paid in Germany.