JUDGMENT OF THE COURT (Third Chamber)

9 February 2012

(Reference for a preliminary ruling – Approximation of laws – Intellectual property – Copyright and related rights – Directives 93/83/EEC, 2001/29/EC, 2006/115/EC and 2006/116/EC – Sharing of the rights to exploit a cinematographic work, by contract, between the principal director and the producer of the work – National legislation allotting those rights, exclusively and by operation of law, to the film producer – Possibility of departing from that rule by an agreement between the parties – Subsequent rights to remuneration)

In Case C-277/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria), made by decision of 17 May 2010, received at the Court on 3 June 2010, in the proceedings

Martin Luksan

v

Petrus van der Let,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2011,

after considering the observations submitted on behalf of:

– Mr Luksan, by M. Walter, Rechtsanwalt,

– Mr van der Let, by Z. van der Let-Vangelatou, Rechtsanwältin,

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

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the European Commission, by J. Samnadda and F.W. Bulst, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of:

– Articles 2 and 4 of Council 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 (OJ 1992 L 346, p. 61);

– Articles 1 and 2 of 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);

– Article 2 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9); and

– Articles 2, 3 and 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The reference has been made in proceedings between the principal director of a documentary film, Mr Luksan, and the film's producer, Mr van der Let, concerning performance of the contract by which Mr Luksan is stated to have assigned his copyright and certain exploitation rights in the film to Mr van der Let.

Legal context

International law

The Berne Convention

3 Article 14*bis* of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 July 1979 ('the Berne Convention'), provides:

'(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner

of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)

(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By “contrary or special stipulation” is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, nor to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.’

WIPO Copyright Treaty

4 The World Intellectual Property Organisation (WIPO) adopted the WIPO Copyright Treaty in Geneva on 20 December 1996. That treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

5 Article 1(4) of the WIPO Copyright Treaty provides that Contracting Parties are to comply with Articles 1 to 21 of the Berne Convention.

European Union law

Directive 93/83

6 Article 1(5) of Directive 93/83 provides:

'For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.'

7 Chapter II of that directive, headed 'Broadcasting of programmes by satellite', contains Article 2, which is headed 'Broadcasting right' and provides:

'Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

Directive 2001/29

8 Recitals 5, 9 to 11, 20, 31 and 35 in the preamble to Directive 2001/29 are worded as follows:

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

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. 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.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) as amended by Directive 93/98, Directive 92/100 as amended by Directive 93/98, Directive 93/83, Directive 93/98 and 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 it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...

...

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

9 Article 1(2) of Directive 2001/29 provides:

'Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

...

(b) rental right, lending right and certain rights related to copyright in the field of intellectual property;

(c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;

(d) the term of protection of copyright and certain related rights;

...'

10 Article 2 of Directive 2001/29, headed 'Reproduction right', provides:

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

(a) for authors, of their works;

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

(c) for phonogram producers, of their phonograms;

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

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

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

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

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

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

(b) for phonogram producers, of their phonograms;

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

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

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

12 Article 5(2)(b) and (5) of Directive 2001/29 state, under the heading '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;

...

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

Directive 2006/115/EC

13 Directive 92/100 was repealed by 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). Directive 2006/115 codifies and reproduces, in analogous terms, the provisions of Directive 92/100. Given the time of the facts in the main proceedings (March 2008), Directive 2006/115 is applicable *ratione temporis*, and it is therefore in the light of this directive that the Court will examine the questions referred by the national court.

14 Recitals 5 and 12 in the preamble to Directive 2006/115 state:

'(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be

effectively guaranteed only through adequate legal protection of the rightholders concerned.

...

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.'

15 Article 2(2) of Directive 2006/115 states:

'The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.'

16 Under Article 3 of Directive 2006/115, headed 'Rightholders and subject matter of rental and lending right':

'1. The exclusive right to authorise or prohibit rental and lending shall belong to the following:

(a) the author in respect of the original and copies of his work;

(b) the performer in respect of fixations of his performance;

(c) the phonogram producer in respect of his phonograms;

(d) the producer of the first fixation of a film in respect of the original and copies of his film.

