OPINION OF ADVOCATE GENERAL
TRSTENJAK
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Case C‑467/08

Sociedad General de Autores y Editores (SGAE)
v
Padawan S. L.

(Reference for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain))

(Directive 2001/29/EC – Copyright and related rights – Article 2 – Reproduction right – Article 5(2)(b) – Exceptions and limitations – Fair compensation – Scope – Levy system in respect of digital reproduction equipment, devices and media)

I – Introduction

1. The invention of printing by Johannes Gutenberg in approximately 1450 constituted a culturally and historically significant turning point in the history of Europe and the world. This event, which involved the introduction of a new method of reproduction and at first sight only had technical relevance, was able to bring about a media revolution which led to the notable flourishing of European intellectual life. It facilitated access to information and education, namely by means of the exact reproduction of knowledge to an extent never previously known and within the means of more and more citizens. This aided mass dissemination and a lively exchange of ideas, which paved the way to the cultural age of the Renaissance and later to the Age of Enlightenment. At the same time, authorship gained significance, since the question of who had written what and in what factual and temporal context became more and more important. From this, arose the necessity to effectively protect the right of authors in their works and the rights of printers and publishers involved in producing printed works. In this way, the basic idea of copyright law came into being. In retrospect, the problems linked to the control of reproductions of literary and artistic works turn out to be just as old as the technical methods of producing those reproductions themselves. (2) As the present case shows, these problems have gained in topicality, especially since technological development up to the digital age has given rise to new methods and devices

which make it possible for every person to save data digitally, to amend it and to reproduce it at will. The legislature and the judge have the sensitive task of developing appropriate solutions to these new challenges which should take into account the interests of the author and the user to the same extent.

2. In the present reference for a preliminary ruling under Article 234 EC, (3) the Audiencia Provincial de Barcelona (Provincial Court, Barcelona; 'the referring court') submits a series of questions to the Court concerning the interpretation of the concept of 'fair compensation', mentioned 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, (4) to which, pursuant to this exception to the rule, the rightholders of any copyright are entitled in the event of the reproduction of a work or other subject-matter for private use.

3. These questions arise in the context of proceedings in which the Sociedad General de Autores y Editores de España (SGAE; 'the claimant in the main proceedings'), a Spanish intellectual property rights management society, is bringing a claim against the company Padawan S. L. ('the defendant in the main proceedings') for payment of flat-rate compensation for private copying in respect of storage media marketed by it during a precisely defined period.

II – Legislative framework

A – European Union law

4. Recital 10 in the preamble to Directive 2001/29 states:

'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. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on‑demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

5. Recital 31 is worded as follows:

'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.'

6. Recital 32 contains the following statement:

'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.'

7. Recital 35 is worded as follows:

'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.'

8. Recital 38 states inter alia:

'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 audiovisual 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.'

9. Article 2 of Directive 2001/29 states as follows:

'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.'

10. Article 5(2)(b) of the directive provides as follows:

'Exceptions and limitations

…

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

…

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

B – National law

11. According to the information provided by the referring court, Article 2 of Directive 2001/29 was implemented under national law by Article 17 of the consolidated version of the Law on Intellectual Property (Texto Refundido de la Ley de Propiedad Intelectual; 'TRLPI') which was approved by the Real Decreto Legislativo (Royal Legislative Decree) 1/1996 of 12 April 1996, which provides that '[t]he author has exclusive rights of exploitation of his works regardless of their form and, in particular, reproduction rights …which cannot be exercised without his permission except in circumstances laid down in this Law', and by the following articles which extend that reproduction right to other holders of intellectual property rights.

12. Article 18 of the TRLPI specifies that reproduction means: 'the fixation of the work on a medium which enables communication of the work and copying of the whole or part of the work'.

13. In accordance with Article 5(2)(b) of Directive 2001/29, Article 31(1)(2) of the TRLPI provides that works which have already been circulated may be reproduced without the author's permission for 'private use by the copier without prejudice to Articles 25 and 99(a) of this Law, provided that usage of the copy is not collective or for profit'.

14. The version of Article 25 of the TRLPI which preceded Amending Law No 23/2006 of 7 July 2006 (5) lays down highly detailed rules governing the compensation to which the holders of intellectual property rights are entitled in respect of reproductions made exclusively for private use, 'by means of non-typographical devices or technical instruments, of works circulated in the form of books or publications deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media'.

15. That compensation, which must be fair and paid only once, consists of a levy applicable not only to equipment and devices for reproducing books but also to equipment and devices for reproducing phonograms and videograms, and to media for sound, visual and audiovisual reproduction (Article 25(5) of the TRLPI). The levy must be imposed on manufacturers and importers of the aforementioned equipment and media and on 'wholesalers and retailers as subsequent purchasers of the products concerned' (Article 25(4)(a) of the TRLPI), and it is to be paid to intellectual property rights management societies (Article 25(7) of the TRLPI).

16. Amending Law No 23/2006 amended Article 25 of the TRLPI so as to extend the application of that levy specifically to digital reproduction equipment, devices and media. The amount of compensation must be approved jointly by the Ministry of Culture and the Ministry of Industry, Tourism and Trade in accordance with the following procedure: first of all, rights management societies and the industry associations, representing in the main persons liable for payment, are granted a period of four months to determine which equipment, devices and media attract fair compensation for private copying, together with the amount payable in each case; second, three months after notification of the agreement, or after expiry of the four-month period if no agreement has been reached, the Ministry of Culture and the Ministry of Industry, Tourism and Trade must approve the list of equipment, devices and media which attract the 'levy' and the amount thereof (Article 25(6) of the TRLPI).

17. In that connection, the law lays down a number of criteria to be taken into account: (a) the harm actually caused to the holders of the intellectual property rights as a result of the reproductions classified as private copying;

(b) the degree to which the equipment, devices and media are used for the purpose of such private copying; (c) the storage capacity of the equipment, devices and media used for private copying; (d) the quality of the reproductions; (e) the availability, level of application and effectiveness of the technological measures; (f) how long the reproductions can be preserved; and (g) the amount of compensation applicable to the equipment, devices and media concerned should be economically proportionate to the final retail price of those products (Article 25(6) of the TRLPI).

18. In order to implement the abovementioned provisions, Orden Ministerial (Ministerial Order) No 1743/2008 of 18 June 2008 (6) laid down which digital reproduction equipment, devices and media must attract payment of the private copying compensation, and the amount of compensation payable in respect of each product by every person liable.

III – Facts of the case, main proceedings and questions referred

19. As mentioned in my introductory remarks, the claimant in the main proceedings is a Spanish intellectual property rights management society. The defendant in the main proceedings markets electronic storage media, inter alia in the form of CD‑Rs, CD‑RWs, DVD‑Rs and MP3 players. The claimant in the main proceedings is bringing an action against the defendant in the main proceedings for payment of a lump sum in compensation for private copying in respect of the storage media marketed by it between September 2002 and September 2004.

20. At first instance, the claim was upheld in full and the defendant in the main proceedings was ordered to pay EUR 16 759.25 plus interest. The defendant in the main proceedings appealed against that judgment.

21. In its order for reference, the referring court, which must decide the appeal, expresses uncertainty with regard to the correct interpretation of the concept of ‘fair compensation’ in Article 5(2)(b) of Directive 2001/29. It has doubts as to whether the provision which is applicable in the Kingdom of Spain, pursuant to which the private copying levy is charged indiscriminately on digital reproduction equipment, devices and media, can be regarded as compatible with the directive. It is of the opinion that the replies to its questions will affect the resolution of the main proceedings, because they will determine whether the claimant in the main proceedings is entitled to claim fair compensation for private copying in respect of all the CD-Rs, CD-RWs, DVD-Rs and MP3 players marketed by the defendant in the main proceedings in the abovementioned period, or only in respect of those digital reproduction devices and media which it may be presumed have been used for private copying.

22. The referring court has accordingly stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the concept of "fair compensation" in Article 5(2)(b) of Directive 2001/29 entail harmonisation, irrespective of the Member States' right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightholders affected by the adoption of the private copying exception or limitation?

(2) Regardless of the system used by each Member State to calculate fair compensation, must that system ensure a fair balance between the persons affected, the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other, and is that balance determined by the reason for the fair compensation, which is to mitigate the harm arising from the private copying exception?

(3) Where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, must that charge (the fair compensation for private copying) necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, with the result that the application of the charge would be justified where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying, but not otherwise?

(4) If a Member State adopts a private copying "levy" system, is the indiscriminate application of that "levy" to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of "fair compensation"?

(5) Might the system adopted by the Spanish State of applying the private copying levy indiscriminately to all digital reproduction equipment, devices and media infringe Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of rights justifying the compensation does not exist?'

IV – Procedure before the Court

23. The order for reference dated 15 September 2008 was received at the Registry of the Court on 31 October 2008.

24. Written observations were submitted by the parties to the main proceedings, the Governments of the Kingdom of Spain, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic, the French Republic, the Republic of Finland, the Portuguese Republic, the Centro Español de Derechos Reprográficos (CEDRO), the Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), the Asociación de Artistas Intérpretes o Ejecutantes – Sociedad de Gestión de España (AIE), the Asociación de Gestión de Derechos Intelectuales (AGEDI) and the Commission within the period stated in Article 23 of the Statute of the Court.

25. At the hearing on 4 March 2010, the representatives of the parties in the main proceedings, of EGEDA, AIE, AGEDI and CEDRO, the representatives of the Governments of the Kingdom of Spain, the Federal Republic of Germany and the Hellenic Republic, and the representatives of the Commission presented their observations.

V – Main submissions of the parties

A – Admissibility of the questions referred

26. The Spanish Government and CEDRO propose that the Court should declare the reference inadmissible, since in their opinion the referring court has made a reference for a preliminary ruling in the context of proceedings to which the provision which was replaced by the Spanish implementing legislation for Directive 2001/29 applies. They submit that the provisions of Article 25 of the TRLPI which applied before Amending Law No 23/2006 came into force are exclusively applicable. A ruling on the interpretation of the concept of 'fair compensation' in Directive 2001/29 is therefore unnecessary in order to decide the main proceedings.

