

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la  
Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

**JUDGMENT OF THE COURT (Third Chamber)**

**26 April 2012**

(Approximation of laws – Copyright and related rights – Directive 2001/29/EC –  
Article 5(2)(d) – Right to communicate works to the public – Exception to the  
reproduction right – Ephemeral recordings of works made by broadcasting  
organisations by means of their own facilities and for their own broadcasts – Recording  
made with the facilities of a third party – Obligation of the broadcasting organisation to  
pay compensation for any adverse effects of the actions and omissions of the third  
party)

In Case C-510/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Østre Landsret  
(Denmark), made by decision of 18 October 2010, received at the Court on 25 October  
2010, in the proceedings

**DR,**

**TV2 Danmark A/S**

v

**NCB - Nordisk Copyright Bureau,**

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur),  
R. Silva de Lapuerta, E. Juhász and D. Šváby, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2011,

after considering the observations submitted on behalf of:

- DR and TV2 Danmark A/S, by H. Samuelsen Schütze, advokat,
- NCB - Nordisk Copyright Bureau, by P.H. Schmidt, advokat,
- the Spanish Government, by N. Díaz Abad, acting as Agent,

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– the European Commission, by J. Samnadda and H. Støvlbæk, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 17 January 2012, gives the following

### **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 5(2)(d) of and recital 41 in the preamble to 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), which provide for an exception to the exclusive reproduction right of the author in his work ‘in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts’.

2 The reference has been made in proceedings between, on the one hand, DR and TV2 Danmark A/S (‘TV Danmark’), two Danish broadcasting organisations, and, on the other, NCB - Nordisk Copyright Bureau (‘NCB’), a copyright management company, concerning recordings made in connection with television programmes commissioned from a third party by those broadcasting organisations for use in their own transmissions.

### **Legal context**

#### *International law*

##### The WIPO Copyright Treaty

3 On 20 December 1996, the World Intellectual Property Organisation (WIPO) adopted in Geneva the WIPO Copyright Treaty. 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).

4 Article 1(4) of the WIPO Copyright Treaty provides that the Contracting Parties must comply with Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 (‘the Berne Convention’).

##### The Berne Convention

5 Article 1 of the Berne Convention provides:

‘The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.’

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6 Article 11*bis* of the Berne Convention provides:

‘(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

...

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the [Berne] Union to determine the regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorised by such legislation.’

*European Union law*

7 Recital 41 in the preamble to Directive 2001/29 states:

‘When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations, it is understood that a broadcaster’s own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.’

8 Article 2 of that directive, entitled ‘Reproduction right’, provides:

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

(a) for authors, of their works;

...’

9 Article 3(1) of Directive 2001/29, entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides:

‘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.’

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10 Article 5 of Directive 2001/29, entitled ‘Exceptions and limitations’, provides in paragraphs 2 and 5:

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

...

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

...

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.’

#### *National law*

11 Paragraph 31 of the Danish Law on Copyright (Ophavsretslov), as amended by Consolidated Law No 202 (lovbekendtgørelse No 202) of 27 February 2010 (‘the Law on Copyright’), provides:

‘Broadcasting organisations may, for the purpose of their broadcasts, record works on tape, film, or any other device that can reproduce them, on condition that they have the right to broadcast the works in question. The right to make such recorded works available to the public shall be subject to the provisions otherwise in force. The Minister for Culture may lay down more detailed rules governing the conditions under which such recordings may be made and on their use and storage.’

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

12 The applicants in the main proceedings are DR, a public radio and television broadcasting organisation which has the obligation to provide public service programming as an independent public institution financed by the audiovisual licence fee, and TV2 Danmark, a commercial public television broadcasting organisation, financed by advertising, which also has the obligation to provide public service programming.

13 The radio and television programmes broadcast by DR and TV2 Danmark may be programmes produced internally or programmes produced by third parties under

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specific agreements with a view to being broadcast for the first time by DR or TV2 Danmark.

14 The defendant in the main proceedings, NCB, is a company which administers the rights to record and copy music for composers, songwriters and music publishers in a number of Nordic and Baltic States.