...

4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.

5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.

...'

17 Article 5(1) and (2) of Directive 2006/115 provide, under the heading 'Unwaivable right to equitable remuneration':

'1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.'

Directive 2006/116/EC

18 Directive 93/98 was repealed by 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 2006/116 codifies and reproduces, in analogous terms, the provisions of Directive 93/98. Given the time of the facts in the main proceedings (March 2008), Directive 2006/116 is applicable *ratione temporis*, and it is therefore in the light of this directive that the Court will examine the questions referred by the national court.

19 Recital 5 in the preamble to Directive 2006/116 states:

'The provisions of this Directive should not affect the application by the Member States of the provisions of Article 14*bis*(2)(b), (c) and (d) and (3) of the Berne Convention.'

20 Article 2 of Directive 2006/116, headed 'Cinematographic or audiovisual works', provides:

'1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.'

National law

21 Paragraph 38(1) of the Law on Copyright (Urheberrechtsgesetz, BGBl. 111/1936), as amended by the federal law published in the *Bundesgesetzblatt für die Republik Österreich* I, 58/2010 ('the UrhG'), states:

'The exploitation rights in commercially produced cinematographic works shall vest in the owner of the undertaking (film producer) … The author's statutory rights to remuneration shall be shared equally by the film producer and the author, provided that

they are not unwaivable and the film producer and the author have not agreed otherwise ...'

22 Paragraph 42b(1) of the UrhG provides:

'Where it is to be anticipated that, by reason of its nature, a work which has been broadcast, made available to the public or captured on an image or sound recording medium manufactured for commercial purposes will be reproduced for personal or private use by being recorded on an image or sound recording medium pursuant to Paragraph 42(2) to (7), the author shall be entitled to equitable remuneration (remuneration for reproductions made on recording material) in respect of recording material brought into domestic circulation for consideration in the course of business; blank image or sound recording media which are suitable for such reproduction or other image or sound recording media intended for that purpose shall be regarded as recording material.'

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

23 The applicant in the main proceedings, Mr Luksan, is the scriptwriter and principal director of a documentary film entitled 'Fotos von der Front' ('Photos from the Front'), which concerns German war photography during the Second World War. It is undisputed that this documentary film, which takes a critical view of the ambivalence of war photography, constitutes a cinematographic work, protected as an original work on that basis.

24 The defendant in the main proceedings, Mr van der Let, produces cinematographic and other audiovisual works commercially.

25 In March 2008 the parties concluded a 'directing and authorship agreement' (audiovisual production contract) stating that Mr Luksan was the scriptwriter and principal director of the film in question and that Mr van der Let would produce and exploit it. Under that contract, Mr Luksan assigned to Mr van der Let all copyright and/or related rights held by him in the film. However, that assignment expressly excluded certain methods of exploitation, namely making available to the public on digital networks and broadcast by closed circuit television and by pay TV, that is to say (encrypted) broadcasting to closed circles of users in return for separate payment.

26 Also, the contract contained no express provision concerning statutory rights to remuneration, such as the remuneration referred to in Paragraph 42b of the UrhG for reproductions made on recording material ('Leerkassettenvergütung', literally 'blank cassette remuneration').

27 The dispute in the main proceedings arose because the producer, Mr van der Let, made the film in question available on the internet and assigned the rights for this

purpose to Movieeurope.com. The film could thus be downloaded from that website by means of video on demand. The producer also made the trailer for the film available on the internet, through YouTube, and assigned the pay TV rights to Scandinavia TV.

28 In those circumstances, the director, Mr Luksan, brought proceedings against the producer, Mr van der Let, before the national court. He contends that, given the methods of exploitation reserved for him by the contract (the right to broadcast to closed circles of users by video on demand and by pay TV), the producer's exploitation of the film at issue in the main proceedings breaches that contract and his copyright.