27. The claimant in the main proceedings also proposes that the reference should be declared inadmissible, but for a different reason. It considers it to be obvious that compensation for private copying was merely the subject of minimal harmonisation. Directive 2001/29 lays down neither the methods, pursuant to which fair compensation for private copying should be calculated, nor the equipment, devices and media, the sale of which gives rise to a claim for fair compensation, nor the specific circumstances in which payment should not be exacted.

B – The first question referred

28. The Commission, the United Kingdom Government, the German and the Finnish Governments and EGEDA and AIE take the view that the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 requires a uniform interpretation in all Member States and must be applied by every

Member State within the limits laid down by Community law and in particular the abovementioned directive.

29. On the other hand, the Spanish, French and in part also the Greek Governments, the claimant in the main proceedings, CEDRO and AGEDI take the view that the intention of the Community legislature was clearly to limit the harmonisation function of a concept, namely that of 'fair compensation', for the reason that, first, it does not necessarily have to be incorporated into the national legislation of the Member States and second, it does not contain the essential criteria for the parties to be able to determine the subject-matter and the content of the legal relationship, which is necessary in order to be able to infer a harmonised concept at a European level. It follows that there is no association between the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 and any harmonisation at Community level.

C – The second question referred

30. The United Kingdom Government and the Greek Government, the defendant in the main proceedings and EGEDA and AGEDI assert that each Member State's system of calculating the amount of the 'fair compensation' must make sure that a balance exists between the authors and the users, as well as between the persons who are directly or indirectly affected by this levy, by taking into account the harm or prejudice if any, suffered by the author, as a result of permitting private copying. The French and the German Governments submit in particular that the calculation of the 'fair compensation' should allow authors to receive an appropriate payment for the use of their works.

31. On the other hand, the Spanish Government and CEDRO assert that no requirement of balance can be inferred from the wording of Directive 2001/29. They also state that the objective of that compensation cannot be only to compensate for a loss, especially since that element could merely be a 'valuable criterion', which does not mean that it is either the only criterion to be taken into account or even the decisive one for determining the financial compensation. However, the German Government takes the view that Article 5(2)(b) of Directive 2001/29 does not preclude a Member State's system of appropriate reward, based on a lump sum related to the presumed use of the devices normally used for private copying, provided that those methods were not contrary to the principle of proportionality.

32. The Commission is of the opinion that in so far as Directive 2001/29 does not contain any provisions on the financing of the fair compensation provided for in Article 5(2)(b), it is left to the Member States to determine both the means of financing that compensation and, in the event that they finance it by means of a levy, the detailed arrangements for that levy,

nevertheless always within the limits laid down by Community law, above all the fundamental rights and the general principles of law.

D – The third question referred

33. The United KingdomGovernment and the French Government, the defendant in the main proceedings and AGEDI are of the opinion that if a Member State decides to introduce a levy system applying to equipment, devices and media, pursuant to the objective laid down in Article 5(2)(b) of giving the authors compensation for the harm or prejudice they suffer, that levy must have a connection to the presumed use of those digital reproduction equipment and devices.

34. On the other hand, the Spanish, Finnish and Greek Governments, and EGEDA and CEDRO take the view that the Member States were granted discretion, allowing them to introduce different compensation systems, which is actually what they have done to date. They submit that it was therefore permissible, in the context of that diversity, to introduce such systems based on the objective capability of equipment or a device to make copies for private use. They say that it is also sensible to proceed on the basis of the premiss that the act of manufacturing or importing the device already provides the means of causing authors financial loss, regardless of the possibility of adapting that criterion, as was already the case for the Spanish legislation in the light of the specific circumstances and other criteria.

35. The Commission and AIE point out that Directive 2001/29 leaves the decision to the Member States as to who should contribute to financing the 'fair compensation' and in what form. The directive does not preclude those who profit from the exceptions and limitations to the copyright of authors, artists, interpreters, producers or media companies from being obliged to pay a contributory payment within the limits set by Community law.

E – The fourth question referred

36. The United Kingdom Government, the French Government and the defendant in the main proceedings take the view that the indiscriminate application of the levy to undertakings and professional persons who clearly purchased digital reproduction devices and media for purposes other than private copying is not compatible with the concept of 'fair compensation'. In particular, in the opinion of the Finnish Government, if the Member State has selected a levy system in relation to digital reproduction equipment, devices and media, it is justified to abstain from a levy for those devices which would be used for purely professional purposes.

37. On the other hand, the Spanish and Greek Governments, EGEDA, CEDRO and AGEDI are of the view that even if it is correct that the criterion of the

objective suitability of the equipment or the device could also be adjusted on the basis of the subjective disposition of the purchaser (in so far as it is guaranteed that he will not use it for private copying), it is no less correct that there could be no reason for elevating that subjective element to the rank of a decisive criterion, especially since the final purpose of the devices cannot easily be determined. They assert that Directive 2001/29 does not oblige the Member States to exempt particular categories of purchasers from the obligation to pay appropriate compensation. The Greek Government takes the view that equipment and devices used for professional purposes should not be exempted from the compensation payment, since it is not possible to verify the actual use that is made of these devices.

38. The Commission and AIE point out that Directive 2001/29 does not prevent a Member State, which has introduced a system of levying in respect of equipment, devices and media linked with the digital reproduction of protected works for private use, from applying this system regardless of whether the purchaser is a private individual, a business or a professional person.

F – The fifth question referred

39. The Spanish and the French Governments and SGAE, EGEDA, CEDRO and AGEDI are of the view that the legislation which the Spanish legislature has chosen is compatible with Directive 2001/29. Although the Commission does not expressly give its opinion on this question referred, it also appears to proceed on the basis of the Spanish legislation being compatible with Directive 2001/29.

40. On the other hand, the defendant in the main proceedings is of the opinion that the Spanish legislation in relation to private copying is contrary to Article 5(2)(b) of Directive 2001/29 and the principles of proportionality and non-discrimination in Community law in so far as it applies indiscriminately to all digital reproduction equipment, devices and media, regardless of whether they are actually used for private copying (and not for commercial purposes) of works and other subject-matter.

VI – Legal assessment

A – Introductory observations

41. Directive 2001/29, which entered into force on 23 June 2001 for the purposes of implementing the WIPO Copyright Treaty (7) of 1996 at Community level, together with six further directives, forms the basis of the copyright law of the European Union. (8) It is the Community legislature's reaction to technological development in information technology, which on the one hand opens up new forms of output and exploitation for rightholders,

(9) but on the other hand presents new challenges to the protection of intellectual property in the light of the risk of piracy, counterfeiting and the unauthorised reproduction of works and other subject‑matter. (10) At the same time, the directive is intended to make concessions to the public's justified interest in access to such subject-matter. Directive 2001/29 is consequently informed by the Community legislature's efforts to reconcile the interests of the rightholder and of the public. (11) As demonstrated by its recital 2, the directive forms part of a series of legislative measures, which the European Council adopted at its meeting in Corfu on 24 and 25 June 1994, which were aimed at creating a general and flexible legal framework at Community level in order to foster the development of the information society in Europe.

42. As demonstrated by its recital 1, the directive, which was adopted on the basis of Articles 95 EC, 47(2) EC and 55 EC, constitutes a contribution to ensuring that competition in the internal market is not distorted. According to its recital 6, harmonisation at Community level is intended to respond to the risk of refragmentation of the internal market as a consequence of differences in protection. Recital 4 makes clear that the legislative objective of Directive 2001/29 consists in creating a harmonised legal framework on copyright and related rights, which, 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 should lead in turn to growth and increased competitiveness of European industry.

43. In terms of regulatory policy, Directive 2001/29 represents a compromise, (12) which, despite the declared objective of harmonisation, sufficiently takes into account the differing legal traditions and views in the Member States of the European Union – including in particular the common law concept of copyright and the continental European concept of copyright protection (13) –, for instance by providing for numerous exceptions (14) and allows the Member States considerable flexibility in the transposition of the directive. (15)

44. That also applies to the rule in Article 5(2)(b) of the directive, which permits Member States to provide for exceptions or limitations in their legal systems with regard to the reproduction of protected works and/or performances for private use; in those circumstances, the Member States are however expressly obliged to ensure that there is 'fair compensation' for the rightholder. The decision as to whether such an exception or limitation should be introduced is optional in character, as indicated by the wording of that provision ('may'), which means that it is left to the discretion of the Member States. (16) However, the question which is at the centre of the present case, as to the details of how such a compensation system should be

organised, cannot readily be answered on the basis of the wording of that provision of the directive. That question requires a thorough interpretation of the directive to be undertaken, taking into account all the interpretative methods available to the Court.

45. On the basis of a careful assessment of the questions referred, the reference for a preliminary ruling is essentially aimed at learning from the Court where the Community law limits to the Member States' margin of discretion for implementation lie and what criteria they must take into account for the purposes of organising this 'fair compensation' in the light of the requirements laid down by the Community legislature. In the interests of clarity, for the purposes of the legal assessment I will follow the order of the questions used by the referring court. Due to the fact that they are closely related in terms of subject-matter, the third to fifth questions referred will be dealt with together.

B – Admissibility of the reference

1. Admissibility of the subject-matter for interpretation and relevance of the reference

46. Prior to examining the questions referred, it is still necessary to consider the plea of inadmissibility of the reference raised by the Spanish Government, CEDRO and the claimant in the main proceedings.

47. The Spanish Government and CEDRO essentially assert that the questions referred are irrelevant to the decision in the main proceedings, since it is not the Spanish provisions implementing Directive 2001/29 which are applicable, but the provisions which they replaced. The claimant in the main proceedings, on the other hand, refers to the fact that Directive 2001/29 provides for a minimum level of harmonisation, so that the question of how fair compensation for making reproductions for private use must be calculated is not a question of Community law, but one of national law, with the consequence that it depends entirely on the interpretation of the applicable Member State's provisions.

