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Provisional text

JUDGMENT OF THE COURT (First Chamber)

23 November 2023 (*)

(Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2(e) – Broadcasting organisations – Reproduction right of fixations of broadcasts – Article 5(2)(b) – Private copying exception – Fair compensation – Harm to broadcasting organisations – Equal treatment – National legislation excluding broadcasting organisations from the right to fair compensation)

In Case C-260/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Erfurt (Regional Court, Erfurt, Germany), made by decision of 31 March 2022, received at the Court on 19 April 2022, in the proceedings

Seven.One Entertainment Group GmbH

v

Corint Media GmbH,

THE COURT (First Chamber),

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

Advocate General: A.M. Collins,

Registrar: K. Hötzel, Administrator,

having regard to the written procedure and further to the hearing on 29 March 2023,

after considering the observations submitted on behalf of:

- Seven.One Entertainment Group GmbH, by C. Masch and W. Raitz von Frenzt, Rechtsanwälte,
- Corint Media GmbH, by O. Fiss and M. von Albrecht, Rechtsanwälte,
- the German Government, by J. Möller, J. Heitz and M. Hellmann, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,
- the Austrian Government, by G. Eberhard, F. Koppensteiner and G. Kunnert, acting as Agents,
- the European Commission, by G. von Rintelen and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Seven.One Entertainment Group GmbH ('Seven.One'), a broadcasting organisation, and Corint Media GmbH, a collective management company, concerning the payment of 'fair compensation' under Article 5(2)(b) of Directive 2001/29.

Legal context

European Union law

3 Recitals 4, 9, 31, 35 and 38 of Directive 2001/29 state:

'(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers,

consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

...

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

...

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

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

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

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;

- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

5 Article 5 of that directive, entitled ‘Exceptions and limitations’, states, in paragraphs 2 and 5 thereof:

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

...

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

...

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

German law

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

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

7 Under Paragraph 54(1) of the UrhG:

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

8 Paragraph 87 of the UrhG is worded as follows:

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

...

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

...

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

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

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

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

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

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

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

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

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

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

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

The request to have the oral part of the procedure reopened

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

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

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

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

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

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

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

Consideration of the questions referred

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

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

23 In the first place, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive, in the event of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the holders of that exclusive right receive fair compensation.

24 In that respect, it is expressly apparent from Article 2(e) that broadcasting organisations, in the same way as the other rightholders referred to in Article 2(a) to (d), enjoy the exclusive right ‘to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

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

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

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

and film producers and broadcasting organisations benefit from the same level of protection for their works or other subject matter as regards acts protected by the reproduction right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Costs

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

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

Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society,

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

[Signatures]

* Language of the case: German.