JUDGMENT OF THE COURT (Fourth Chamber)

12 November 2015 (*)

(Reference for a preliminary ruling — Approximation of laws — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Exclusive reproduction right — Exceptions and limitations — Article 5(2)(a) and (b) — Reprography exception — Private copying exception — Requirement for consistent application of exceptions — Concept of 'fair compensation' — Recovery of remuneration as fair compensation for multifunction printers — Proportional remunerative payment — Lump-sum remunerative payment — Accumulation of lump-sum and proportional remunerative payments — Method of calculation — Recipients of fair compensation — Authors and publishers — Sheet music)

In Case C-572/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium), made by decision of 23 October 2013, received at the Court on 8 November 2013, in the proceedings

Hewlett-Packard Belgium SPRL

v

Reprobel SCRL

intervener:

Epson Europe BV,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský (Rapporteur), M. Safjan, A. Prechal and K. Jürimäe, Judges,

Advocate General: P. Cruz Villalón,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 29 January 2015,

after considering the observations submitted on behalf of:

– Hewlett-Packard Belgium SPRL, by T. van Innis, avocat,

– Reprobel SCRL, by A. Berenboom, J.-F. Puyraimond, P. Callens, D. De Marez and T. Baumé, avocats,

– Epson Europe BV, by B. Van Asbroeck, E. Cottenie and J. Debussche, avocats,

– the Belgian Government, by J.-C. Halleux and T. Materne, acting as Agents, assisted by F. de Visscher, avocat,

– the Czech Government, by M. Smolek, acting as Agent,

– Ireland, by E. Creedon, E. McPhillips and A. Joyce, acting as Agents, assisted by J. Bridgman, BL,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes and T. Rendas, acting as Agents,

– the Finnish Government, by H. Leppo, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2)(a) and (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 Hewlett-Packard Belgium SPRL ('Hewlett-Packard') and Reprobel SCRL ('Reprobel') concerning the recovery by Reprobel from Hewlett-Packard of sums corresponding to the fair compensation owed under exceptions to the reproduction right.

Legal context

European Union ('EU') law

3 Recitals 31, 32, 35 and 37 in the preamble to Directive 2001/29 are worded as follows:

‘(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.

(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 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.

...

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.’

4 According to Article 2 of Directive 2001/29:

‘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(2) of Directive 2001/29 provides:

'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;

...'

6 Pursuant to Article 5(5) of that directive:

'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.'

Belgian law

7 Article 1(1) of the Law of 30 June 1994 on Copyright and Related Rights (*Moniteur belge* of 27 July 1994, p. 19297), in the version applicable to the dispute in the main proceedings ('the LCRR'), provides:

'The author of a literary or artistic work alone shall have the right to reproduce that work or to authorise its reproduction in any way or in any form, whether direct or indirect, temporary or permanent, in whole or in part.

...’

8 Article 22(1) of the LCRR provides:

‘Once a work has been lawfully published, its author may not prohibit:

...

4. the reproduction in part or in whole of articles or works of art or the reproduction of short fragments of other works fixed on a graphic or similar medium where such reproduction is intended for a strictly private purpose and does not adversely affect the normal exploitation of the work;

4a. the reproduction in part or in whole of articles or works of art or the reproduction of short fragments of other works fixed on a graphic or similar medium where such reproduction is intended for the purposes of teaching or scientific research, in so far as it is justified by the not-for-profit purpose for which it is carried out and does not adversely affect the normal exploitation of the work ...

5. reproductions of sound and audiovisual works made within the family circle and exclusively intended for that circle.’

9 Articles 59 to 61 of the LCRR state:

‘Article 59

The authors and publishers of works fixed on a graphic or similar medium shall be entitled to remuneration for the reproduction of such works, including under the conditions laid down in Article 22(1), items 4 and 4a ...

The remuneration shall be made by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory.

Article 60

Furthermore, proportional remuneration, determined by reference to the number of copies made, shall be owed by natural or legal persons who make copies of works or, where appropriate, in lieu of such persons, by those who, for consideration or free of charge, make a reproduction device available to others.

Article 61

The King shall fix the amount of the remuneration referred to in Articles 59 and 60 by decree deliberated in the Council of Ministers. The remuneration referred to in Article 60 may be adjusted depending on the sectors concerned.