48. It must be noted that the plea of inadmissibility raised by the abovementioned parties – despite clear differences in the arguments – is essentially based on the fact that the decision in the main proceedings does not depend upon an interpretation of Community law, but, on the contrary, on an interpretation of national law. The parties accordingly call into question, from a legal point of view, on the one hand, the existence of an admissible subject-matter for interpretation and, on the other hand, the relevance of the reference. Consequently, they also submit that the Court has no power to interpret provisions of national law.

49. Whilst the latter is correct and also reflects the established case-law the Court, (17) it is also apparent from the case-law of the Court that the Court is not permitted to evaluate the national judges' grounds for referring a particular question. (18) Thus the Court has indicated on a number of occasions that, for the purposes of the cooperation between the Court and the national courts under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of the case it is called upon to resolve, 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. (19)

50. Where the questions submitted by the national court concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling, (20) unless in reality it is obviously being prevailed upon to decide on a hypothetical case or to deliver advisory opinions on general or hypothetical questions, the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose 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. (21)

51. As far as the present reference for a preliminary ruling is concerned, first of all it is clear that an interpretation of Article 5(2)(b) of Directive 2001/29 is sought from the Court. There is no doubt that that constitutes an admissible subject‑matter for interpretation under Article 234(1)(b) EC. As far as the question of relevance is concerned, no support can be found for the theory that the questions referred do not bear any relation to the main proceedings. On the contrary, the opposite appears to be the case, especially since in its order for reference (22) the referring court points out several times that a reply to the questions referred will affect the resolution of the proceedings giving rise to the reference for a preliminary ruling, because it will determine to what extent the claimant in the main proceedings is entitled to claim fair compensation. According to the referring court's comments, that depends on whether the specific formulation of the legislation applicable in Spain is at all compatible with the Community law concept of 'fair compensation', or in other words whether it meets the requirements for 'fair compensation' within the meaning of Article 5(2)(b) of Directive 2001/29.

52. Against that background, the issue of precisely which national provisions are applicable in the main proceedings is basically irrelevant for the purposes of assessing the admissibility of the present reference for a preliminary ruling. The assessment of that question falls within the competence of the national judge who has jurisdiction to determine the interpretation and application of national law in relation to the main proceedings.

53. Accordingly, the reference for a preliminary ruling is admissible.

2. Argument as to the subsequent introduction of the concept of ‘fair compensation’ into Spanish copyright law

54. For the sake of completeness, I would like, in this context, to consider the submission of the Spanish Government that an interpretation of Directive 2001/29 is not necessary in order to decide the proceedings, since the concept of ‘fair compensation’ (‘compensación equitativa’) within the meaning of Article 5(2)(b) of Directive 2001/29 was inserted into Article 25 of the TRLPI only as a replacement for the previously used concept of ‘fair remuneration’ (‘remuneración equitativa’) by Amending Law No 23/2006 of 7 July 2006.

55. First of all, it must be noted that the Spanish Government has neither explained nor proven to what extent the concept previously used in the Spanish legislation differs, in normative content, from the concept of ‘fair compensation’. In particular, it remains unclear whether the Spanish legislature’s intention in making that amendment was merely to make it semantically more precise in order to adapt the terminology of its national copyright law to that of Directive 2001/29. The latter appears more probable on the basis of the minor changes in the wording. (23)

56. It should also be remembered that proceedings under Article 234 EC are based on cooperation between the Court and the national courts, in the context of which it is not for the Court to rule on the interpretation of national provisions or to decide whether the referring court’s interpretation thereof is correct. (24) From a procedural point of view, the Court must essentially take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. (25) Since that aspect has not been raised by the referring court, what follows proceeds on the basis of its lack of relevance to the present reference for a preliminary ruling.

57. However, in view of the necessity to give the national judge a useful answer to the questions referred, (26) I consider it necessary, as a precaution, to point out that in so far as it should depend, for the purposes of the main proceedings, on precisely determining the temporal application of national law – not least because of the adaptations to the requirements of the directive which have been made to Spanish substantive law – it should be taken into consideration that the facts which gave rise to these proceedings occurred in a period between September 2002 and September 2004 and consequently, for the most part, at a time when, first, Directive 2001/29 was already in force and by which, second, the Member States should have adopted the necessary implementing provisions. It is apparent from Article 13(1) of Directive 2001/29 that the Member States were obliged to adopt the

necessary legal and administrative provisions in order to comply with this directive prior to 22 December 2002.

58. If the concept of ‘fair compensation’ applied only to Spanish copyright law later as a result of Amending Law No 23/2006 of 7 July 2006, and was not legally identical to the concept which it replaced, then it should be pointed out that, from the expiry of the period for implementing the directive, the Spanish courts were obliged to give an interpretation which was in conformity with the directive. According to the Court’s case-law, once the period for implementing the directive has expired, the national courts owe a general obligation to interpret domestic law in conformity with the directive. (27) The obligation to give an interpretation in conformity with the directive means that domestic law must be interpreted, so far as possible, in the light of the wording and purpose of the relevant directive, in order to achieve the objective pursued by the directive, by selecting an interpretation of the national legal provisions which best corresponds to that objective and consequently reaching a solution which is compatible with the provisions of that directive. (28)

C – The first question referred

59. By the first question referred, the referring court seeks information on whether the concept of ‘fair compensation’ in Article 5(2)(b) of Directive 2001/29 entails harmonisation and whether it is a Community concept which must be given an autonomous Community interpretation.

60. Directive 2001/29 does not itself contain any legal definition of that concept. Therefore the question arises as to whether that fact precludes it from being classified as a Community law concept.

61. First of all, the case-law of the Court, (29) which has in the meantime doubtless become established, may be cited in favour of such a classification: uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question. However, if the Community legislature makes an implied reference to the national usage in a Community act, it is not for the Court to give a uniform Community definition of the term used. (30)

62. Where there is an implied reference to national usage or even legislation in order to explain the concept, a Community law definition of the concept is accordingly dispensed with. In those circumstances, the national law has an

interpretative effect within Community law. References of that nature are, in particular, indispensable in those situations where the Community, by reason of non-exercise or even the lack of legislative competence, has not created uniform terminology in a specific area of Community law. They arise as a consequence, therefore, of the principles of limited legal competence and subsidiarity which, in accordance with Article 5 EC, are inherent in Community law. (31)

63. Since Directive 2001/29 does not contain any express reference to the law of the Member States, in principle that would point in favour of classification as a Community law concept.

64. The abovementioned case-law must be understood to mean that the Court clearly proceeds on the basis of a presumption in favour of an autonomous interpretation, due to the necessity for uniform application and for equal treatment; however, that presumption may be rebutted in certain circumstances (32) if a uniform conceptual scheme is not possible (33) or if it requires only partial harmonisation. (34)

65. There are no such circumstances in the present case, since the content of that concept may be determined sufficiently precisely by means of a systematic and teleological consideration of individual provisions of the directive, taking into account the recitals. According to the Court's case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it forms part. (35)

66. Thus, that concept in Article 5(2)(b) of the directive is used to describe the content of a 'condition'. As stated by way of introduction, the Member States must fulfil that condition if they provide for exceptions or limitations to the reproduction right provided for in Article 2. In addition, recital 35 explains the objective of such fair compensation: it is a question of compensating the rightholder adequately for the use made of his protected works or other subject‑matter. However, individual Community law requirements which the Member States must fulfil in relation to the form of such compensation, which will be discussed further in this Opinion, may also be inferred from other recitals, including recitals 31 and 32. Therefore, as the United Kingdom Government correctly observes, (36) Directive 2001/29 regulates the issue to the extent that it allows those applying the law to at least determine the contours of such fair compensation.

67. Last but not least, the objective of Directive 2001/29 itself, of harmonising certain aspects of copyright law and related rights in the information society and in this way ensuring that competition in the internal market is not distorted as a result of Member States' different legislation, points towards classification as a Community law concept. Approximation of laws

necessarily requires the development of autonomous Community law concepts, including uniform terminology, if it intends to achieve its legislative objective. (37) It must be possible for a directive to have its own conceptual scheme regardless of whether Member States are entitled to a certain amount of discretion with regard to implementation. The Community legislature's concern to achieve an interpretation of Directive 2001/29 which is as uniform as possible is reflected in recital 32, in which Member States are called upon to arrive at a coherent application of those exceptions and limitations in relation to the reproduction right. Divergent interpretations of the central concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 would plainly defeat this objective.

68. The above views are confirmed in SENA, (38) in which the Court was called upon to interpret the concept of 'equitable remuneration' within the meaning of Article 8(2) of Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. (39) In that case, the Court referred first of all to the case-law cited above in relation to the autonomous interpretation of Community concepts, (40) in order to then point out the fact that Directive 92/100 did not provide any definition of that concept. (41) It clearly proceeded on the basis of the presumption that the Community legislature deliberately refrained from laying down a detailed and universally applicable method for calculating the level of such remuneration. (42) Consequently, it expressly acknowledged the Member States' right to lay down specific methods for determining what constitutes such 'equitable remuneration', by determining 'the most relevant criteria for ensuring, within the limits imposed by Community law, and particularly Directive 92/100, adherence to that Community concept' (43) and restricted itself to calling upon the Member States to ensure the greatest possible adherence throughout the territory of the Community to the concept of 'equitable remuneration' in the light of the objectives of Directive 92/100, as specified in particular in the preamble thereto. (44) At the same time, it must be emphasised that the fact that that concept required more detailed expression to be given to it by means of criteria to be laid down by national law did not prevent the Court from stating that the concept of 'equitable remuneration' in Article 8(2) of Directive 92/100 had to be interpreted uniformly in all the Member States and applied by each Member State. (45) Consequently, in conclusion, even in the special circumstances of that case, the Court was able to answer in the affirmative that it was a concept of Community law necessitating an autonomous Community interpretation.