29 Mr van der Let submits in response to those arguments that, on the basis of the 'statutory assignment' provided for in the first sentence of Paragraph 38(1) of the UrhG, all exclusive exploitation rights in the film in question vest in him as the producer of the film and that agreements diverging from that rule or a reservation having the same effect are void.

30 In addition, Mr van der Let contends that the statutory rights to remuneration provided for by the UrhG, in particular the 'remuneration for reproductions made on recording material', share the fate of the exploitation rights. Consequently, because of the contract awarding him all the exploitation rights in the film, all the statutory rights to remuneration also vest in him. Mr van der Let indeed claims to be entitled to receive not only one half of the statutory rights to remuneration by virtue of the second sentence of Paragraph 38(1) of the UrhG, in his capacity as producer, but also the other half which under Paragraph 38(1) vest in principle in the film's author (Mr Luksan, as director), since an agreement departing from that statutory provision is permissible.

31 Mr Luksan contests that proposition and requests the national court to declare that half of the statutory rights to remuneration vest in him.

32 According to the information in the order for reference, the view is taken in Austrian legal literature and case-law that the first sentence of Paragraph 38(1) of the UrhG provides for the original and direct allocation of the exploitation rights to the film producer alone rather than for a 'statutory assignment' or a presumption of transfer of those rights. On the basis of this interpretation of Paragraph 38(1) of the UrhG, agreements departing from this principle of direct and original allocation are void.

33 The second sentence of Paragraph 38(1) of the UrhG provides that statutory rights to remuneration, including the 'remuneration for reproductions made on recording material', are to be shared equally by the producer and the author of the film, while expressly allowing agreements derogating from that principle, even as regards the half share vesting in the author of the film.

34 In those circumstances, the national court seems to be of the view that the first and second sentences of Paragraph 38(1) of the UrhG, as interpreted hitherto by Austrian legal literature and the Austrian courts, are contrary to European Union law.

According to the national court, an interpretation consistent with European Union law would require the first sentence of Paragraph 38(1) of the UrhG to be regarded as establishing a rebuttable presumption of transfer. Also, the principal director would have the unwaivable right to equitable remuneration. As regards the statutory rights to remuneration, the national court takes the view that, whilst the second sentence of Paragraph 38(1) of the UrhG allocates half of those rights to the author of the film, which it considers equitable, derogation from that rule of apportionment should not be permitted.

35 The national court wishes to be in a position to determine whether the relevant provisions of the UrhG, which grant certain rights to the producer independently of the contractual provisions, are applicable as interpreted hitherto by the Austrian courts or whether a contrary interpretation that is consistent with European Union law is required.

36 It is in those circumstances that the Handelsgericht Wien (Commercial Court, Vienna) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Must the provisions of European Union law concerning copyright and related rights, in particular Article 2(2), (5) and (6) of Directive 92/100, Article 1(5) of Directive 93/83 and Article 2(1) of Directive 93/98, in conjunction with Article 4 of Directive 92/100, Article 2 of Directive 93/83 and Articles 2 and 3 and Article 5(2)(b) of Directive 2001/29, be interpreted as meaning that the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislatures of the Member States are directly (originally) entitled in any event, by operation of law, to the exploitation rights in respect of reproduction, satellite broadcasting and other communication to the public through the making available to the public and that the film producer is not entitled thereto directly (originally) and exclusively; are laws of the Member States which allocate the exploitation rights by operation of law directly (originally) and exclusively to the film producer inconsistent with European Union law?

(2) If the answer to Question 1 is in the affirmative:

(a) Does European Union law allow the legislatures of the Member States the option, even in respect of rights other than rental and lending rights, of providing for a statutory presumption in favour of a transfer to the film producer of the exploitation rights within the meaning of [Question] 1 to which the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislatures of the Member States are entitled and, if so, must the conditions laid down in Article 2(5) and (6) of Directive 92/100, in conjunction with Article 4 of that directive, be satisfied?