He shall specify the detailed arrangements for collecting, distributing and verifying such remuneration and the time at which it is due.

Subject to international conventions, the remuneration provided for in Articles 59 and 60 shall be allocated in equal parts to authors and publishers.

Subject to the conditions and detailed arrangements which He shall specify, the King shall entrust a company that is representative of all the rights management companies with the task of ensuring that remuneration is recovered and distributed.'

10 The amounts of the lump-sum remuneration and the proportional remuneration referred to in Articles 59 and 60 of the LCRR are fixed in Articles 2, 4, 8 and 9 of the Royal Decree of 30 October 1997 concerning the remuneration of authors and publishers for copies made for private or didactic purposes of works fixed on a graphic or similar medium ('the Royal Decree'). Those articles state:

'Article 2

(1) The amount of the lump-sum remuneration applicable to copiers shall be set at:

1. EUR [5.01] per copier producing under 6 copies per minute;

2. EUR [18.39] per copier producing between 6 and 9 copies per minute;

3. EUR [60.19] per copier producing between 10 and 19 copies per minute;

4. EUR [195.60] per copier producing between 20 and 39 copies per minute;

5. EUR [324.33] per copier producing between 40 and 59 copies per minute;

6. EUR [810.33] per copier producing between 60 and 89 copies per minute;

7. EUR [1 838.98] per copier producing over 89 copies per minute.

In setting the amount of the lump-sum remuneration, the speed of black-and-white copying shall be taken into consideration, even for devices which produce colour copies.

(2) The amount of the lump-sum remuneration applicable to duplicating machines and to office-type offset printing machinery shall be set at:

1. EUR [324.33] per duplicating machine;

2. EUR [810.33] per office type offset printing machine.

...

Article 4

In the case of devices combining several of the functions of the devices referred to in Articles 2 and 3, the amount of the lump-sum remuneration shall be the highest of the amounts provided for in Articles 2 and 3 which are capable of being applied to the combined device.

...

Article 8

Should the person liable for payment fail to cooperate as set out in Articles 10 to 12, the amount of the proportional remuneration shall be set at:

1. EUR [0.0334] per copy of a protected work;

2. EUR [0.0251] per copy of a protected work produced by means of devices used by an educational or public lending establishment.

In the case of colour copies of protected works in colour, the amounts referred to in the previous paragraph shall be multiplied by two.

Article 9

In so far as the person liable for payment has cooperated in the recovery of the proportional remuneration by the rights management company, the amount of that remuneration shall be set at:

1. EUR [0.0201] per copy of a protected work;

2. EUR [0.0151] per copy of a protected work produced by means of devices used by an educational or public lending establishment.

In the case of colour copies of protected works in colour, the amounts referred to in the previous paragraph shall be multiplied by two.'

11 The cooperation referred to in Articles 8 and 9 of the Royal Decree is defined in Articles 10 to 12 of that decree. Article 10 provides:

'The person liable for payment shall have cooperated in the recovery of the proportional remuneration when he has:

1. submitted his declaration for the period under consideration to the rights management company in accordance with Section 3;

2. provisionally paid the rights management company, at the time of submitting the declaration to that company, the proportional remuneration corresponding to the declared number of copies of protected works multiplied by the relevant rate as set out in Article 9; and

3. (a) either agreed with the rights management company, within 200 working days of receipt of the declaration by that company, on the number of copies of protected works produced during the period under consideration; or

(b) provided the information necessary for the drafting of the opinion referred to in Article 14, if the rights management company has requested an opinion pursuant to that article.'

12 Article 26 of the Royal Decree states:

'(1) At the end of the second year following the entry into force of the present Decree at the latest, and every five years thereafter, the rights management company shall commission a study on copies made for private or didactic purposes of works fixed on a graphic or similar medium, to be carried out in Belgium by an independent body.

(2) That study shall seek to determine, inter alia:

1. the number of devices used and the way in which those devices are distributed by activity sector;

2. the volume of copies produced by means of those devices and the way in which that volume is distributed by activity sector;

3. the volume of copies of protected works fixed on a graphic or similar medium produced by means of those devices and the way in which that volume is distributed by activity sector;

4. the way in which the volume of copies of protected works is distributed according to the different categories of protected works fixed on a graphic or similar medium;

5. the budget allocated by the persons liable for payment to the reproduction for private or didactic purposes of works fixed on a graphic or similar medium and the budget allocated by those persons to remuneration for reprography.