69. It appears conceivable to me that those principles could be applied to the case at issue in the main proceedings, especially since the present case is also concerned with the interpretation of a legal concept in the field of Community copyright law, which as a result of the regulatory approach

adopted by the Community legislature is similarly vague and in need of more detailed expression.

70. Finally, a further argument may be advanced in favour of classification as a Community law concept, which is based on a historical interpretation of Directive 2001/29. It may be inferred from the drafting history of that directive that the concept of 'fair compensation' in Article 5(2)(b) was intended to be a 'new concept', which, in the absence of a legal definition in the Commission proposal, required the Council to lay down guidelines on its application. (46) Those guidelines may now be found in recital 35 in the preamble to the directive. It follows that the intention of the Community legislature was to introduce a new concept at Community level, without it being linked with pre-existing concepts in international copyright law (47) or that of the Member States. This differentiates this concept somewhat from the concept of 'equitable remuneration' used in Article 5 and Article 8(2) of Directive 2006/115, which originated from international copyright law (48) and was adopted verbatim in the Community legal system.

71. Consequently, the choice of a new concept for compensating the author in the event of private copying appears, in the light of its drafting history, the need for it to be further filled out, its autonomy vis-à-vis Member States and international terminology, and the harmonising objective of Directive 2001/29, to be inspired by the efforts of the Community legislature to take into consideration the pre-existing national legislation originating in the different legal traditions of the Member States. At the same time, it can be assumed that it saw the need for a concept as flexible as possible, capable of developing in the light of regular reviews depending on technological and economic developments. (49)

72. Having regard to the above considerations, the answer to the first question referred is that the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 is an autonomous Community law concept which must be interpreted uniformly in all the Member States and transposed by each Member State; it is however for each Member State to determine, for its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and by the directive in particular, compliance with that Community concept.

D – The second question referred

73. By its second question referred, the referring court would essentially like to know whether the Member States are obliged to ensure a balance between the intellectual property rightholders and the persons directly or indirectly liable to pay the compensation. If that question is answered in the affirmative, the referring court asks whether the justification for the fair

compensation to be achieved is the mitigation of the harm caused to the rightholder.

74. The first part of the question should in principle be answered in the affirmative in my opinion. The necessity to ensure such a balance arises first of all from recital 31 in the preamble to Directive 2001/29, in which reference is made to ensuring a 'fair balance of rights and interests' between the different categories of rightholders and users of protected subject-matter. The wording of Article 5(2)(b) also expressly refers to the fact that the limitation in respect of private copying is subject to the condition of 'fair compensation'. From a semantic point of view alone, this concept implies a certain balance between conflicting interests. Apart from that, the Community legislature's recourse to a concept like fairness in fact derives from legal philosophy, which facilitates a deeper understanding of the legislative considerations behind the rule. In that connection, it is necessary only to recall Aristotle who, in his work Nicomachean Ethics, made the first attempt to examine and structure that concept systematically, establishing that fairness is not only a virtue but is always to be thought of in relation to others. Aristotle argued that a person acted unfairly if he demanded more than he was entitled to by law. On the other hand, unfairness prevailed where someone received too little in proportion to his efforts. The task of ensuring equality, and consequently fairness, usually falls to the judge (dikastes) in Aristotle's view. Here, it is noteworthy that in order to illustrate his theses on 'commutative justice' (iustitia commutativa) he referred, inter alia, to the right of every artist to receive a payment for his work which is appropriate in quantitative and qualitative terms. (50) It must be concluded therefore that the fair character of that compensation must be achieved, as the United Kingdom Government has correctly stated, by means of balancing the interests of the rightholder and the user.

75. The fact that in its question, the referring court does not expressly refer to the 'user', but to the 'persons directly or indirectly liable to pay the compensation', is not capable of weakening those considerations. On the contrary, the question referred must be placed in the right context, which requires some clarification in this Opinion. The formal characteristic of being the person liable to pay compensation does not as such yet reveal anything about the identity of the natural person within the meaning of Article 5(2)(b) of Directive 2001/29 who avails himself of the private copying rule. In my opinion, that person should be taken as the focus rather than the person liable to pay compensation. Since the user must bear the economic burden of the compensation pursuant to the maxim cuius commoda, eius incommoda, (51) his interests should also be taken into account in the course of the balancing of interests. That appears to me to correspond more closely to the intention of the Community legislature which is expressed in recital 31 in the preamble to the directive.

76. Apart from that, Article 5(2)(b) of Directive 2001/29 does not determine who should actually be obliged to pay. Nor does recital 35 in the preamble to the directive provide any help with interpretation. In certain circumstances, the person liable to pay may by all means be the user himself, as is for instance the case in relation to the 'equitable remuneration' provided for in Article 8(2) of Directive 92/100. (52) It should also be taken into account that in a system of lump-sum compensation by means of a levy – as provided for in the Spanish legal system – those who are directly liable to pay such fair compensation, that is the dealers and importers according to Article 25(4)(a) of the TRLPI, that levy is normally passed on to the customer and therefore ultimately to the user via the purchase price. (53) Therefore, as the German Government correctly observes, (54) the effect of that provision on the dealers and importers proves to be neutral. Whilst they have to pay the lump-sum compensation to the authors, they do not suffer any prejudice as a result because they are reimbursed for the compensation by the user via the purchase price. In that respect, it would not be correct for the interests of the person liable to pay the compensation to be taken as the sole basis. However, that does not exclude them from being attributed some significance in certain circumstances, for instance when they act to protect the interests of the user.

77. Consequently, the first part of the question only makes sense if one understands the expression 'the persons … indirectly liable to pay the compensation' used by the referring court in a non-technical sense, namely to the effect that it means the users who ultimately bear the economic burden of the compensation. In those circumstances, the above considerations would apply.

78. As far as the second part of the question is concerned, it should be pointed out to begin with that 'fair compensation' within the meaning of Article 5(2)(b) of Directive 2001/29 is not aimed at compensating the rightholder for illegal actions in connection with the unauthorised reproduction of works and other subject-matter. There is only a claim to compensation in connection with private copying, provided that such copying is permitted according to the copyright laws of the Member States. (55) The fact that – for instance on the internet via so-called 'P2P' (peer-to-peer) file sharing – widespread infringement of the essentially comprehensive reproduction rights of the author may be observed is not relevant in connection with that provision of the directive, and neither can it be regarded as a factor for the purpose of ensuring a balance between the interests of the rightholder and of the user. (56) Copies which are made illegally in that way in fact mostly serve commercial purposes. In any case, they serve purposes other than 'private use' within the meaning of Article 5(2)(b) of Directive 2001/29 and are therefore not covered by the limiting provision. (57)

79. The right to ‘fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29, as the German Government correctly points out, primarily has the character of a reward. (58) This is apparent from the first sentence of recital 10, pursuant to which 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. Recital 35 makes clear that ‘fair compensation’ should also be classified in this category of rewards, where it is stated that 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.

80. On the other hand, legal categorisation of the legal concept of ‘fair compensation’ as a straightforward claim for damages, as the referring court apparently assumes, may not readily be confirmed. Of course, the exclusive reproduction right established in Article 2 of Directive 2001/29 constitutes an expression of the intellectual property of the author. An exception or limitation to that right under Article 5(2)(b) of the directive may therefore be regarded as interference with that fundamental right which is protected by Community law. (59) However, the criterion of harm does not necessarily have to be taken as a basis for determining fair compensation. The directive merely permits harm or prejudice to be taken as a guide, but does not make them binding criteria. (60)

81. Thus, it must be inferred from the second sentence of recital 35 in the preamble to the directive that when determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case; in evaluating those circumstances, a ‘valuable criterion’ may be the possible harm to the rightholder. That suggests that possible harm, as the Spanish Government correctly observes, should not be regarded either as the sole criterion for determining such fair compensation or as the decisive criterion, but instead constitutes just one of a number of criteria, which the Member States may take as a basis for determining fair compensation. Further criteria, which are listed in recital 35 in the preamble to the directive, may be added, for instance payment already received in some other form, the degree of use of technological protection measures or the minimal nature of the prejudice suffered. However, that list should not be regarded as exhaustive. (61)

82. Directive 2001/29 pleads, to a certain extent, for preservation of the private copying exception, when it states in the first sentence of recital 38 that 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 audiovisual material for private use, accompanied by fair compensation. However, at the same time it confers a wide discretion on the Member States as to how their respective national systems implement such fair compensation, (62) for instance when it provides, in the second sentence of

recital 38, that that may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders.

83. That regulatory approach is consistent with the legal nature of a directive which, pursuant to the third paragraph of Article 249 EC, is binding as to the result to be achieved, but largely leaves to the Member State the choice of form and methods. (63) At the same time, it is a feature of Directive 2001/29 that it contains individual, in part not very specific, Community law requirements, for instance pursuant to its recital 35 in relation to the form, detailed arrangements and level of the 'fair compensation'. The obligation of each Member State to produce a particular result (64) is associated with the implementation of every directive, and in the case of Directive 2001/29 consists in ensuring financial compensation of authors by users, in the event that that Member State decides to provide for exceptions or limitations in relation to the author's reproduction right pursuant to Article 5(2)(b). (65)

84. It follows from all the foregoing that the answer to the first part of the second question referred must be that, regardless of the system used by each Member State to calculate fair compensation, the Member States are obliged to ensure a fair balance between the persons affected – the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other. The answer to the second part of the question is that the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 must be understood as a payment to the rightholder which, taking into account all the circumstances of the permitted private copying, constitutes an appropriate reward for the use of his protected work or other subject-matter.