15 The dispute in the main proceedings relates to whether the exception for ephemeral recordings also covers recordings made by legally independent external television production companies in cases where those recordings have been commissioned from them by DR or by TV2 Danmark for initial broadcast on DR or TV2 Danmark.

16 DR and TV2 Danmark submit that it is irrelevant to copyright holders whether recordings for purposes of transmission are made by the staff of the broadcasting organisation itself with its own equipment, or by an employee of a third company from which the broadcasting organisation has commissioned the production, with that third company's equipment. DR and TV2 Danmark further submit that there is no condition in Paragraph 31 of the Danish Law on Copyright which requires broadcasting organisations to make recordings 'by means of their own facilities'. Thus, under Danish law it is irrelevant, for the application of the exception concerning recordings for the purpose of transmission, whether those recordings are made by employees of the broadcasting organisation or by employees of third parties.

17 By contrast, NCB submits that European Union law imposes a condition relating to production 'by means of their own facilities' and that that condition is also applicable under the Danish Law on Copyright. Furthermore, it submits that the condition relating to production 'by means of their own facilities' can be satisfied only if the independent external producer is acting on behalf of the television broadcasting organisation and under its responsibility. NCB also argues that the expression 'acts on behalf of and under the responsibility of the television broadcasting organisation' must be interpreted to mean that the television broadcasting organisation is liable towards third parties for the producer's acts and any omissions on its part as if that organisation itself had made the recordings.

18 In those circumstances the Østre Landsret (Eastern Regional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Should the terms "by means of their own facilities" in Article 5(2)(d) of [Directive 2001/29] and "on behalf of and under the responsibility of the broadcasting organisation" in recital 41 in the preamble to that directive be interpreted with reference to national law or to European Union law?

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2. Should it be assumed that the wording of Article 5(2)(d) of [Directive 2001/29], as in the Danish, English and French versions of that provision, is to mean “on behalf of and under the responsibility of the broadcasting organisation” or, as in the German version, is to mean “on behalf of or under the responsibility of the broadcasting organisation”?

3. On the assumption that the terms cited in Question 1 are to be interpreted with reference to European Union law, the following question is asked: What criteria should national courts apply to a specific assessment as to whether a recording made by a third party (the “Producer”) for use in a broadcasting organisation’s transmissions was made “by means of their own facilities”, and “on behalf of [and/or] under the responsibility of the broadcasting organisation”, such that the recording is covered by the exception laid down in Article 5(2)(d) of [Directive 2001/29]?

In connection with the answer to Question 3, answers are sought in particular to the following questions:

(a) Should the concept of “own facilities” in Article 5(2)(d) of [Directive 2001/29] be understood to mean that a recording made by the Producer for use in a broadcasting organisation’s transmissions is covered by the exception laid down in Article 5(2)(d) only if the broadcasting organisation is liable towards third parties for the Producer’s acts and omissions in relation to the recording, as if the broadcasting organisation had itself carried out those acts and omissions?

(b) Is the condition that the recording must be made “on behalf of [and/or] under the responsibility of the broadcasting organisation” satisfied where a broadcasting organisation has commissioned the Producer to make the recording in order that that broadcasting organisation can transmit the recording in question, and on the assumption that the broadcasting organisation concerned has the right to transmit the recording in question?

The Østre Landsret seeks to ascertain whether the following situations may or must be taken into consideration for the purpose of answering Question 3(b), and if so, what weight should be given to them:

i. Whether it is the broadcasting organisation or the Producer which has the final and conclusive artistic/editorial decision on the content of the commissioned programme under agreements between those parties;

ii. Whether the broadcasting organisation is liable towards third parties in respect of the Producer’s obligations in relation to the recording, as if the broadcasting organisation itself had carried out those acts and omissions;

iii. Whether the Producer is contractually obliged by the agreement with the broadcasting organisation to deliver the programme in question to the broadcasting

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organisation for a specified price and has to meet, out of this price, all expenses that may be associated with the recording;

iv. Whether it is the broadcasting organisation or the Producer which assumes liability for the recording in question vis-à-vis third parties.