(b) Must the original ownership of rights which is enjoyed by the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislature of a Member State also be applied to the rights granted by the

legislature of a Member State to equitable remuneration, such as 'blank cassette remuneration' pursuant to Paragraph 42b of the [UrhG], or to rights to fair compensation within the meaning of Article 5(2)(b) of Directive 2001/29?

(3) If the answer to Question 2(b) is in the affirmative:

Does European Union law allow the legislatures of the Member States the option of providing for a statutory presumption in favour of a transfer to the film producer of the rights to remuneration within the meaning of [Question 2(b)] to which the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislatures of the Member States are entitled and, if so, must the conditions laid down in Article 2(5) and (6) of Directive 92/100, in conjunction with Article 4 of that directive, be satisfied?

(4) If the answer to Question 3 is in the affirmative:

If a statutory provision of a Member State accords to the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislatures of the Member States a right to half of the statutory rights to remuneration, but provides that that right is capable of alteration and not therefore unwaivable, is that provision consistent with the aforementioned provisions of European Union law in the area of copyright and related rights?'

Consideration of the questions referred

Question 1

37 By its first question, the national court asks, in essence, whether Articles 1 and 2 of Directive 93/83, and Articles 2 and 3 of Directive 2001/29 in conjunction with Articles 2 and 3 of Directive 2006/115 and with Article 2 of Directive 2006/116, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director, in his capacity as author of that work. It asks whether, consequently, the abovementioned provisions preclude national legislation which allocates the rights in question by operation of law exclusively to the producer of the work.

38 It should be noted at the outset that the various rights to exploit a cinematographic or audiovisual work have been dealt with in a number of directives. First, Chapter II of Directive 93/83 regulates the satellite broadcasting right. Next, the reproduction right and the right of communication to the public through the making available to the public are governed respectively by Articles 2 and 3 of Directive 2001/29. Finally, rental right and lending right are covered by Articles 2 and 3 of Directive 2006/115.

39 As regards Directive 93/83, Article 1(5) provides that the principal director of a cinematographic or audiovisual work is to be considered its author or one of its authors.

40 Likewise, Article 2(2) of Directive 2006/115 provides that the principal director of a cinematographic work is to be considered its author or one of its authors.

41 On the other hand, Directive 2001/29 provides no express indication as to the status of the principal director of a cinematographic work.

42 In those circumstances, it is necessary, first, to determine the position of the principal director of a cinematographic work with regard to the exploitation rights governed by Directive 2001/29.

43 It is apparent from recital 20 in the preamble that Directive 2001/29 is based on the principles and rules already laid down in the directives in force in this area, inter alia Directive 92/100 on rental right and lending right (now Directive 2006/115) and Directive 93/98 harmonising the term of protection of copyright (now Directive 2006/116). It is stated that Directive 2001/29 develops those principles and rules and places them in the context of the information society. Accordingly, the provisions of Directive 2001/29 should be without prejudice to the provisions of those two directives, unless otherwise provided in Directive 2001/29 (see, to this effect, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraphs 187 and 188).

44 Article 2(1) of Directive 2006/116 sets out, under the heading 'Cinematographic or audiovisual works', the general rule that the principal director of a cinematographic work is to be considered its author or one of its authors, Member States being free to designate other co-authors.

45 Thus, this provision must be interpreted as meaning that, irrespective of any choice made in national law, the principal director of a cinematographic work has in any event, unlike the other authors of such a work, the status of author pursuant to Directive 2006/116.

46 In addition, Article 2(2) of Directive 2006/116 sets the term of protection of cinematographic or audiovisual works. This provision necessarily entails that such a work, including the rights of its author or co-authors and, in particular, those of the principal director, is in fact protected in law.

47 Given that Directive 2001/29 does not provide otherwise and that its provisions are to be without prejudice to the provisions of Directive 2006/116 and to those of Directive 2006/115, in particular Article 2(2) thereof, articles 2 and 3 of Directive 2001/29 must be interpreted in such a way that the copyright of the principal director of a cinematographic work which those articles lay down is secured.