E – The third to fifth questions referred

85. The referring court's third to fifth questions all relate to how the Member States must organise their systems for the implementation of the condition as to fair compensation, where they introduce an exception or limitation pursuant to Article 5(2)(b) of Directive 2001/29. Their objective is to have the Court determine what Community law requirements a national system, which, like the Spanish one, provides for a lump-sum payment to the rightholder in respect of the presumed use of equipment, devices and media for private copying, must meet. The contested issue, as to the compatibility of such national legislation with Community law, primarily Directive 2001/29, arises in particular against the background of the indiscriminate application of that legislation to a whole series of addressees and technical devices.

86. In proceedings under Article 234 EC, the Court cannot decide on the compatibility of national legal provisions with Community law provisions.

However, it does have jurisdiction to give the national court all necessary guidance on the interpretation of Community law so as to enable that court to determine whether those legal provisions are compatible with the Community law provisions. (66)

1. Requirement of a link between the compensation and the presumed use for private copying

87. The third question referred is a fundamental one and must therefore be examined first of all. By that question, the referring court would like to know whether there must necessarily be a link between the levy, through which the fair compensation is to be financed, and the presumed use of the abovementioned devices and storage media. In other words, the question is whether a method of calculating the payment to the rightholder on a lump-sum basis is in conformity with Community law.

(a) Linkage as an unwritten factual element

88. As already explained, an exception or limitation under Article 5(2)(b) of Directive 2001/29 may be regarded as a form of interference with the exclusive reproduction right of the rightholder which is permitted by Community law, (67) although in such a case that provision of the directive mandatorily requires compensation for the author. Where a Member State transposes that provision into its national legal system, the making of a private copy by a natural person must be regarded as the specific act of interference which, subject to further criteria to be laid down by statute, triggers the rightholder's entitlement to financial compensation.

89. In that respect, there is certainly a linkage between the making of a private copy and the payment which is owed. That applies regardless of how the respective Member State's system of collection for compensation for private copying is organised in detail and whether it is financed, for instance, by means of a levy. Logically, from the viewpoint of Community law it must also be required that in any case there be a sufficiently close link between the relevant levy and the use of the abovementioned devices and storage media.

90. On the other hand, the requirements in relation to that link should not be raised so high that ultimately the actual use of the relevant devices for the purposes of private copying would have to be required. Rather, even potential use would have to be regarded as sufficient. A similar conclusion may be drawn from the judgment in SGAE, (68) in which the Court interpreted the ambiguous legal concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and considered the mere possibility of a work being made available to the public, in the specific case by means of television sets, to be sufficient. (69) On the other hand, the

Court did not consider it to be material that some users had not made use of that possibility because they had not switched on the television sets. (70) The comments of Advocate General Sharpston in her Opinion in that case are extremely valuable as she recalled that, according to the fundamental principles of copyright, copyright holders are remunerated on the basis not of the actual enjoyment of the work but of a legal possibility of that enjoyment. (71)

(b) Maintenance of linkage in a levy system allowing lump-sum payments

91. It is doubtful whether the requirement for a sufficiently close link between the use of the right and the corresponding financial compensation for private copying is maintained within a national levy system which employs a method of lump-sum calculation of the payment.

92. However, the requirement of a sufficiently close link does not prevent the Member States, when exercising the wide margin of discretion for implementation they enjoy, from introducing a system based on practical considerations, which is based not on the actual extent of private copying but on the presumed use for private copying by the users of devices which are capable of making such copies, and consequently calculates 'fair compensation' under Article 5(2)(b) of Directive 2001/29 on the basis of an estimate. Last but not least, the fact that it is almost impossible both to effectively monitor such reproduction and to make a statistical survey of the precise quantity of private copying would probably make the introduction of such a system at a Member State level appear to be necessary. (72) Therefore it must be presumed that as a general rule the rightholder is not in a position to find out whether and to what extent private reproduction has been carried out. Thus, a direct charge to the user must be excluded for reasons of practicality. (73) The Spanish, Greek, German and United Kingdom Governments refer expressly to these difficulties.

93. The lump-sum remuneration of the rightholder provided for under Spanish law, which is linked to the presumed use of devices and storage media, overcomes these practical difficulties in an objective way: the manufacturer, importer or dealer of a device or storage medium, which is in fact typically used for reproductions, directly pays a lump sum, which is demanded as remuneration for private copying for the benefit of all rightholders. Admittedly, the actual user is not subject to the payment obligation; it is 'moved up' to the first-mentioned group of persons. However, as already mentioned, it must be assumed that the lump sum is passed on to the purchaser of a device or storage medium, and ultimately to the user, via the purchase price. (74) Consequently, the remuneration is in effect linked to the typical actual use of the device or storage media for private copying.

94. Gearing the legislative approach to the objective suitability of a device for private copying is based, as the Spanish Government states in its written observations, (75) to a certain extent on a statutory presumption that in all probability the buyer will make use of this possibility. (76) Thus a sufficiently close link exists provided that that presumption is not rebutted by specific evidence to the contrary. That statutory presumption takes into account the connection required by Article 5(2)(b) of Directive 2001/29 between the use of the right, on the one hand, and fair compensation, on the other hand. Consequently, a method which calculates the rightholder's remuneration as a lump sum should be regarded as being in principle compatible with Community law.

(c) Conclusion

95. Therefore, the answer to the third question referred is that, where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, such a charge can be based upon Article 5(2)(b) of Directive 2001/29 only where it may be presumed that those equipment, devices and media are to be used for making reproductions covered by the private copying exception.

2. Indiscriminate application of the levy to undertakings and professional persons

96. The fourth question referred is somewhat more specific in nature, since by it the referring court draws attention to a special feature of the Spanish levy system. It questions whether indiscriminately charging a levy, in particular to undertakings and professional persons, as provided for in the Spanish system, is compatible with the concept of 'fair compensation'. In that context, the referring court proceeds on the assumption that undertakings and professional persons clearly purchase the digital reproduction devices and media in question for purposes other than private copying. (77) Thus, there is an important finding of facts in the question referred, which the Court must incorporate into its legal assessment.

(a) Need to take into account the particular circumstances of each case

97. Indiscriminately charging a levy, without duly taking into account the fact that, owing to factors specific to a certain line of business, the devices in question could be acquired for purposes other than private copying, may not be based on Article 5(2)(b) of Directive 2001/29. It is not 'fair compensation' within the meaning of that provision, especially since, as shown by recital 35, the Member States are expressly urged, (78) when determining the form, detailed arrangements and possible level of such fair compensation, to take account of the particular circumstances of each case.

Consequently, that requirement would not be met in the case in the main proceedings.

(b) Necessary linkage between private copying and compensation

98. In addition, in the prevailing circumstances, such legislation would particularly disregard the link which, according to Article 5(2)(b) of Directive 2001/29, must exist between the act of interference and the corresponding financial compensation. In the main proceedings there would in fact already be no legal basis for compensation. According to that provision, the main requirement for compensation is a reproduction made 'by a natural person for private use and for ends that are neither directly nor indirectly commercial'.

99. Indiscriminately burdening an undertaking by means of a levy as compensation for private copying could not be justified, since first of all the private copies must have been made 'by a natural person', so that a reproduction 'by an undertaking' is not covered, at least on the basis of the wording. However, even looking at the reality of the situation, whereby the act of reproduction must necessarily be carried out by a natural person, for instance an employee of the undertaking, the attribution of an act of reproduction to the undertaking would raise legal questions upon which a conclusive opinion cannot be given. On the other hand, it follows indirectly from the spirit and purpose of the provision in Article 5(2)(b) of Directive 2001/29 that the copy in question must in any case be intended 'for the private use of a particular person'. The making of a private copy for use by a legal person would therefore for example be excluded, in so far as that is understood to mean the use of the copy by a number of people. (79)

100. However, even if exceptionally the act of reproduction were regarded as attributable, the factual conditions for application of Article 5(2)(b) would not be satisfied. That provision expressly excludes any type of copying for commercial purposes, regardless of whether it is for legal purposes (for example backup copies) or illegal commercial purposes (for example music piracy). In a case where, in the words of the referring court, undertakings or professional persons 'clearly purchase for purposes other than private copying', the abovementioned digital reproduction devices and storage media, for example for professional purposes, that would not be covered by the limitation in Article 5(2)(b). (80) Financial remuneration for the rightholders would accordingly in those circumstances go beyond what Directive 2001/29 actually required with regard to ensuring 'fair compensation'. (81)

101. From a legal point of view, the disputed national legislation expands the personal and material scope of Article 5(2)(b) of Directive 2001/29 by, first, extending the compensation obligation provided for in that article

beyond natural persons and, second, by extending it to cases which do not involve a reproduction ‘for private use’.

(c) Exhaustive regulation of ‘fair compensation’ in Article 5(2)(b)

102. The consequences of the above essentially depend on whether or not Article 5(2)(b) of Directive 2001/29 exhaustively regulates ‘fair compensation’ for private copying.

103. If provisions of a directive regulate a particular matter exhaustively, then more far-reaching provisions adopted by Member States in relation to the same facts are not permitted. Whether a directive intends to make such an exhaustive regulation must be assessed on a case‑by‑case basis, taking into account the wording, objectives and the regulatory system of the directive. (82) A directive may in fact contain both provisions of an exhaustive nature, and at the same time provisions which allow the Member States a discretion – for instance with regard to the level of protection afforded by a provision. (83)

104. In that context, reference should again be made to the fact that ‘fair compensation’ within the meaning of that provision of the directive is a sufficiently precise Community law concept. Despite the relatively low degree of harmonisation in Directive 2001/29 ‑–which in that respect is comparable to a framework directive – Article 5(2)(b) clearly lays down the circumstances in which the rightholder is entitled to remuneration. In addition, the person who may be held liable may be ascertained with precision from the spirit and purpose of the provision: in case of doubt, it is the user who benefits from the private copying rule. (84) Against this background, it must be assumed that Article 5(2)(b) contains an exhaustive Community law regulation of ‘fair compensation’ for private copying, which prevents the Member States – at least as far as private copying is concerned – from unilaterally expanding the circle of those who can be held liable to other groups of people such as undertakings and professional persons, who from experience purchase digital reproduction devices and media for purposes other than private use.