...'

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

13 Hewlett-Packard imports into Belgium reprographic devices for business and household use, including ‘multifunction’ devices, the main function of which is the printing of documents at different speeds depending on the print quality.

14 Reprobel is the management company entrusted with collecting and distributing sums corresponding to fair compensation under the reprography exception.

15 By fax of 16 August 2004, Reprobel informed Hewlett-Packard that the sale of ‘multifunction’ printers by that company should entail, in principle, the payment of a levy of EUR 49.20 per printer.

16 As the meetings held and correspondence exchanged between Hewlett-Packard and Reprobel did not result in an agreement regarding the rate to be applied to those ‘multifunction’ printers, by writ of 8 March 2010 Hewlett-Packard summoned Reprobel before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels). It claimed that that court should rule that no remuneration was owed for the printers which it had offered for sale, or, in the alternative, that the remuneration which it had paid corresponded to the fair compensation owed pursuant to the Belgian legislation, interpreted in the light of Directive 2001/29. It also claimed that Reprobel should be ordered to carry out within the year, on pain of a periodic penalty payment of EUR 10 million, a study consistent with that referred to in Article 26 of the Royal Decree and concerning, inter alia, the number of printers in dispute and their actual use as copiers of protected works for the purpose of comparing that use with the actual use of all other devices for the reproduction of protected works.

17 On 11 March 2010, Reprobel summoned Hewlett-Packard before that court so that the latter might be ordered to pay to Reprobel the provisional sum of EUR 1 towards the remunerative payments which Reprobel considered were owed pursuant to the Royal Decree.

18 The Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) joined those two sets of proceedings.

19 By judgment of 16 November 2012, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) ruled that the first paragraph of Article 59 and the third paragraph of Article 61 of the LCRR were incompatible with EU law.

20 Hewlett-Packard and Reprobel have appealed against that judgment to the referring court.

21 The Cour d’appel de Bruxelles (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must the term “fair compensation” contained in Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted differently depending on whether the reproduction on

paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial? If the answer is in the affirmative, on what criteria must that difference of interpretation be based?

2. Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to fix the fair compensation payable to rightholders in the form of:

(a) lump-sum remuneration paid by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, the amount of which is calculated solely by reference to the speed at which the copier is capable of producing a number of copies per minute, without being otherwise linked to any harm suffered by rightholders; and

(b) proportional remuneration, determined solely by means of a unit price multiplied by the number of copies produced, which varies depending on whether or not the person liable for payment has cooperated in the collection of that remuneration, which is payable by natural or legal persons making copies of works or, as the case may be, in lieu of those persons, by those who, for consideration or free of charge, make a reproduction device available to others?

If the reply to this question is in the negative, what are the relevant and consistent criteria that the Member States must apply in order to ensure that, in accordance with European Union law, the compensation may be regarded as fair and that a fair balance is maintained between the persons concerned?

3. Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to allocate half of the fair compensation due to rightholders to the publishers of works created by authors, the publishers being under no obligation whatsoever to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived?

4. Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to introduce an undifferentiated system for recovering the fair compensation due to rightholders in the form of a lump-sum and an amount for each copy made, which, implicitly but indisputably, covers in part the copying of sheet music and counterfeit reproductions?'

22 By interlocutory judgment of 7 February 2014, the Cour d'appel de Bruxelles (Court of Appeal, Brussels) granted Epson Europe BV leave to intervene in the dispute in the main proceedings.

The questions referred

Admissibility

23 Reprobel and the Belgian Government contest the admissibility of the questions concerning the interpretation of Article 5(2)(b) of Directive 2001/29, on the ground that the interpretation thus sought bears no relation to the purpose of the dispute in the main proceedings.

24 In that regard, according to the settled case-law of the Court of Justice, in the context of the cooperation between it and the national courts provided for by Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraph 21).

25 Given that questions concerning EU law enjoy a presumption of relevance, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 36 and the case-law cited).

26 That is not the situation in the present case. It appears that the interpretation sought does indeed concern EU law and that, in so far as the fair compensation at issue in the main proceedings applies to, among others, natural persons carrying out reproductions for private use and for ends that are neither directly nor indirectly commercial, it is not obvious that the interpretation of Article 5(2)(b) of Directive 2001/29 being requested is unrelated to the actual facts or the purpose of the dispute in the main proceedings or that it is hypothetical.