48 It follows from the foregoing that, with regard to all the exploitation rights at issue, including those governed by Directive 2001/29, the principal director of a cinematographic work is to be considered its author or one of its authors.

49 Second, it is to be determined whether rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director of the work, as its author, or whether, where appropriate, those rights may vest directly, originally and exclusively in the producer of the work.

50 In the case of the satellite broadcasting right, Article 2 of Directive 93/83 lays down an exclusive right for the author alone to authorise the communication to the public by satellite of copyright works.

51 In the case of the reproduction right, Article 2 of Directive 2001/29 recognises as the holders of that right authors, as regards their works, and producers of the first fixations of films, as regards the original and copies of their films.

52 Likewise, in the case of the right to communicate works through the making available to the public, Article 3 of Directive 2001/29 establishes that right for authors, as regards their works, and for producers of the first fixations of films, as regards the original and copies of their films.

53 Thus, the provisions referred to in the previous three paragraphs allot, by way of original grant, to the principal director in his capacity as author the rights to exploit a cinematographic work that are at issue in the main proceedings.

54 However, notwithstanding these provisions of secondary legislation, the Austrian Government relies in its observations submitted to the Court upon paragraph 2(b), in conjunction with paragraph 3, of Article 14*bis* of the Berne Convention, an article which relates to cinematographic works and which, in its submission, authorises it to grant those rights to the producer of the work alone.

55 It is apparent from those provisions of the Berne Convention, read together, that, by way of derogation, it is permitted for national legislation to deny the principal director certain rights to exploit a cinematographic work, such as, in particular, the reproduction right and the right of communication to the public.

56 In this connection, it should be noted first of all that all the Member States of the European Union have acceded to the Berne Convention, some before 1 January 1958 and others before the date of their accession to the European Union.

57 As regards, more specifically, Article 14*bis* of the Berne Convention, relating to cinematographic works, it is to be observed that this article was inserted following the revisions to the convention adopted in Brussels in 1948, then in Stockholm in 1967.

58 Thus, the Berne Convention displays the characteristics of an international agreement for the purposes of Article 351 TFEU, which provides inter alia that the rights and obligations arising from agreements concluded before 1 January 1958, or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third countries, on the other, are not to be affected by the provisions of the Treaties.

59 It should also be observed that the European Union, which is not a party to the Berne Convention, is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, which forms part of its legal order and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention (see, to this effect, *Football Association Premier League and Others*, paragraph 189 and the case-law cited). Consequently, the European Union is required to comply inter alia with Article 14*bis* of the Berne Convention.

60 Accordingly, the question arises whether the provisions of Directives 93/83 and 2001/29 referred to in paragraphs 50 to 52 of the present judgment must be interpreted, in the light of Article 1(4) of the WIPO Copyright Treaty, as meaning that a Member State may in its national legislation, on the basis of Article 14*bis* of the Berne Convention and in reliance upon the power which that convention article is said to accord to it, deny the principal director the rights to exploit a cinematographic work that are at issue in the main proceedings.

61 In this regard, it should be recalled first of all that the purpose of the first paragraph of Article 351 TFEU is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an agreement preceding its accession and to comply with its corresponding obligations (see Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 27, and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 56).

62 However, when such an agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to European Union law, the Member State must refrain from adopting such a measure (see, to this effect, *Evans Medical and Macfarlan Smith*, paragraph 32, and *Centro-Com*, paragraph 60).

63 That case-law must also be applicable *mutatis mutandis* when, because of a development in European Union law, a legislative measure adopted by a Member State in accordance with the power offered by an earlier international agreement appears contrary to European Union law. In such a situation, the Member State concerned

cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from European Union law.

64 In providing that the principal director of a cinematographic work is to be considered its author or one of its authors, the European Union legislature exercised the competence of the European Union in the field of intellectual property. In those circumstances, the Member States are no longer competent to adopt provisions compromising that European Union legislation. Accordingly, they can no longer rely on the power granted by Article 14*bis* of the Berne Convention.