(c) Is the condition that the recording must be made “on behalf of [and/or] under the responsibility of the broadcasting organisation” satisfied in the case where a broadcasting organisation has commissioned the Producer to make the recording in order for the broadcasting organisation to be able to transmit the recording in question, and on the assumption that the broadcasting organisation in question has the right to transmit the recording, where the Producer, in the agreement with the broadcasting organisation relating to the recording, has assumed the financial and legal responsibility for (i) meeting all the expenses associated with the recording in return for payment of an amount fixed in advance; (ii) the purchase of rights; and (iii) unforeseen circumstances, including any delay in the recording and breach of contract, but without the broadcasting organisation being liable towards third parties in respect of the Producer’s obligations in relation to the recording as if the broadcasting organisation had itself carried out those acts and omissions?’

### **Consideration of the questions referred**

#### *Admissibility*

19 DR and TV2 Danmark, in their capacity as broadcasting organisations, dispute the admissibility of the questions referred, arguing that the answers which might be given to those questions would not, in any event, help to resolve the dispute in the main proceedings.

20 They call into question the very relevance of Directive 2001/29, the interpretation of which constitutes the subject-matter of the questions referred, to the outcome of the dispute pending before the national court. They submit, in particular, that the expression ‘by means of their own facilities and for their own broadcasts’ in the Danish version of Article 5(2)(d) of Directive 2001/29 does not appear in Paragraph 31 of the Danish Law on Copyright and that it cannot therefore apply in the main proceedings.

21 In that regard, it must be borne in mind that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 16 and the case-law cited).

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22 Where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of European Union law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 17 and case-law cited).

23 That is not, however, the position in the present reference for a preliminary ruling. None of the abovementioned circumstances which would permit the Court to refuse to give a ruling on that reference is present in this case. In particular, it is clear from the order for reference that the answers to the questions referred, which relate to the interpretation of several provisions of European Union law, will be required by the national court in order for it to determine the legal classification of the recordings commissioned by DR or TV2 Danmark from legally independent external television production companies and, thus, to dispose of the case before it.

24 It follows that the questions referred must be regarded as admissible and must therefore be answered.

*The first question*

25 By its first question, the national court asks, in essence, whether the term ‘by means of their own facilities’ in Article 5(2)(d) of Directive 2001/29, as clarified by recital 41 in the preamble to that directive, is to be interpreted with reference to national law or to European Union law.

26 It must be recalled, first, that, under Article 2 of Directive 2001/29, Member States are, in principle, to grant to authors the exclusive right to authorise or prohibit direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of their works.

27 Under Article 5(2)(d) of that directive, however, Member States may provide for an exception or limitation to the author’s exclusive reproduction right in his work in respect of ephemeral recordings of works made by broadcasting organisations ‘by means of their own facilities’ and for their own broadcasts.

28 It must be stated at the outset that the wording of that latter provision is directly inspired by that of Article 11*bis*(3) of the Berne Convention.

29 With regard to the Berne Convention, the European Union, although not a party to it, 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



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to implement, to comply with Articles 1 to 21 of the Berne Convention (see, to that effect, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 189 and the case-law cited). Consequently, the European Union is obliged to comply with, inter alia, Article 11*bis* of the Berne Convention (see, by analogy, Case C-277/10 *Luksan* [2012] ECR I-0000, paragraph 59).

30 Article 11*bis*(3) of that Convention expressly states that it is a matter for legislation in the countries of the Berne Union to determine the regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts.

31 That being so, by adopting Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, the European Union legislature is deemed to have exercised the competence previously devolved on the Member States in the field of intellectual property. Within the scope of that directive, the European Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the relevant stipulations of the Berne Convention (see, to that effect, *Luksan*, paragraph 64).

32 It is on that basis that the European Union legislature granted the Member States the option of introducing into their national laws the exception in respect of ephemeral recordings, as set out in Article 5(2)(d) of Directive 2001/29, and clarified the scope of that exception by stating, in recital 41 in the preamble to that directive, that a broadcaster's own facilities include those of a person acting 'on behalf of [and/or] under the responsibility of the broadcasting organisation'.

33 Secondly, it must be borne in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union 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 independent and uniform interpretation throughout the European Union (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-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 27; and Case C-34/10 *Brüstle* [2011] ECR I-0000, paragraph 25).

