OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 24 January 2013

Joined Cases C-457/11, C-458/11, C-459/11 and C-460/11

Verwertungsgesellschaft Wort (VG Wort)

v

KYOCERA Document Solutions Deutschland GmbH and Others

Canon Deutschland GmbH

Fujitsu Technology Solutions GmbH

Hewlett-Packard GmbH

v

Verwertungsgesellschaft Wort (VG Wort)

(References for a preliminary ruling from the Bundesgerichtshof (Germany))

(Copyright and related rights in the information society – Temporal effect of Directive 2001/29/EC – Reproduction right – Exceptions or limitations – Fair compensation – Notion of 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects' – Reproductions made by means of printers or personal computers – Reproductions from a digital source – Reproductions made using a chain of devices – Consequences of non-use of available technological measures designed to prevent or restrict unauthorised acts – Consequences of implicit or explicit authorisation to make reproductions)

1. Directive 2001/29 (2) requires Member States to provide for authors to have 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. However, they may also provide for exceptions or limitations to that right in certain cases, in particular in respect of 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects' and 'reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial', provided that the rightholders receive fair compensation.

2. In Germany, fair compensation is achieved by levying a charge on those who manufacture, import or sell devices capable of making reproductions. In the main proceedings in the present cases, the Bundesgerichtshof (Federal Court of Justice) has to decide whether the charge should be levied on printers or personal computers able to make reproductions only when linked to one or more other devices, such as scanners, which may themselves be subject to the same charge. It has therefore referred two questions on the interpretation of the Directive, designed to elucidate that matter. It also wishes to know how the possibility of applying technological measures to prevent or restrict copying, (3) and the explicit or implicit granting of authorisation for reproduction, affect the entitlement to fair compensation. Finally, it has a question on the temporal scope of the Directive.

3. Those questions, although they might appear relatively straightforward at first sight, in fact raise complex issues concerning the interactions between the Directive and the German legislation, and between the different provisions of each.

EU law

The Directive

4. According to Article 2 of the Directive, entitled 'Reproduction right':

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

(a) for authors, of their works;

…'

5. Article 5(2) provides, inter alia:

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

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

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

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

…'

6. Article 5(3) states, inter alia:

'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

…

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

…'

7. The other cases listed in Article 5(2) and (3) (4) all concern use which is non-commercial or, broadly speaking, in the public interest. The proviso that the rightholders *must* receive fair compensation applies only to the situations in Article 5(2)(a), (b) and (e), (5) but recital 36 in the preamble to the Directive clearly indicates that Member States are intended to *be able* to provide for such compensation in respect of any or all of the other optional exceptions to or limitations of the reproduction right. (6)

8. Article 5(5) specifies:

'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.'

9. It may be noted that the provision in Article 5(5) of the Directive, often known as the 'three-step test', reproduces the almost identical terms of Article 9(2) of the Berne Convention (1967 revision), (7) Article 13 of the TRIPs Agreement (1994) (8) and Article 10(2) of the WIPO Copyright Treaty (1996). (9) In the context of TRIPs, the three steps have been interpreted by a WTO panel. (10) Very briefly, the panel's view was that the three conditions were cumulative, that the first condition (certain special cases) requires that a limitation or exception should be clearly defined and should be narrow in its scope and reach, that the second condition (no conflict with normal exploitation) means that an exception or limitation must not authorise uses which enter into economic competition with the ways in which rightholders normally extract economic value from their work, and that the third condition (no unreasonable prejudice to the rightholder's legitimate interests) rules out any exception or limitation which causes or has the potential to cause an unreasonable loss of income to the rightholder.

10. Article 6(3) of the Directive defines 'technological measures' as 'any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright ... Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective'. Essentially, Article 6 as a whole requires Member States to afford rightholders adequate legal protection against any means designed to circumvent such technological measures as the rightholders may voluntarily apply, or as may be applied in implementation of measures taken by Member States themselves.

11. Article 10 of the Directive is entitled 'Application over time'. Under Article 10(1), the provisions of the Directive are to apply in respect of all works which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights. Article 10(2) states: 'This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002'.

12. Under Article 13(1), Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 22 December 2002. Under Article 14, the Directive entered into force on the day of its publication in the *Official Journal of the European Communities*, namely, 22 June 2001.

The Padawan *judgment*

13. The Court has interpreted provisions of the Directive in a number of judgments, of which perhaps the most relevant to the present proceedings is *Padawan*, (11) which dealt with Article 5(2)(b), often referred to as the 'private copying' exception.