65 Next, a legislative measure as described in paragraph 60 of the present judgment does not prove compatible with the aim pursued by Directive 2001/29.

66 It is evident from recital 9 in the preamble to Directive 2001/29, a measure which governs, in particular, the reproduction right and the right of communication to the public, that the European Union legislature, taking the view that copyright protection was crucial to intellectual creation, sought to guarantee authors a high level of protection. Intellectual property was therefore recognised as an integral part of property.

67 Since the status of author has been accorded to the principal director of a cinematographic work, it would prove incompatible with the aim pursued by Directive 2001/29 to accept that that creator be denied the exploitation rights at issue.

68 Finally, it should be pointed out that, under Article 17(1) of the Charter of Fundamental Rights of the European Union, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Article 17(2) provides that intellectual property is to be protected.

69 In the light of what has been found in paragraph 53 of the present judgment, the principal director of a cinematographic work must be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property in that work.

70 In those circumstances, the fact that national legislation denies him the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right.

71 It follows from the foregoing that the provisions of Directives 93/83 and 2001/29 referred to in paragraphs 50 to 52 of the present judgment cannot be interpreted, in the light of Article 1(4) of the WIPO Copyright Treaty, as meaning that a Member State might in its national legislation, on the basis of Article 14*bis* of the Berne Convention and in reliance upon the power which that convention article is said to accord to it, deny

the principal director the rights to exploit a cinematographic work that are at issue in the main proceedings, because such an interpretation, first, would not respect the competence of the European Union in the matter, second, would not be compatible with the aim pursued by Directive 2001/29 and, finally, would not be consistent with the requirements flowing from Article 17(2) of the Charter of Fundamental Rights guaranteeing the protection of intellectual property.

72 In the light of the foregoing considerations, the answer to the first question referred is that Articles 1 and 2 of Directive 93/83, and Articles 2 and 3 of Directive 2001/29 in conjunction with Articles 2 and 3 of Directive 2006/115 and with Article 2 of Directive 2006/116, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question.

Question 2(a)

73 First of all, it should be noted that the European Union legislature established in Article 2(5) of Directive 92/100 a presumption of transfer of the rental right in favour of the producer of a cinematographic work.

74 Article 3(4) of Directive 2006/115, which repeats the wording of Article 2(5) of Directive 92/100, now provides that, when a contract concerning film production is concluded by performers with the film producer, the performer covered by this contract is to be presumed, subject to contractual clauses to the contrary, to have transferred his rental right to the producer.

75 In addition, Article 3(5) of Directive 2006/115, which repeats the wording of Article 2(6) of Directive 92/100, empowers the Member States to provide for a similar presumption with respect to authors.

76 Having regard to this preliminary clarification, the national court's question must be understood as relating, in essence, to whether European Union law may be interpreted as allowing the Member States the option of laying down such a presumption of transfer also as regards rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public) and, if so, subject to what conditions.

77 With regard to the objective underlying the provisions of Directive 2006/115 alluded to in the national court's question, reference should be made to recital 5 in the preamble to that directive, which points out, first, that the creative and artistic work of

authors and performers necessitates an adequate income as a basis for further creative and artistic work and, second, that the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

78 It follows, in particular, from that recital in the preamble to Directive 2006/115 that a balance must be struck between, on the one hand, observance of the rights and interests of the various natural persons who have contributed to the intellectual creation of the film, namely the author or co-authors of the cinematographic work, and, on the other, those of the film's producer, who has taken the initiative and assumed the responsibility for the making of the cinematographic work and who bears the risks connected with that investment.

79 In those circumstances, it can be stated that, in the context of Directive 2006/115, the mechanism consisting in a presumption of transfer of the lending right to the film producer was devised in order to meet one of the aims to which recital 5 in the preamble to that directive refers, that is to say, in order to enable the producer to recoup the investment which he has undertaken for the purpose of making the cinematographic work.