105. Accordingly, remuneration which is granted to rightholders as a result of the indiscriminate application of a levy to undertakings and professional persons on the basis of a private copying rule also cannot amount to ‘fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29.

106. However, that does not mean that charging a copyright law levy on undertakings and professional persons pursuant to Article 5(2)(b) of Directive 2001/29 is fundamentally prohibited. The directive harmonises only certain aspects of copyright law. Consequently, Article 5(2)(b) of Directive 2001/29 merely precludes a national provision which demands a

levy from undertakings and professional persons in respect of compensation for private copying on devices, media and equipment, if it may be assumed that those devices, media and equipment will not be used for private copying within the meaning of Article 5(2)(b) of Directive 2001/29. However, Article 5(2)(b) of Directive 2001/29 does not preclude a national provision which imposes a levy for other reasons. (85)

(d) Conclusion

107. Therefore, the answer to the fourth question referred is that remuneration which is granted to rightholders, as a result of the indiscriminate application of a levy to undertakings and professional persons on the basis of a private copying rule, is in any case not ‘fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29.

3. Compatibility of the Spanish levy system with Directive 2001/29

108. The fifth question referred, with regard to whether a levy system such as that applicable in Spain infringes Directive 2001/29, must be answered in the light of the above considerations and taking into account the findings of the referring court.

109. A compensation system for private copying financed by a levy, which for practical reasons determines ‘fair compensation’ by means of a lump sum is, in the light of the broad discretion enjoyed by the Member States, essentially compatible with Directive 2001/29. However, the national legislature must ensure that the correlation required by Article 5(2)(b) of Directive 2001/29 between the interference with the comprehensive reproduction right of the rightholder and the corresponding financial compensation is substantially maintained. (86)

110. Where such correlation no longer exists, for instance because the relevant levy is largely applied to different situations in which there is no limitation of rights which would justify the financial compensation, the remuneration granted to the rightholders does not in any case constitute ‘fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29.

111. Therefore the answer to the fifth question referred is that a national system which indiscriminately provides for a levy for private copying on all equipment, devices and media infringes Article 5(2)(b) of Directive 2001/29 in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent the levy is applied to different situations in which the limitation of rights which would justify the compensation does not exist.

VII – Conclusion

112. In the light of the above considerations, I propose that the Court should answer the questions referred by the Audiencia Provincial de Barcelona as follows:

(1) The concept of 'fair compensation' 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 is an autonomous Community law concept which must be interpreted uniformly in all the Member States and transposed by each Member State; it is however for each Member State to determine, for its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and by Directive 2001/29 in particular, compliance with that Community concept.

(2) The concept of 'fair compensation' must be understood as a payment to the rightholder which, taking into account all the circumstances of the permitted private copying, constitutes an appropriate reward for the use of his protected work or other subject-matter. Regardless of the system used by each Member State to calculate fair compensation, the Member States are obliged to ensure a fair balance between the persons affected – the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other.

(3) Where a Member State opts for a levy system in respect of compensation for private copies on digital reproduction equipment, devices and media, that levy must, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, meaning that the application of the charge is justified only where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying.

(4) The indiscriminate application of a levy, on the basis of a private copying rule, to undertakings and professional persons who clearly acquire digital reproduction devices and media for purposes other than private copying, is not compatible with the concept of 'fair compensation' within the meaning of Article 5(2)(b) of Directive 2001/29.

(5) A national system which indiscriminately provides for a levy for compensation for private copying on all equipment, devices and media, infringes Article 5(2)(b) of Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because it cannot be assumed that those equipment, devices and media will be used for private copying.

1 – Original language: German.

2 – See, to that effect, also Falcón Tella, R., ‘El llamado “canon por derechos de autor” (Copyright Levy) o compensación equitativa por copia privada (I): antecedentes y configuración en la Ley 23/2006, de 7 julio (RCL 2006, 1386)’, Quincena Fiscal Aranzadi, No 15/2006, p. 1, who refers to the development of various methods of reproduction. See also Ortega Díaz, J.F., ‘Medidas tecnológicas y derechos de autor’, Noticias de la Unión Europea, 2008, No 286, p. 67, who refers to the challenges to the protection of copyright created by the inventions in the 1980s, for example photocopiers and music cassettes and by the computer in the so-called ‘information age’.

3 – Pursuant to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the reference for a preliminary ruling is now governed by Article 267 of the Treaty on the Functioning of the European Union.

4 – OJ 2001 L 167, p. 10.

5 – BOE No 162 of 8 July 2006, p. 25561.

6 – BOE No 148 of 19 June 2008, p. 27842.

7 – The WIPO Copyright Treaty, adopted in 1996 by the World Intellectual Property Organisation (WIPO), is a special agreement within the meaning of Article 20 of the Berne Convention; it forms a framework for adapting national copyright laws to the requirements of digital network media (published in OJ 2000 L 89, p. 8).

8 – Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16), 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), Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12), Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20), and Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32).

9 – See recital 5.

10 – See recital 22.

11 – See, for example, inter alia, recitals 9, 14 and 23 in the preamble to the directive and recital 5 in the preamble to the WIPO Copyright Treaty, which speaks of the need ‘to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.

12 – Buhrow, A., ‘Richtlinie zum Urheberrecht in der Informationsgesellschaft’, European Law Reporter, 2001, Volume 10, p. 313, takes Article 5 of Directive 2001/29 to be a political compromise, in which the differing legal traditions and views found expression. According to the author’s view, the actual extent of harmonisation remains questionable, in the light of the numerous limiting provisions, until it is finally implemented in all Member States.

13 – Ullrich, J.N., ‘Clash of Copyrights – Optionale Schranke and zwingender finanzieller Ausgleich im Fall der Privatkopie nach Art. 5 Abs. 2 Buchst. b Richtlinie 2001/29/EG und Dreistufentest’, Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil, 2009, Volume 4, p. 283, refers to the fact that, as in the rest of the world, the information society in Europe finds itself exposed to a multitude of national copyright law systems which differ, sometimes considerably, in terms of their conception, form and definition of copyright law protection. In the view of the author, reconciling the differences between the continental European concept of copyright protection and the concept of copyright in common law countries is and remains the greatest challenge.

14 – Philapitsch, F., Die digitale Privatkopie, Graz, 2007, p. 85, refers to the considerable number of limiting provisions which emerged in the course of the legislative process. Whilst there were still 9 provisions in the proposal for the directive, these increased in the second amended proposal to 11 and ultimately as a result of the joint position to the final number of 22.

15 – According to Metzger, A. and Kreutzer, T., ‘Richtlinie zum Urheberrecht in der Informationsgesellschaft – Privatkopie trotz technischer Schutzmaßnahmen?’, Multimedia und Recht, 2002, Volume 3, p. 139, the directive allows the Member States considerable discretion in relation to implementation. They assert that the reason for this is that it would not have been possible to agree on central issues in relation to a future system of copyright law at a European level. In the view of Guntrum, S., Zur Zukunft der Privatkopie in der Informationsgesellschaft, Hamburg, 2007, p. 126, the optional character and the wording of the European limitation on private copies and the corresponding recitals point in favour of a free choice as to the form of the limitation on private copies.

16 – To that effect, Guntrum, S., loc. cit. (footnote 15), p. 118, 125; Plaza Penadés, J., ‘Propiedad intelectual y sociedad de la información’, Contratación y nuevas tecnologías, Madrid, 2005, p. 147; Bércovitz Rodríguez-Cano, R., ‘El canon de

copia privada: escaramuza sobre el fuero', Aranzadi Civil, No 14/2009, p. 1; Hugenholtz, B., Guibault, L. and van Geffen, S., 'The Future of Levies in a Digital Environment', 2003, available on the internet (http://www.ivir.nl/publications/other/DRM&levies-report.pdf), p. 32, refer to the fact that Directive 2001/29 does not impose any obligation on the Member States with regard to introducing an exception for private copies. They argue that the national legislature is therefore free to completely prohibit private copies or to allow them to some extent.

17 – See Case 38/77 Enka [1977] ECR 2203, paragraph 20.

18 – See Middeke, A., Handbuch des Rechtsschutzes in der Europäischen Union, 2nd edition, Munich, 2003, p. 226, paragraph 38, and Case 244/78 Union laitière normande [1979] ECR 2663, paragraph 5.

19 – See, inter alia, Joined Cases C‑297/88 and C‑197/89 Dzodzi [1990] ECR I‑3763, paragraphs 33 and 34; Case C‑231/89 Gmurzynska-Bscher [1990] ECR I‑4003, paragraphs 18 and 19; Case C‑28/95 Leur-Bloem [1997] ECR I‑4161, paragraph 24; Case C‑275/06 Promusicae [2008] ECR I‑271, paragraph 36; and Case C‑2/06 Kempter [2008] ECR I‑411, paragraph 42.

20 – See, inter alia, Case C‑379/98 PreussenElektra [2001] ECR I‑2099, paragraph 38; Case C‑18/01 Korhonen and Others [2003] ECR I‑5321, paragraph 19; Case C‑380/01 Schneider [2004] ECR I‑1389, paragraph 21; Case C‑295/05 Asemfo [2007] ECR I‑2999, paragraph 30; and Joined Cases C‑261/07 and C‑299/07 VTB-VAB [2009] ECR I‑0000, paragraph 32.

21 – See, inter alia, Case 244/80 Foglia [1981] ECR 3045, paragraph 18; Joined Cases C‑422/93 to C‑424/93 Zabala Erasun and Others [1995] ECR I‑1567, paragraph 29; Case C‑415/93 Bosman [1995] ECR I‑4921, paragraph 61; Case C‑314/96 Djabali [1998] ECR I‑1149, paragraph 19; PreussenElektra, cited in footnote 20 above, paragraph 39; Schneider, cited in footnote 20 above, paragraph 22; Case C‑212/06 Government of the French Communityand Walloon Government [2008] ECR I‑1683, paragraph 29; and VTB-VAB, cited in footnote 20 above, paragraph 33.