27 It follows that the questions referred for a preliminary ruling are admissible.

The first question

28 By its first question, the referring court asks, in essence, whether Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 are to be interpreted as meaning that, with regard to the phrase ‘fair compensation’ contained in those provisions, it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.

29 According to Article 5(2)(a) of Directive 2001/29, Member States may provide for exceptions or limitations to the reproduction right in respect of reproductions on paper or a 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 ('the reprography exception').

30 As Article 5(2)(a) of Directive 2001/29 does not specify the users for which the reprography exception provided for therein is intended, the purpose of the reproduction which it covers or the context, private or otherwise, in which such reproduction takes place, such an exception must be regarded as covering all categories of users, including natural persons, whatever the purpose of the reproductions, including those made for private use and for ends that are neither directly nor indirectly commercial.

31 For its part, Article 5(2)(b) of Directive 2001/29 provides that Member States may provide for such exceptions or limitations 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 ('the private copying exception').

32 As that provision explicitly states that the reproductions which it covers are made on 'any medium', it must be regarded as also covering those made on paper or a similar medium. Moreover, as that provision does not specify the reproduction technique concerned, it must be regarded as not excluding from its scope reproductions effected by the use of any kind of photographic technique or by some other process having similar effects.

33 It follows that there is some overlap between the respective ambits of the provisions setting out the reprography exception and those setting out the private copying exception.

34 More specifically, while reproductions made by natural persons for private use and for ends that are neither directly nor indirectly commercial may come within the scope of the reprography exception and the private copying exception, reproductions carried out by users other than natural persons, as well as those carried out by natural persons for a use other than private use or for commercial purposes, come within the scope of the reprography exception alone.

35 With regard to the phrase 'fair compensation', it should be noted, as a preliminary point, that the Court has previously held that the concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of EU law which must therefore be interpreted uniformly in all the Member States that have introduced a private copying exception (judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraph 37).

36 The Court has also held that fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works. It is apparent

from recitals 35 and 38 in the preamble to Directive 2001/29 that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by that author (see, to that effect, judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraphs 40 and 42).

37 It is true that the case which gave rise to the judgment in *Padawan* (C-467/08, EU:C:2010:620) specifically concerned Article 5(2)(b) of Directive 2001/29. However, in that judgment, the Court interpreted the concept of fair compensation using, inter alia, arguments based on recital 35 in the preamble to that directive which are valid for all the exceptions laid down in Article 5 thereof in respect of which fair compensation is required. The case-law laid down in that judgment, as mentioned in paragraph 36 above, must, therefore, be regarded as being equally relevant, *mutatis mutandis*, for the interpretation of Article 5(2)(a) of that directive (see, to that effect, *VG Wort and Others*, C-457/11 to C-460/11, EU:C:2013:426, paragraphs 73 and 77).

38 That finding is supported by the argument based on the requirement that Member States be consistent in the application of the exceptions which bind them, as set out in the last sentence of recital 32 in the preamble to Directive 2001/29.

39 Consistency in the implementation of those exceptions, which partially overlap, could not be ensured if the Member States were free to determine the way in which fair compensation ought to be fixed for reproductions made under the same conditions, solely depending on whether they have chosen to make provision for only one of those exceptions or for both of them (either simultaneously or successively).

40 On the basis of those elements, it is necessary to examine whether it is appropriate, when applying the reprography exception, to draw a distinction, as regards fair compensation, between reproductions made for private use and for ends that are neither directly nor indirectly commercial by natural persons and those made by other users and/or for other ends.

41 In that regard, in view of the case-law referred to in paragraph 36 above, a situation in which reproductions are made, in the context of the reprography exception, by a natural person for private use and for ends that are neither directly nor indirectly commercial is not comparable, as regards fair compensation, to a situation in which reproductions which, while made in that same context of the reprography exception, are made either by a user other than a natural person, or by a natural person but for a use other than private use or for ends that are directly or indirectly commercial, since the harm suffered by the rightholders in each of those situations is not, as a general rule, identical.