14. That case concerned a levy applied in Spain to digital recording media, (12) in the context of a national private copying exception and thus of Article 5(2)(b) of the Directive. The Court did not follow the Commission's submission that the manner of financing fair compensation, not being regulated by the Directive, is for the Member States to determine (subject only to limits set by, in particular, fundamental rights and general principles of law); that, in other words, their obligation is to achieve a defined result rather than to do so by defined means. (13) It took the view, rather, that a person who makes use of the private copying exception, causing the rightholder the harm in respect of which he is entitled to fair compensation, must make good that harm by financing the compensation. (14) It thus considered there to be a necessary link between the application of a levy to digital reproduction equipment, devices and media and their use for private copying. (15) However, since it is not practical to link the levy to actual use, natural persons may be deemed to take full advantage of the functions of equipment made available to them as private users; thus, the fact that devices are able to make copies can justify the application of a private copying levy. (16) None the less, indiscriminate application of such a levy to equipment, devices or media not made available to private users and clearly reserved for uses other than private copying is incompatible with the Directive. (17)

Relevant German law

15. Paragraph 53 of the Urheberrechtsgesetz (18) sets out certain situations in which, as an exception to the normal rules on copyright, it is permissible to reproduce protected material.

16. Since 13 September 2003, Paragraph 53(1) of the UrhG has allowed a natural person to make single copies for private use on any medium, provided that there is no direct or indirect commercial purpose and that the original was not obviously unlawfully produced – an exception broadly similar to that in Article 5(2)(b) of the Directive; before that date, however, it was not confined to natural persons. In addition, a person authorised to make copies himself may also have copies made for him by another either if there is no payment – a condition which has no explicit basis in the Directive – or, since 13 September 2003, if the copies are made on paper or a similar medium by any kind of photomechanical technique or other process having similar effects – a condition which echoes Article 5(2)(a).

17. Paragraph 53(2) has a more complex structure. It allows persons (not confined to natural persons) to make or have made single copies for their own use: (i) for scientific use, to the extent necessary; (ii) for inclusion in the person's own archive, to the extent necessary, provided that the original is also the person's own; (iii) for current affairs information where the original was broadcast; and (iv) of articles, extracts of published

works or works which have been out of print for at least two years. Those exceptions do not correspond clearly to any provided for in the Directive: in so far as they are not confined to natural persons, they go beyond Article 5(2)(b); in so far as they are conditional on use for own purposes, they are more restrictive than those contained in other subparagraphs.

18. Until the 2003 amendment of the UrhG, no further conditions were attached to the exceptions in Paragraph 53(2). By that amendment, the exception under (ii) was made subject to at least one of the following conditions: the copying must be on paper or a similar medium and by any kind of photomechanical technique or other process having similar effects; it must be exclusively analogue; (19) and/or the archive must be in the public interest and devoid of commercial or economic purpose. The exceptions under (iii) and (iv) were made subject to at least one of the first two of those conditions.

19. Paragraph 53(3) of the UrhG again concerns articles or extracts, together with shorter works, and authorises own-use copying (again, there is no limitation to natural persons) for purposes of education or preparation for examinations, essentially within educational institutions of all kinds. Its content appears to correspond in part to that of Article 5(2)(c) and (3)(a) of the Directive.

20. Under Paragraph 54a(1) of the UrhG, when the nature of a work is such that it may be expected to be reproduced by photocopying or by any process having similar effects – a condition which again echoes Article 5(2)(a) of the Directive – for the purposes set out in Paragraph 53(1) to (3), the author may claim an 'angemessene Vergütung' (20) from manufacturers, importers or distributors of devices 'intended to make such reproductions'. Under Paragraph 54g(1), the author may require those liable to pay such remuneration to provide him with information. However, under Paragraph 54h(1) of the UrhG, only authorised collecting societies are entitled to claim the remuneration, or to require the provision of information, in question.

21. Pursuant to Paragraph 54d of the UrhG and Annex II thereto, the levy on devices referred to in Paragraph 54a(1) is set at a sum varying from EUR 38.35 to EUR 613.56, depending on the number of copies that can be made per minute and the availability or not of colour copying; however, other amounts may be fixed by agreement.

Facts, procedure and questions referred

22. Verwertungsgesellschaft Wort (VG Wort) is an authorised collecting society. It has exclusive responsibility for representing authors and publishers of literary works in Germany. It is therefore entitled to claim remuneration from manufacturers, importers or distributors of devices subject to the requirement to pay remuneration to authors under Paragraph 54a(1) of the UrhG. In its own name and on behalf of another collecting society representing those who hold rights in graphic works of all kinds, it has sought to claim such remuneration from the other parties to the main proceedings ('the suppliers'), (21) by way of a levy on personal computers, printers and/or

plotters (22) marketed in Germany between the beginning of 2001 and the end of 2007. The amounts claimed are based on the rates agreed between the two collecting societies and published in the *Bundesanzeiger* (Federal Gazette).