34 The wording of Directive 2001/29 does not make any reference to national laws as regards the meaning of the expression 'by means of its own facilities' in Article 5(2)(d) of that directive. It follows that that expression must be regarded, for the purposes of applying that directive, as covering an autonomous concept of European Union law, which must be interpreted in a uniform manner throughout the territory of the European Union.

35 This conclusion is supported by the subject-matter and purpose of Directive 2001/29. The objective of Directive 2001/29, which is based, in particular, on Article

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95 EC and is intended to harmonise certain aspects of the law on copyright and related rights in the information society and to ensure that competition in the internal market is not distorted as a result of differences in the legislation of Member States (Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraphs 26 and 31 to 34), requires the elaboration of autonomous concepts of European Union law. The European Union legislature's aim of achieving a uniform interpretation of the concepts contained in Directive 2001/29 is apparent in particular from recital 32 in the preamble thereto, which calls on the Member States to arrive at a coherent application of the exceptions to and limitations on reproduction rights, with a view to ensuring a functioning internal market.

36 Consequently, although it is open to the Member States, as has been pointed out in paragraph 32 of this judgment, to introduce an exception in respect of ephemeral recordings into their domestic law, an interpretation according to which Member States which, exercising that option afforded to them by European Union law, have introduced an exception of that kind, are free to determine, in an un-harmonised manner, the limits thereof, inter alia as regards the facilities used to make those ephemeral recordings, would be contrary to the objective of that directive as set out in the preceding paragraph, inasmuch as the limits of that exception could vary from one Member State to another and would therefore give rise to potential inconsistencies (see, by analogy, concerning the concept of 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29, Case C-467/08 *Padawan* [2010] ECR I-0000, paragraphs 34 to 36).

37 In the light of the foregoing considerations, the answer to the first question is that the expression 'by means of their own facilities' in Article 5(2)(d) of Directive 2001/29 must be given an independent and uniform interpretation within the framework of European Union law.

*The second question*

38 By its second question, the national court asks whether Article 5(2)(d) of Directive 2001/29, read in the light of recital 41 in the preamble thereto, is to be interpreted as meaning that a broadcasting organisation's own facilities include the facilities of a person acting 'on behalf of and under the responsibility of the broadcasting organisation' or as meaning that a broadcasting organisation's own facilities include the facilities of a person acting 'on behalf of or under the responsibility of the broadcasting organisation'.

39 It must be stated at the outset that there is a divergence between the different language versions of recital 41 in the preamble to Directive 2001/29.

40 In some language versions (the Czech, German and Maltese versions), that recital states that a broadcasting organisation's own facilities include the facilities of a person acting 'on behalf of or under the responsibility of the broadcasting organisation'. It follows, *prima facie*, from such wording that, in order for the recordings made by a

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broadcasting organisation, for its own broadcasts but with the facilities of a third party, to be covered by the exception laid down in Article 5(2)(d) of Directive 2001/29 in respect of ephemeral recordings, it is sufficient for the third party in question to be acting either ‘on behalf of’ the broadcasting organisation or ‘under the responsibility’ of that organisation.

41 By contrast, in other language versions, significantly more numerous (the Bulgarian, Spanish, Danish, Estonian, Greek, English, French, Latvian, Lithuanian, Hungarian, Dutch, Polish, Rumanian, Slovak, Slovenian, Finnish and Swedish language versions), recital 41 in the preamble to Directive 2001/29 reads to the effect that a broadcaster’s own facilities include those of a person acting ‘on behalf of and under the responsibility of the broadcasting organisation’. It follows, from the outset, from that version of the legislation that, in order for the recordings made by a broadcasting organisation, for the purposes of its own broadcasts but with the facilities of a third party, to be covered by the exception set out in Article 5(2)(d) of Directive 2001/29 in respect of ephemeral recordings, the third party in question must satisfy both of the conditions laid down.

42 Consequently, by its second question, the national court asks, in essence, whether the two conditions set out in recital 41 in the preamble to Directive 2001/29 must be understood as being alternative or cumulative in nature.

43 It is necessary to note at the outset that a purely literal interpretation of the recital at issue does not, in itself, provide an answer to the question referred since it inevitably results in an outcome which proves to be *contra legem* on the basis of the wording of one or the other of the abovementioned linguistic variants.