42 Consequently, it is appropriate to draw a distinction, in the context of the reprography exception, as regards fair compensation, between the making of reproductions by natural persons for private use and for ends that are neither directly nor indirectly commercial and the making of reproductions by natural persons but for a use

other than private use or for ends that are directly or indirectly commercial or the making of reproductions by other categories of users.

43 In the light of the foregoing, the answer to the first question is that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that, with regard to the phrase 'fair compensation' contained in those provisions, it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.

The third question

44 By its third question, which it is appropriate to consider in the second place, the referring court asks, in essence, whether Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, the publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.

45 It should be noted at the outset that it is apparent from the wording thus used by the referring court that its question refers to a situation in which the compensation paid to publishers corresponds to a substantial reduction in the compensation which should normally be payable to reproduction rightholders by virtue of Directive 2001/29.

46 Pursuant to Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29, the possibility for Member States to provide for the exceptions referred to in those provisions is subject to fulfilment by those States of their obligation to ensure that reproduction rightholders receive fair compensation.

47 However, publishers are not among the reproduction rightholders listed in Article 2 of Directive 2001/29.

48 Since, first, the fair compensation which is payable under the reprography exception and the private copying exception is intended, as is apparent from paragraph 36 above, to compensate for the harm suffered by rightholders as a result of the reproduction of their works without their authorisation and, second, publishers are not exclusive reproduction rightholders pursuant to Article 2 of Directive 2001/29, publishers do not suffer any harm for the purposes of those two exceptions. They cannot, therefore, receive compensation under those exceptions when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation to which they are entitled under those exceptions.

49 It follows from the foregoing that the answer to the third question is that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation,

such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.

The fourth question

50 By its fourth question, which it is appropriate to consider in the third place, the referring court asks, in essence, whether Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music and counterfeit reproductions made from an unlawful source.

51 First of all, with regard to sheet music, it follows expressly from the wording of Article 5(2)(a) of Directive 2001/29 that sheet music is excluded from the scope of the reprography exception. Sheet music cannot, therefore, be taken into consideration when calculating fair compensation in the context of that exception, even in situations where the reproduction of sheet music is carried out by a natural person for private use and for ends that are neither directly nor indirectly commercial.

52 In view of the finding made in paragraph 33 above, it is necessary to draw the same conclusion, in principle, as regards the private copying exception. Were it otherwise, the joint or parallel application of the private copying exception and of the reprography exception by Member States would risk being inconsistent, contrary to the requirement set out in the last sentence of recital 32 in the preamble to Directive 2001/29.

53 Indeed, were the reproduction of sheet music to be authorised in the context of one of those exceptions and prohibited in the context of the other, the legal situation in the Member State concerned would be contradictory and would make it possible for the prohibition on authorising the reproduction of sheet music to be circumvented.

54 Under those conditions, the exclusion of sheet music set out in Article 5(2)(a) of Directive 2001/29 must be understood as being intended not only to limit the scope of the reprography exception but also to introduce a special regime for that category of protected subject-matter, prohibiting, in principle, the reproduction thereof without rightholders' authorisation.

55 It follows that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music.

56 That being said, in view of the last sentence of recital 35 in the preamble to Directive 2001/29, it cannot be ruled out that, in certain limited and isolated situations,

the unauthorised reproduction of sheet music made in the context of the private copying exception may, in a situation where the harm which that reproduction is likely to cause to rightholders is minimal, be regarded as compatible with the special regime referred to in paragraph 54 above.

57 Next, concerning counterfeit reproductions, the Court has previously held 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 (judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 41).

58 According to the Court, although Article 5(2)(b) of Directive 2001/29 must be understood as meaning that the private copying exception admittedly prohibits copyright holders from relying on their exclusive right to authorise or prohibit reproductions with regard to persons who make private copies of their works, that provision cannot be understood as requiring, beyond that limitation which is provided for expressly, copyright holders to tolerate infringements of their rights which may accompany the making of private copies (see judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 31).

59 The Court has also observed that it is apparent from recital 22 in the preamble to Directive 2001/29 that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works (judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 36) and that, when it is applied, national legislation which does not draw a distinction according to whether the source from which a reproduction for private use is made is lawful or unlawful may infringe certain conditions laid down by Article 5(5) of Directive 2001/29 (judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 38).

60 First, to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected (judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 39).

61 Secondly, it would be likely, having regard to the finding made in the preceding paragraph, unreasonably to prejudice copyright holders (judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 40).