23. The suppliers argue in particular that printers and plotters are incapable of reproducing any work on their own. They can do so only when linked to a device which can use a photographic technique or process having similar effects in order to create an image of the work. Consequently, compensation should be levied only on such devices, not on printers or plotters. That view is consistent with previous case-law in which the Bundesgerichtshof has considered that, when devices such as a scanner, a computer and a printer are linked together in order to copy a document, it is only on the device which most clearly typifies the photographic technique – namely the scanner – that remuneration should be due.

24. Two further questions arise, in the national court's view, concerning the calculation of the remuneration due. Where technological measures designed to prevent copying are available but not used, or when copying has been authorised in any way, is fair compensation still due in respect of the originals concerned? In addition, it is not entirely clear from what date, and in respect of what events, national law must be interpreted in accordance with the Directive.

25. The Bundesgerichtshof therefore asks: (23)

'1. In interpreting national law, is account to be taken of the Directive in respect of events which occurred after the Directive entered into force on 22 June 2001, but before it became applicable on 22 December 2002?

2. Do reproductions effected by means of printers [or personal computers] constitute reproductions effected by the use of any kind of photographic technique or by some other process having similar effects within the meaning of Article 5(2)(a) of the Directive?

3. If Question 2 is answered affirmatively: can the requirements laid down in the Directive relating to fair compensation for exceptions or limitations to the right of reproduction under Article 5(2) and (3) of the Directive, having regard to the fundamental right to equal treatment under Article 20 of the EU Charter of Fundamental rights, be fulfilled also where the appropriate reward [(24)] must be paid not by the manufacturers, importers and distributors of the printers [or personal computers] but by the manufacturers, importers and distributors of one or more other devices in a chain of devices capable of making the relevant reproductions?

4. Does the possibility of applying technological measures under Article 6 of the Directive suffice to render the condition relating to fair compensation within the meaning of Article 5(2)(b) thereof inapplicable?

5. Is the condition relating to fair compensation (Article 5(2)(a) and (b) of the Directive) and the possibility thereof (see recital 36 in the preamble to the Directive) inapplicable where the rightholders have expressly or implicitly authorised reproduction of their works?'

26. Written observations have been submitted by VG Wort, by the suppliers, by Finland, Germany, Ireland, Lithuania, the Netherlands, Poland, Spain and the United Kingdom and by the Commission. At the hearing on 22 October 2012, VG Wort, Fujitsu, Hewlett Packard, Kyocera, the Czech Republic, Germany, the Netherlands, Austria, the United Kingdom and the Commission submitted oral argument.

Assessment

27. The Bundesgerichtshof is concerned to interpret certain provisions of the UrhG in accordance with those of the Directive, to the extent that such interpretation is required by EU law. It therefore asks one question on the applicability of the Directive *ratione temporis*, and four on the interpretation of substantive provisions. Since it is undisputed that the Directive is relevant for most of the period covered by the disputes in the main proceedings, I shall deal first with the substantive issues. Before doing so, however, it may be helpful to consider some general points about the Directive and its relationship to the German legislation.

Preliminary remarks

The relationship between the preamble and the enacting terms of the Directive

28. A feature of the Directive is the length of its extremely detailed preamble, some 40% longer than the enacting terms. In the course of the submissions to the Court, extensive reference has been made to certain recitals in the preamble, and the Court has relied significantly on such recitals in its judgments. (25)

29. It is clear from that preamble that the legislature intended not only to achieve as much as possible of the uniformity necessary for the internal market (26) but also to allow adaptation to new forms of exploitation, new uses and technological developments. (27) There is, consequently, some justification for adopting a progressive, adaptive and harmonising approach to the interpretation of the Directive.

30. On the other hand, it must be remembered that a great deal of discretion is left to the Member States, and many aspects are not harmonised. For example, how much compensation is fair, and how is it to be provided for? And the mere existence of 20 optional exceptions or limitations to the reproduction right, of which 17 involve a further option for fair compensation, far from pursuing uniformity or harmonisation, seems practically to amount to a renunciation of those goals. Where the legislature has thus deliberately left choices open for the Member States, it does not seem appropriate for the Court to close them up in the name of greater harmonisation.