22 – See pp. 2 and 13 of the order for reference.

23 – See the preamble (Part I, fourth paragraph) to Amending Law No 23/2006 of 7 July 2006, in which it can be read that the transposition of Directive 2001/29 into Spanish law had primarily as its objective the principle of 'literal transposition' of that directive and of the 'minimal reform of the legislation in force'. Ruiz Zapatero, G., 'Naturaleza y límites constitucionales de la compensación equitativa por copia digital privada establecida en la Ley 23/2006 de modificación del texto refundido de la Ley de Propiedad Intelectual', Jurisprudencia Tributaria Aranzadi,

2007, Volume 7, takes the view that the original wording of Article 25 of the TRLPI could not have been maintained any longer considering the difference between the terms used there and Directive 2001/29. Amending Law No 23/2006 had made the necessary changes, which were primarily of a technical nature, to make it more precise. Falcón Tella, R., loc. cit. (footnote 2), p. 4, explains that the amendment to the previously used concept of 'fair remuneration' in Article 25 of the TRLPI arose from the intention to follow the terminology of Directive 2001/29.

24 – See, to that effect, Case C‑58/98 Corsten [2000] ECR I‑7919, paragraph 24, and Joined Cases C‑482/01 and C‑493/01 Orfanopoulos and Oliveri [2004] ECR I ‑5257, paragraph 42.

25 – See Case C‑475/99 Ambulanz Glöckner [2001] ECR I‑8089, paragraph 10; Case C‑153/02 Neri [2003] ECR I‑13555, paragraphs 34 and 35; Orfanopoulos and Oliveri,, cited in footnote 24 above, paragraph 42; and Case C‑267/03 Lindberg [2005] ECR I‑3247, paragraphs 41 and 42.

26 – It is apparent from the case-law that the Court endeavours to give useful answers to the questions which are referred to it. See Joined Cases C‑402/07 and C ‑432/07 Sturgeon and Others [2009] ECR I‑0000, paragraph 28; Case C‑445/06 Danske Slagterier [2009] ECR I‑0000, paragraph 29; and Case C‑41/90 Höfner and Elsner [1991] ECR I‑1979, paragraph 16.

27 – Case C‑212/04 Adeneler and Others [2006] ECR I‑6057, paragraph 115, and Case C‑304/08 Plus Warenhandelsgesellschaft [2010] ECR I‑0000, paragraph 17.

28 – See Joined Cases C‑397/01 to C‑403/01 Pfeiffer and Others [2004] ECR I‑ 8835, paragraphs 115, 116, 118 and 119), and Adelener and Others, cited in footnote 27 above, paragraph 111.

29 – See, inter alia, Case 327/82 Ekro [1984] ECR 107, paragraph 11; Case C‑ 287/98 Linster [2000] ECR I‑6917, paragraph 43; Case C‑357/98 Yiadom [2000] ECR I‑9265, paragraph 26; Case C‑245/00 SENA [2003] ECR I‑1251, paragraph 23; Case C‑55/02 Commission v Portugal [2004] ECR I‑9387, paragraph 45; Case C‑188/03 Junk [2005] ECR I‑885, paragraphs 27 to 30; and Case C‑306/05 SGAE [2006] ECR I‑11519, paragraph 31.

30 – See Ekro, cited in footnote 29 above, paragraph 14.

31 – See on this point my Opinion in Case C‑62/06 Zefeser [2007] ECR I‑11995, points 32 and 33.

32 – This is the view of Riesenhuber, K., Europäische Methodenlehre, Berlin, 2006, p. 247, paragraph 7.

33 – See Case C‑369/90 Micheletti [1992] ECR I‑4239, paragraphs 10 to 15, in connection with the concept of ‘nationality’ and Case 12/76 Tessili [1976] ECR 1473, paragraph 14, in relation to the concept of ‘place of performance’ for the purposes of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

34 – See Case 105/84 Danmols Inventar [1985] ECR 2639, paragraphs 22 to 27, on the concept of ‘employee’ within the meaning of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).

35 – See, inter alia, Case C‑156/98 Germany v Commission [2000] ECR I‑6857, paragraph 50; Case C‑53/05 Commission v Portugal [2006] ECR I‑6215, paragraph 20; and SGAE, cited in footnote 29 above, paragraph 34.

36 – See paragraph 16 of the written observations of the United Kingdom Government.

37 – According to the view of Riesenhuber, K., loc. cit. (footnote 32), p. 246, paragraph 6, the approximation of laws means that an autonomous Community law concept should be created. If it is the intention to approximate laws, the author argues that one standard has to be set. By means of dynamic reference to the national interpretation at the time concerned, Community law would relinquish its autonomy, whereas a static reference to its original state would fossilise it. Rott, P., ‘What is the Role of the ECJ in EC Private Law?’, Hanse Law Review, No 1/2005, p. 8, points out that the principle of autonomous interpretation causes difficulties in those cases in which Community law uses general clauses. The author speaks strictly against allowing Member States the freedom to find their own interpretation of this concept. In the author’s view, this stance is unacceptable if the Community aspires to harmonisation of the Member States’ legislation, for instance on the basis of Article 95 EC. The use of general clauses was a regulatory technique which was customarily applied in the continental European legal system where it proves to be impossible to define certain definitional elements in advance. However, the author asserts that this could not have the objective of limiting the influence of Community law on the legal systems of the Member States.

38 – Cited in footnote 29 above.

39 – OJ 1992 L 346, p. 61.

40 – SENA, cited in footnote 29 above, paragraph 21.

41 – Ibid., paragraphs 7, 25, and 34.

42 – Ibid., paragraph 32.

43 – Ibid., paragraph 34.

44 – Ibid., paragraph 36.

45 – Ibid., paragraph 38.

46 – See Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000, pursuant to the procedure under Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2000 C 344, p. 1), recital 19.

47 – According to the established case-law of the Court, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (see, inter alia, Case C‑61/94 Commission v Germany [1996] ECR I‑3989, paragraph 52; Case C‑341/95 Bettati [1998] ECR I‑4355, paragraph 20; and SGAE, cited in footnote 29 above, paragraph 35). Certain international copyright law conventions give the signatory States the possibility of providing for limitations or exceptions in certain special cases, in relation to the rights granted to the authors of works, such as for example the revised Berne Convention (Article 9), the WIPO Copyright Treaty (Article 10) and the Convention on Trade‑Related Aspects of Intellectual Property Rights (TRIPS) (Article 13). However, no concept may be taken from any of these which would correspond exactly to the concept of ‘fair compensation’ within the meaning of Article 5(2)(b) of Directive 2001/29.

48 – See Articles 11bis(2) and 13(1) of the revised Berne Convention.

49 – Thus also Carbajo Cascón, F., ‘Copia privada y compensación equitativa’, Noticias de la Unión Europea, No 286/2008, pp. 34 and 35.

50 – See Aristotle, Nicomachean Ethics, fifth book, seventh chapter – Commutative justice, 322 BC, 1132b. There it states: ‘Das Gesagte muss auch noch in anderer Hinsicht, bei den Leistungen der verschiedenen Künste, vor Augen gehalten werden. Es wäre um sie geschehen, wenn der Künstler nicht tätig ein Produkt schüfe, das sich quantitativ und qualitativ bewerten ließe, und nicht leidend dafür sowohl quantitativ als qualitativ entsprechend ausgelohnt würde.’ (German translation: Eugen Rolfes, ed. Günther Bien, 4th edition, Hamburg, 1985, p. 110).

51 – This Roman law maxim states that the person who derives benefit from a thing should also bear the disadvantages. According to the submissions of the Spanish Government, the Spanish levy system is based on this principle.

52 – Article 8(2) of Directive 92/100 provides as follows: ‘Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers.’

53 – Falcón Tella, R., clearly proceeds on this basis, in ‘El llamado ‘canon por derechos de autor’ (Copyright Levy) o compensación equitativa por copia privada (II): antecedentes y configuración en la Ley 23/2006, de 7 julio (RCL 2006, 1386)’, Quincena Fiscal Aranzadi, No 17/2006, p. 1, when he refers to the spirit and purpose of the levy, which in his opinion consists in allowing the dealers and – via them – the buyers of digital reproduction equipment, devices and media to contribute to the fair compensation. See also Carbajo Cascón, F., loc. cit. (footnote 49), p. 26, who points out that the manufacturers, importers and dealers who are liable to pay this levy normally passed it on to the customers via the purchase price, by means of which they ensured a balance between the interests of the author and the user. Similarly, see also Bércovitz Rodríguez-Cano, R., ‘Compensación equitativa por copia privada’, Aranzadi Civil, No 16/2007, p. 2, and the same author, loc. cit. (footnote 16) , p. 1.

54 – See p. 11, paragraph 26 of the written observations of the German Government.

55 – See, to that effect, Carbajo Cascón, F., loc. cit. (footnote 49), p. 31, who does not see ‘private copies’ within the meaning of the Spanish rule in Article 31(2) of the TRLPI as including the reproduction of illegal subject-matter (for example in the course of online music piracy). He refers at the same time to the unambiguous wording of this rule (‘… a partir de obras a las que haya accedido legalmente …’).

56 – Philapitsch, F., loc. cit. (footnote 14), p. 91, takes the view that ‘fair compensation’ according to Article 5(2)(b) of Directive 2001/29 is merely provided for in relation to legitimate private reproduction, as is described in the directive. He argues that the harm suffered as a result of illegal copying in the broader sense should not be compensated for in this way and is accordingly not an admissible criterion for determining the system of compensation either.

57 – See, to that effect, Hugenholtz, B., Guibault, L. and van Geffen, S., loc. cit. (footnote 16), p. 32, who do not see acts of reproduction which go beyond private use (for example music piracy) as being within the scope of this exception to the rule.