62 Those arguments, used by the Court in the context of the private copying exception, are, in view of their nature, fully transposable to the reprography exception. Consequently, the case-law referred to in paragraphs 58 to 61 above must be regarded as relevant in the context of interpreting the latter exception.

63 Such an interpretation of the reprography exception is supported by the fact that the private copying exception concerns reproductions made on ‘any medium’, whether paper

or any similar medium, by the use of any kind of photographic technique or by some other process having similar effects. The implementation of those two exceptions by Member States could be inconsistent, in breach of the requirement arising from the last sentence of recital 32 in the preamble to Directive 2001/29, if the reprography exception — in contrast to the private copying exception — were deemed to cover counterfeit reproductions.

64 Accordingly, the answer to the fourth question is that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music and that those provisions preclude national legislation which introduces an undifferentiated system for recovering fair compensation which also covers counterfeit reproductions made from unlawful sources.

The second question

65 By its second question, which it is appropriate to consider last, the referring court asks, in essence, whether Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which combines, in order to finance the fair compensation granted to rightholders, two forms of remuneration, namely, first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, the amount of which is calculated solely by reference to the speed at which such devices are capable of producing copies, and, second, proportional remuneration, recovered after the reproduction operation, determined solely by means of a unit price multiplied by the number of copies produced, which also varies depending on whether or not the person liable for payment has cooperated in the recovery of that payment, which, in principle, is to be made by natural or legal persons who make copies of works.

66 The system at issue in the main proceedings is a combined remuneration system which involves, for the purposes of financing fair compensation, both remuneration fixed prior to the reproduction operation by reference to the speed at which the device in question technically produces copies and remuneration fixed after the reproduction operation by reference to the number of copies produced.

67 In the first place, regarding the remuneration fixed in advance, the referring court is unsure, in particular, whether the maximum speed at which a device produces copies constitutes a relevant criterion for fixing the levy which must be paid by manufacturers, importers or intra-Community acquirers of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory.

68 In that regard, it should be recalled at the outset, as has been stated in paragraphs 36 and 37 above, that the aim of fair compensation is to compensate copyright

holders adequately for the reproduction of protected works without their authorisation. It must, therefore, be regarded as recompense for the harm suffered by those rightholders as a result of the act of reproduction. In addition, the case-law of the Court concerning the criterion of harm must apply in the context of both the private copying exception and the reprography exception.

69 Accordingly, first, fair compensation is, in principle, intended to compensate for the harm suffered resulting from the copies actually produced ('the criterion of actual harm suffered') and, second, in principle, it is for the persons who have made the reproductions to make good the harm related to those reproductions by financing the compensation which will be paid to the rightholder (see judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraph 45).

70 However, the Court has acknowledged that, given the practical difficulties in identifying users and obliging them to compensate rightholders for the harm caused to them, it is open to the Member States to establish a levy chargeable not to the users concerned but to the persons who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to those users or who provide copying services for them and who are able to pass on the cost of the levy to the users (see, to that effect, judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraphs 46 and 48).

71 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.

72 In that regard, the persons to whom such devices are made available are rightly presumed to benefit fully from the making available of those devices, that is to say, that they are deemed to take full advantage of the functions associated therewith, including copying. It follows that the fact that those devices are capable of producing copies is sufficient in itself to justify the application of the levy to the persons concerned (see, to that effect, judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraphs 55 and 56).

73 By contrast, it cannot be inferred from the case-law cited in the preceding paragraph that all persons to whom those devices are made available are to be deemed to take full advantage of the technical copying capacity of those devices, that capacity corresponding to the maximum number of copies which can technically be produced within a given period.

74 It is common ground that, as the different categories of acquirers or users do not have the same needs and are not subject to the same limits as those set out in Article 5(2)(b) of Directive 2001/29, they will use the technical capacity of a given device only so far as those needs or limits require.

75 In particular, the use of the technical capacity of reproduction devices differs depending on whether the person concerned is making copies for public or private use, and whether such copies are made for commercial or other ends.

76 Remuneration the amount of which is set as a lump sum and which must be paid by persons who make devices available to natural and legal persons for the purpose of making copies must, in principle, take that difference into account, given that the assessment of the harm suffered is likely to lead to significantly different results for each of the situations mentioned in the preceding paragraph.