44 According to settled case-law, the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of European Union law (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16, and Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23).

45 In those circumstances, where there is divergence between two language versions of a European Union legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14; Case C-482/98 *Italy v Commission* [2000] ECR I-10861, paragraph 49; and Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25).

46 As regards the general scheme of which recital 41 in the preamble to Directive 2001/29 forms part, it must be borne in mind that, in principle, it follows from Article 2 of that directive that the reproduction of a protected work is subject to the authorisation of the author.

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47 However, it follows from Article 5(2)(d) of that directive that, by way of exception, in Member States which have so decided, broadcasting organisations which are authorised to broadcast the protected work may, as an incidental activity, make ‘ephemeral’ recordings of that work, without being required to ask the author to authorise such a reproduction.

48 In that regard, both Article 11*bis*(3) of the Berne Convention and Article 5(2)(d) of Directive 2001/29, which is intended to transpose that provision of the Convention, require those ephemeral recordings to be made with the ‘own facilities’ of those broadcasting organisations.

49 In accordance with Article 5(2)(d) of Directive 2001/29, read in the light of recital 41 in the preamble to that directive, the term ‘own facilities’ of a broadcasting organisation, when applying the exception in respect of ephemeral recordings, includes the facilities of a person acting on behalf of and/or under the responsibility of the broadcasting organisation.

50 Consequently, that provision, in the light of that recital, does not require the ephemeral recordings to be made by the broadcasting organisation itself, but states that, if a third party makes those recordings, the latter are deemed to have been made with the ‘own facilities’ of the broadcasting organisation.

51 By that requirement, the European Union legislature intended to maintain a close link between that third party and the broadcasting organisation, which ensures that the third party cannot profit, independently, from the exception in respect of ephemeral recordings, the sole beneficiary of which is the broadcasting organisation.

52 It is for that purpose that the European Union legislature specifies, in recital 41 in the preamble to Directive 2001/29, two cases, each of which is based on a specific relationship between the broadcasting organisation and the third party which has been entrusted, as the case may be, with the making of the ephemeral recordings.

53 The first case, namely that where the third party acts ‘on behalf of’ the broadcasting organisation, presupposes a direct and immediate link between the two parties, on the basis of which the third party in question does not, as a general rule, have any degree of independence. That link is unambiguous vis-à-vis other persons, since, by definition, all of the third party’s activities are necessarily attributable to the organisation in question.

54 The second case, in which the third party acts ‘under the responsibility’ of the broadcasting organisation, implies a more complex, mediate link between the two parties, which allows the third party a degree of freedom in the use of its facilities, while protecting the interests of other persons vis-à-vis the organisation in question, given that it is that organisation which is ultimately responsible for such use, in respect of compensation, with regard to other persons, in particular authors.

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55 It follows that each of the two conditions set out in recital 41 in the preamble to Directive 2001/29 is, in itself and independently of the other, capable of fulfilling the objective pursued by Article 5(2)(d) of that directive, read in the light of that recital, as stated in paragraph 51 of the present judgment.

56 Accordingly, those two conditions must be understood as being equivalent and, therefore, alternative in nature.

57 Furthermore, in the assessment of the choices of interpretation available to the Court, that approach finds support in the fact that it ensures that broadcasting organisations have a greater enjoyment of the freedom to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright.

58 In the light of the foregoing, the answer to the second question is that Article 5(2)(d) of Directive 2001/29, read in the light of recital 41 in the preamble to that directive, must be interpreted as meaning that a broadcasting organisation's own facilities include the facilities of any third party acting on behalf of or under the responsibility of that organisation.

*The third question*

59 By its third question, the national court asks, in essence, what the applicable criteria are for ascertaining, specifically, whether a recording made by a broadcasting organisation, for its own broadcasts, with the facilities of a third party, is covered by the exception laid down in Article 5(2)(d) of Directive 2001/29 in respect of ephemeral recordings.

60 It is apparent from a combined reading of Article 5(2)(d) of Directive 2001/29 and of recital 41 in the preamble to that directive, as interpreted in paragraph 58 of the present judgment, that such a recording is covered by the exception in respect of ephemeral recordings if that person may be regarded as acting either 'on behalf of' or 'under the responsibility' of the broadcasting organisation.