80 That said, the mechanism of a presumption of transfer also had to reflect the interests of the principal director of the cinematographic work. In this regard, it must be stated that the mechanism does not in any way call into question the rule that the rental right and lending right relating to the author's work are vested by operation of law, directly and originally, in the author. Since the European Union legislature expressly allowed for the case of 'contractual clauses to the contrary', it thereby intended the principal director to retain the possibility of agreeing otherwise by contract.

81 Thus, such a presumption mechanism is devised, in accordance with the requirement for balance that is referred to in paragraph 78 of the present judgment, so as to guarantee that the film producer acquires the rental right in the cinematographic work, whilst providing that the principal director may freely dispose of the rights which he holds in his capacity as author in order to safeguard his interests.

82 The objective of ensuring a satisfactory return on cinematographic investments extends beyond the context of just protection of the rental and lending right governed by Directive 2006/115, since it also appears in other relevant directives.

83 Thus, recital 10 in the preamble to Directive 2001/29 confirms that the investment required to produce products such as films or multimedia products is considerable. Adequate legal protection of intellectual property rights is therefore necessary in order to provide the opportunity for satisfactory returns on this investment (see also, to this effect, Case C-61/05 *Commission* v *Portugal* [2006] ECR I-6779, paragraph 27).

84 It should also be pointed out that the European Union legislature expressly stated in recital 5 in the preamble to Directive 2001/29 that, while the existing law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation, on the other hand no new concepts for the protection of intellectual property were needed.

85 In those circumstances, since, first, in 2001, when adopting Directive 2001/29, the European Union legislature is deemed to have kept the various concepts for the protection of intellectual property that were elaborated under the earlier directives and, second, in this instance it did not provide otherwise, it must be held that it did not intend to disapply a concept such as that of presumption of transfer, as regards the exploitation rights governed by that directive.

86 It follows from the foregoing that a presumption of transfer mechanism, such as that laid down originally, as regards rental and lending right, in Article 2(5) and (6) of Directive 92/100 and then essentially repeated in Article 3(4) and (5) of Directive 2006/115, must also be capable of being applied as regards rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public).

87 Having regard to the foregoing considerations, the answer to Question 2(a) is that European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise.

Question 2(b)

88 By its question, the national court asks, in essence, whether the right to equitable remuneration, such as the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception, vests by operation of law, directly and originally, in the principal director, in his capacity as author or co-author of the cinematographic work.

89 First of all, it should be made clear that since the question asked refers solely to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the private copying exception, it will be answered from the point of view of only the reproduction right and the related right to fair compensation.

90 As provided in Article 2(a) of Directive 2001/29, the Member States are in principle to grant authors the exclusive right to authorise or prohibit direct or indirect,

temporary or permanent reproduction of their works by any means and in any form, in whole or in part.

91 Article 2(d) of that directive grants an identical right to producers of the first fixations of films, in respect of the original and copies of their films.

92 It follows that both the principal director, in his capacity as author of the cinematographic work, and the producer, as the person responsible for the investment necessary for the production of that work, must be regarded as being the holders, by operation of law, of the reproduction right.

93 In addition, by virtue of Article 5(2)(b) of that directive, the Member States may provide for an exception to the exclusive reproduction right of the holders of the reproduction right, 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 (private copying exception), on condition, however, that they guarantee that, in return, the rightholders concerned receive payment of fair compensation.

94 Since the principal director of a cinematographic work is one of those rightholders, he must, consequently, be regarded as a person entitled by operation of law, directly and originally, to the fair compensation payable under the private copying exception.

95 Having regard to the foregoing considerations, the answer to Question 2(b) is that European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, the principal director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception.

Questions 3 and 4

96 By these questions, which it is appropriate to consider together, the national court asks, in essence, whether European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the remuneration rights vesting in the principal director of that work.

97 It is not in dispute that the provision of domestic law at issue in the main proceedings which establishes that presumption allows the principal director of a cinematographic work to waive his rights to equitable remuneration.