77 It follows from the foregoing that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude lump-sum remuneration, such as that at issue in the main proceedings, paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer at the time at which a device is put into circulation on national territory, in a situation in which the amount of that remuneration is fixed solely by reference to the speed at which that device is technically capable of producing copies.

78 In the second place, with regard to the remuneration recovered after the fact, the referring court expresses uncertainty, essentially, as to whether EU law authorises a Member State to vary the amount of the levy which must be paid by natural or legal persons who make copies of works according to whether or not those persons cooperate in the recovery of that levy.

79 In that regard, as has been recalled in paragraph 36 above, fair compensation is intended to provide compensation for the harm caused to rightholders. However, the harm caused to the author remains the same regardless of whether or not the person liable for payment cooperates in the recovery of such a levy.

80 The act of cooperation or non-cooperation cannot therefore constitute an adequate criterion for varying the amount of the levy intended to finance fair compensation after the fact.

81 In the third and last place, it is necessary to examine whether Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation which introduces a combined system that simultaneously involves lump-sum remuneration paid in advance and proportional remuneration fixed after the fact.

82 In that regard, it follows implicitly from the case-law cited in paragraph 69 above that the introduction of a levy fixed prior to the making of copies cannot, in principle, be authorised except in the alternative, in the event that it is impossible to identify the users and, consequently, to assess the actual harm suffered by the rightholders.

83 Nevertheless, having regard to the possibility for Member States to determine the detailed arrangements for financing and recovering fair compensation and the level of that compensation, a system which combines lump-sum remuneration fixed in advance

and proportional remuneration fixed after the fact cannot *a priori* be regarded as incompatible with Article 5(2)(a) or Article 5(2)(b) of Directive 2001/29.

84 That being said, such a system, taken as a whole, must enable a levy to be recovered as fair compensation the amount of which corresponds, in essence, to the actual harm suffered by the rightholders, it being understood that a Member State choosing to introduce a form of remuneration fixed after the fact — the amount of which would depend on the number of copies produced — would not appear to be exposed to the practical difficulties of identification and assessment referred to in paragraph 82 above.

85 In order to be able to satisfy the requirement mentioned in the preceding paragraph, a system, such as that at issue in the main proceedings, which combines lump-sum remuneration fixed in advance and proportional remuneration fixed after the fact must contain mechanisms, in particular for reimbursement, which are designed to correct any situation where 'overcompensation' occurs to the detriment of particular categories of users (see, by analogy, judgment in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraphs 30 and 31).

86 Such 'overcompensation' would not be compatible with the requirement, set out in recital 31 in the preamble to Directive 2001/29, that a fair balance be safeguarded between the rightholders and the users of protected subject-matter.

87 In particular, a combined system of remuneration of that kind must include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum.

88 It follows from the foregoing that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which introduces a system that combines, in order to finance the fair compensation payable to rightholders, two forms of remuneration, namely, first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, and, second, proportional remuneration paid after that reproduction operation and determined solely by means of a unit price multiplied by the number of copies produced, which is payable by the natural or legal persons who make those copies, in so far as:

– the lump-sum remuneration paid in advance is calculated solely by reference to the speed at which the device concerned is capable of producing copies;

– the proportional remuneration recovered after the fact varies according to whether or not the person liable for payment has cooperated in the recovery of that remuneration;

– the combined system, taken as a whole, does not include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users.

Costs

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

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

1. **Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, with regard to the phrase 'fair compensation' contained in those provisions, it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.**

2. **Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.**

3. **Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music, and preclude such legislation which introduces an undifferentiated system for recovering fair compensation which also covers counterfeit reproductions made from unlawful sources.**

4. **Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which introduces a system that combines, in order to finance the fair compensation payable to rightholders, two forms of remuneration, namely, first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, and, second, proportional remuneration paid after that reproduction operation and determined solely by**

means of a unit price multiplied by the number of copies produced, which is payable by the natural or legal persons who make those copies, in so far as:

– **the lump-sum remuneration paid in advance is calculated solely by reference to the speed at which the device concerned is capable of producing copies;**

– **the proportional remuneration recovered after the fact varies according to whether or not the person liable for payment has cooperated in the recovery of that remuneration;**

– **the combined system, taken as a whole, does not include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users.**

[Signatures]

** Language of the case: French.