58 – Philapitsch, F., loc. cit. (footnote 14), p. 90, speaks of a ‘reward for reproduction’ in connection with the exception to the rule in Article 5(2)(b) of Directive 2001/29. Carbajo Cascón, F., loc. cit. (footnote 49), p. 26, speaks of ‘a concept of reward’ in relation to private copying.

59 – According to the Court's case-law, the right to property, which includes the right to intellectual property, is a fundamental right, which is protected in the Community legal system as a general principle of Community law (see, to that effect, Case C‑479/04 Laserdisken [2006] ECR I‑8089, paragraph 65, and Promusicae, cited in footnote 19 above, paragraph 62). Recital 9 in the preamble to Directive 2001/29 also states that intellectual property has been recognised as an integral part of property.

60 – See, to that effect, also Ullrich, J. N., loc. cit. (footnote 13), p. 291. The author states that by citing 'harm' as a criterion, the Community legislature wanted to take into account the common law legal tradition, which attributes a central role to the harm caused by the private copying in deciding on the amount of the financial compensation to be awarded. However, the author asserts that since the relevance of harm for the purpose of determining an appropriate reward is unknown to continental European copyright law, the Community legislature decided to reconcile both legal traditions by means of the directive permitting harm or prejudice to be taken as a guide, but not making these binding criteria. However, one thing recital 35 does adhere to by way of general application: where a rightholder suffers prejudice as a result of the private copy which has been taken, which exceeds a minimum level, all legal traditions shall provide for financial compensation for him.

61 – See point 35 of the Opinion of Advocate General Tizzano in Case C‑245/00 SENA [2003] ECR I‑1251.

62 – Lehmann, M., in Handbuch desUrheberrechts (ed. Ulrich Loewenheim), 1st edition, Munich, 2003, p. 878, paragraph 46, also proceeds on the basis that the Member States retain free discretion as to how the 'fair compensation' for the purposes of Article 5(2)(b) of Directive 2001/29 should be calculated and organised in detail.

63 – See Dreier, T., 'Die Umsetzung der Urheberrechtsrichtlinie 2001/29/EG in deutsches Recht', Zeitschrift für Urheber- und Medienrecht, 2002, p. 28, according to which Directive 2001/29, by its nature, is only binding as to the result to be achieved, and leaves it to the discretion of the Member States as to the choice of form and methods. The author observes that at times the directive allows the national legislature considerable latitude, recalling the 20 optional out of a total of 21 limiting provisions. Carbajo Cascón, F., loc. cit. (footnote 49), p. 26, complains about the lack of precision in the requirements of the directive, which in his view undermines the objective of harmonisation it pursues. Ullrich, J.N., loc. cit. (footnote 13), p. 291, points out that the Community legislature drafted Article 5(2)(b) of Directive 2001/29 following a careful review of the relevant rules in force in the Member States. In the course of that review, it had established that where compensation was regulated by a Member State, according to the consistent legal tradition of all Member States, it took the form of financial compensation,

which only exhibited differences with regard to its form, detailed arrangements and level. In the view of the author, the Community legislature intended to fix those lowest common denominators in Article 5(2)(b), whilst the Member States were to continue to regulate the form and details of the payment. In support of this argument, the author cites the wording of the second sentence of recital 35.

64 – The concept of 'Ziel' (objective) in the German version of the third paragraph of Article 249 EC is also understood in the German language jurisprudence in the sense of an 'Ergebnis' (result) prescribed by the directive. This opinion is supported by the wording in other language versions ('résultat', 'result', 'resultado', 'risultato', 'resultaat'). The Member States must consequently provide for a legal position desired by the directive (see, to that effect, Schroeder, W., in EUV/EGV – Kommentar (ed. Rudolf Streinz), Munich, 2003, Article 249 EC, paragraph 77, p. 2178, and Biervert, B., in EU-Kommentar (ed. Jürgen Schwarze), Baden-Baden, 2000, Article 249 EC, paragraph 25, p. 2089). For that reason, the French concept of 'obligation de résultat' has established itself in the jurisprudence (see Lenaerts, K. and Van Nuffel, P., Constitutional Law of the European Union, 2nd edition, London, 2006, paragraph 17-123, p. 768).

65 – In the view of Häuser, M., 'Pauschalvergütung and digitale Privatkopie', Computer und Recht, 2004, p. 830, the directive unequivocally makes clear that, where the national legislature decides in favour of private copying, it is obliged to ensure fair compensation for the rightholders. In this way, he argues, it is made clear that the limitation of private copying and the system of an obligation to reward the rightholder constitute two sides of the same coin which may not be separated.

66 – See, inter alia, Case 6/64 Costa [1964] ECR 585; Enka, cited in footnote 17 above, paragraph 22; Case C‑292/92 Hünermund [1993] ECR I‑6787, paragraph 8; Case C‑17/00 De Coster [2001] ECR I‑9445, paragraph 23; and Case C‑265/01 Pansard and Others [2003] ECR I‑683, paragraph 18.

67 – See point 80 of this Opinion.

68 – SGAE, cited in footnote 29 above.

69 – Ibid., paragraphs 37, 38 and 43 et seq.

70 – Ibid., paragraph 43.

71 – See point 67 of the Opinion of Advocate General Sharpston in SGAE (cited in footnote 29 above). There she refers in turn to the comments of Advocate General La Pergola in his Opinion in Case C‑293/98 Egeda [2000] ECR I‑629, point 22, who stated the following: '[The] argument [, that communication to the public cannot be assumed because the actual receipt of the broadcast work depends upon an independent action by the guests,] contradicts one of the fundamental principles

of copyright: copyright holders are remunerated on the basis not of the actual enjoyment of the work but of a legal possibility of that enjoyment. For example, publishers must pay royalties to authors for their novels on the basis of the number of copies sold, whether or not they are ever read by their purchasers. Similarly, hotels that are responsible for the – simultaneous, uncut and unchanged – internal cable retransmission of an original satellite broadcast cannot refuse to pay the author the remuneration due to him by maintaining that the broadcast work was not actually received by the potential viewers who have access to the televisions in their rooms.'

72 – See, to that effect, the Commission report 'Fair compensation for acts of private copying' of 14 February 2008, which is available on the internet (http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf). In that report, a 'private copying levy' is defined as a form of compensation for rightholders based on the premiss that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant rightholders. It is also pointed out that the private copying levy system was introduced at a Member State level on the basis that there were no effective means to monitor and therefore authorise the reproduction of works for private use.

73 – See, to that effect, Geerlings, J., 'Das Urheberrecht in der Informationsgesellschaft and pauschale Geräteabgaben im Lichte verfassungs- and europarechtlicher Vorgaben', Gewerblicher Rechtsschutz und Urheberrecht, 2004, Volume 3, p. 208, who examines the flat-rate levy system which had already applied in Germany from 1965 (Paragraph 53(5) of the Urheberrechtsgesetz (Law on copyright) (old version)/Paragraphs 54 and 54a of the Urheberrechtsgesetz (new version)), which demonstrates similarities with the Spanish system in this respect. The German system is also based on the premiss that charging a fee directly to the user does not appear practicable, with the consequence that it is not triggered by the act of reproduction but by the sale of devices which facilitate private copying.

74 – See point 76 of this Opinion.

75 – See p. 19, paragraph 44 of the written observations of the Spanish Government.

76 – See Bercovitz Rodríguez-Cano, R. loc. cit. (footnote 16), p. 2, in whose view Article 25 of the TRLPI proceeds, in imposing a levy, on the basis of a rebuttable presumption: the devices and storage media acquired are intended for private copying.

77 – The Commission proceeds on the same basis in its report 'Fair compensation for acts of private copying' of 14 February 2008, referring to statements from a number of collecting societies (see footnote 72 above), point 4.2, p. 12.

78 – In recital 35, it states: ‘When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case.’

79 – See Plaza Penadés, J., loc. cit. (footnote 16), p. 152, in whose opinion the provision in Article 5(2)(b) of Directive 2001/29 does not cover a copy which a natural person makes for use by a legal person (under public law or civil law), in so far as that is taken to mean the use of the copy by a number of people. On the other hand, the author is clearly of the view that a legal person may also make use of the private copying provision, provided that the copy is used exclusively for the private use of the legal person.

80 – See Plaza Penadés, J., loc. cit. (footnote 16), p. 152, who does not see the use of the relevant copy by a legal person for commercial purposes as being covered by the scope of Article 5(2)(b) of Directive 2001/29.

81 – See, in this context, the answer from Mr McCreevy, European Commissioner for the Internal Market and Services, of 19 September 2007 to the written question from the Member of the European Parliament, Raül Romeva i Rueda, of 5 June 2007 on the application of the digital levy in Spain (E‑2864/07). In that answer, the Commissioner expresses the view of the Commission: only devices and equipment that can be used, and are effectively used to produce private copies can attract a levy. The Commission also takes the view that equipment that is used for commercial purposes (for example in companies, public administrations) should not attract a levy since this would clearly go beyond the requirement to provide for the compensation for permitted acts (that is private copying) as laid down in the directive.

82 – See, to that effect, Herrnfeld, H.-H., EU-Kommentar (ed. Jürgen Schwarze), 2nd edition, Baden-Baden, 2009, Article 94, p. 1127, paragraph 42.

83 – See Case C‑11/92 Gallagher [1993] ECR I‑3545, paragraph 11 et seq., and Case C‑323/93 Crespelle [1994] ECR I‑5077, paragraph 33 et seq.

84 – See points 75 to 78 of this Opinion.

85 – Such a levy, unconnected to the compensation for private copying under Article 5(2)(b) of Directive 2001/29, and presumably not covered by the scope of Directive 2001/29, would not affect the legislative competence of the Member States, subject to other Community law limitations (see Case C‑285/08 Moteurs Leroy Somer [2009] ECR I‑0000, paragraph 31).

86 – See point 94 of this Opinion.