61 It follows that it is necessary to determine, initially, whether the third party in question may be regarded as acting 'on behalf of' the broadcasting organisation. Having regard, as has been pointed out in paragraph 53 of the present judgment, to the – generally – unambiguous nature of that relationship, such an assessment will, as a general rule, be obvious, and there will be no need to set out particular criteria for that purpose.

62 If the third party cannot be deemed to be acting 'on behalf of' the broadcasting organisation, it will then be necessary to determine whether that third party could be regarded, at the very least, as acting 'under the responsibility' of the broadcasting organisation.

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63 That will be the case only if the broadcasting organisation is required to be accountable for every act of such a person connected with the reproduction of the protected work, vis-à-vis, among others, the authors who are the holders of the rights in question.

64 In particular, in the context of that assessment, what is essential is that, vis-à-vis other persons, among others the authors who may be harmed by an unlawful recording of their works, the broadcasting organisation is required to pay compensation for any adverse effects of the acts and omissions of the third party, such as a legally independent external television production company, connected with the recording in question, as if the broadcasting organisation had itself carried out those acts and made those omissions.

65 By contrast, as the Advocate General noted in point 87 of her Opinion, the question of who took the final artistic or editorial decision on the content of the reproduced programme commissioned by the broadcasting organisation is irrelevant. Under the exception in Article 5(2)(d) of Directive 2001/29, the concept of ‘recording’ envisaged as a means of technical reproduction is the only important factor.

66 In the light of the foregoing indications, it is for the national court to assess whether, having regard to the facts of the dispute in the main proceedings, the recordings in question were made by a party which may be regarded as having acted, specifically, ‘on behalf of’ the broadcasting organisation or, at the very least, ‘under the responsibility’ of that organisation.

67 Regard being had to the foregoing considerations, the answer to the third question referred is that, for the purposes of ascertaining whether a recording made by a broadcasting organisation, for its own broadcasts, with the facilities of a third party, is covered by the exception laid down in Article 5(2)(d) of Directive 2001/29 in respect of ephemeral recordings, it is for the national court to assess whether, in the circumstances of the dispute in the main proceedings, that party may be regarded as acting specifically ‘on behalf of’ the broadcasting organisation or, at the very least, ‘under the responsibility’ of that organisation. As regards whether that party may be regarded as acting ‘under the responsibility’ of the broadcasting organisation, it is essential that, vis-à-vis other persons, among others the authors who may be harmed by an unlawful recording of their works, the broadcasting organisation is required to pay compensation for any adverse effects of the acts and omissions of the third party, such as a legally independent external television production company, connected with the recording in question, as if the broadcasting organisation had itself carried out those acts and made those omissions.

### **Costs**

68 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.

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

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. The expression ‘by means of their own facilities’ in Article 5(2)(d) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be given an independent and uniform interpretation within the framework of European Union law.

2. Article 5(2)(d) of Directive 2001/29, read in the light of recital 41 in the preamble to that directive, must be interpreted as meaning that a broadcasting organisation’s own facilities include the facilities of any third party acting on behalf of or under the responsibility of that organisation.

3. For the purposes of ascertaining whether a recording made by a broadcasting organisation, for its own broadcasts, with the facilities of a third party, is covered by the exception laid down in Article 5(2)(d) of Directive 2001/29 in respect of ephemeral recordings, it is for the national court to assess whether, in the circumstances of the dispute in the main proceedings, that party may be regarded as acting specifically ‘on behalf of’ the broadcasting organisation or, at the very least, ‘under the responsibility’ of that organisation. As regards whether that party may be regarded as acting ‘under the responsibility’ of the broadcasting organisation, it is essential that, vis-à-vis other persons, among others the authors who may be harmed by an unlawful recording of their works, the broadcasting organisation is required to pay compensation for any adverse effects of the acts and omissions of the third party, such as a legally independent external television production company, connected with the recording in question, as if the broadcasting organisation had itself carried out those acts and made those omissions.

[Signatures]

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\* Language of the case: Danish.