98 Thus, it should first be examined whether European Union law precludes a provision of domestic law which allows the principal director of a cinematographic work to waive his rights to equitable remuneration.

99 It should be made clear first of all that, since the questions asked refer to remuneration rights for the purposes of the preceding question, they will be answered solely from the point of view of the reproduction right and of the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the private copying exception.

100 As has been pointed out in paragraph 93 of the present judgment, it follows from Article 5(2)(b) of Directive 2001/29 that, in the Member States which have decided to establish the private copying exception, the rightholders concerned must, in return, receive payment of fair compensation. It is clear from such wording that the European Union legislature did not wish to allow the persons concerned to be able to waive payment of that compensation to them.

101 Furthermore, since Article 5(2)(b) of that directive establishes an exception to the author's exclusive reproduction right in his work, that provision must be the subject of a restrictive interpretation under which such an exception cannot be extended beyond what is expressly imposed by the provision at issue. The provision at issue authorises an exception solely to the reproduction right and cannot be extended to remuneration rights.

102 This conclusion is borne out, at a contextual level, by Article 5(2) of Directive 2006/115, read in the light of recital 12 in the preamble to that directive, which respectively reproduce the wording of Article 4(2) of, and the 15th recital in the preamble to, Directive 92/100, the measure to which the national court refers. Those provisions state that the right to obtain an equitable remuneration for rental cannot be waived by authors.

103 It is true that in Directives 92/100 and 2006/115 the European Union legislature used the term 'remuneration' instead of the term 'compensation' employed in Directive 2001/29. However, that concept of 'remuneration' is also designed to establish recompense for authors, since it arises in order to compensate for harm to the latter (see, to this effect, Case C-271/10 *VEWA* [2011] ECR I-0000, paragraph 29).

104 As has been observed in paragraphs 84 and 85 of the present judgment, the European Union legislature is deemed, when adopting Directive 2001/29, to have kept the concepts for the protection of intellectual property that were elaborated under the earlier directives, unless it expressly provided otherwise.

105 Here, with regard to the right to the fair compensation payable to authors under the private copying exception, it does not follow from any provision of Directive 2001/29 that the European Union legislature envisaged the possibility of that right being waived by the person entitled to it.

106 Furthermore, the Court has already held that, unless it is to be deprived of all practical effect, Article 5(2)(b) of Directive 2001/29 imposes on a Member State which

has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, within the framework of its powers, that the fair compensation intended to compensate the rightholders harmed for the prejudice sustained is actually recovered (see, to this effect, Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-0000, paragraph 34). Imposition on the Member States of such an obligation to achieve the result of recovery of the fair compensation for the rightholders proves conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation.

107 It follows from all the foregoing that European Union law precludes a provision of domestic law which allows the principal director of a cinematographic work to waive his right to fair compensation.

108 *A fortiori*, European Union law must be interpreted as not allowing the Member States the option of laying down an irrebuttable presumption of transfer, in favour of the producer of a cinematographic work, of the remuneration rights vesting in the principal director of that work, since such a presumption would result in the latter being denied payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29. As has been pointed out in paragraph 100 of the present judgment, the principal director, in his capacity as holder of the reproduction right, must necessarily receive payment of that compensation.

109 Having regard to the foregoing considerations, the answer to the third and fourth questions referred is that European Union law must be interpreted as not allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the right to fair compensation vesting in the principal director of that work, whether that presumption is couched in irrebuttable terms or may be departed from.

Costs

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

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

1. **Articles 1 and 2 of 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, and Articles 2 and 3 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 in conjunction with Articles 2 and 3 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental**

right and lending right and on certain rights related to copyright in the field of intellectual property and with Article 2 of 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, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question.

2. **European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise.**

3. **European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, the principal director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception.**

4. **European Union law must be interpreted as not allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the right to fair compensation vesting in the principal director of that work, whether that presumption is couched in irrebuttable terms or may be departed from.**

[Signatures]