31. Furthermore, legal certainty is a prerequisite for whatever harmonisation is to be achieved in the internal market, (28) and a progressive, adaptive approach to interpretation is not conducive to the greatest legal certainty. Where there are interlinked developments in both technology and business practice, the Court can go only so far in ensuring that legislation is interpreted so as to take account of those developments There comes a point at which only the legislature is competent to ensure that evolution.

32. Finally, I would advise caution as regards over-reliance on the preamble, as opposed to the enacting terms of the Directive. It is true that, when interpreting a measure, account must be taken of the reasons which led to its adoption. (29) I would recall, however, point 10 of the Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation, (30) which states: 'The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations'. Although those guidelines are not legally binding, it should be presumed that the institutions which adopted them by common accord (the Parliament, the Council and the Commission) follow them when drafting legislation. (31)

The relationship between the Directive and the German legislation

33. The Directive protects first and foremost the author's fundamental right to authorise or prohibit reproduction of his works. Although it does not concern licensing arrangements, it proceeds on the basis that authors are able to negotiate remuneration in exchange for authorisation to reproduce their works. Recital 10 in the preamble states that they must receive an 'appropriate reward' for the use of their work. (32)

34. Member States may none the less provide for any or all of the exhaustively listed exceptions or limitations to the right to authorise or prohibit reproduction. In three of those cases they must (and in the remainder they may) ensure that authors receive fair compensation for such encroachment on their rights. (33) Of those three cases, the present references for a preliminary ruling are concerned primarily with Article 5(2)(a) of the Directive, which allows an exception or limitation for reproductions 'on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects', and Article 5(2)(b), for reproductions 'on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial'. However, the Bundesgerichtshof's third question refers explicitly to the whole of Article 5(2) and (3), which list 20 often overlapping situations in which an exception or limitation to the reproduction right is permissible, (34) and the basic issue in its fifth question (that of authorisation by rightholders) may be relevant to all those situations.

35. It must be remembered that the provisions of Article 5(2) and (3) are all optional and that the option is in all cases that of providing for an exception or a limitation to the reproduction right. The optional nature of the exceptions or limitations gives Member

States a certain freedom of action in this area, which is reflected in the preamble to the Directive, particularly in recitals 34, 36 to 40, 51 and 52.

36. I draw certain conclusions from the above.

37. First, an exception or limitation to the reproduction right which goes farther than what is authorised by one or other of the provisions of Article 5(2) or (3) will be incompatible with the Directive. However, given the optional nature of the provisions and the possibility of introducing a limitation rather than an exception, a measure which goes less far will be compatible. For example, a Member State may not, on the basis of Article 5(2)(b), provide for an exception for all reproductions made by a natural person on any medium, without reference to the purpose for which they were made, since that would extend the scope of the exception beyond what is authorised by that (or any other) provision. Conversely, it may, still on the basis of Article 5(2)(b), lay down an exception for reproductions made by a natural person only when they are made on paper and exclusively for the purpose of private study, since the scope of that exception would be narrower than, but still fully encompassed within, what is authorised.

38. Second, the overlapping nature of the various situations must be taken into account when evaluating the compatibility with the Directive of a national provision or of its interpretation in national law. The Directive does not require national exceptions or limitations to be drafted so as to fit in each case within a single one of the 20 situations set out in Article 5(2) and (3). A national exception or limitation to the reproduction right may therefore be compatible with the Directive even if it includes elements from two or more of the provisions of Article 5(2) or (3). However, since it must not go beyond what is permitted by those provisions, care must be taken to ensure that any such 'hybrid' exception does not combine conditions in such a way as to cover an area which falls outwith any of those permitted by the Directive.

39. In that regard, I note that the definitions in Article 5(2)(a) and (b), which are based on quite different – even contrasting – criteria, in fact overlap significantly in terms of the acts of reproduction which they cover. While the definition in Article 5(2)(a) is circumscribed only in terms of the means of reproduction and the medium used, that in Article 5(2)(b) refers exclusively to the identity of the person making the reproduction and the purposes for which it is made.

40. Consequently, an exception in respect of reproductions made by a natural person on paper or a similar medium, using a photographic technique or other process having similar effects, for private use and for ends that are neither directly nor indirectly commercial – thus including most private photocopying of copyright material – will fall within either provision or both. By contrast, reproductions made other than by a natural person and using other means will not fall within either provision; they must be covered by another subparagraph of Article 5(2) or (3) if any exception relating to them is to be compatible with the Directive.

41. Subparagraphs 1 to 3 of Paragraph 53 of the UrhG, which the Bundesgerichtshof and the parties to the main proceedings have cited as relevant to the resolution of the dispute in those proceedings, appear to cover both overlapping and non-overlapping areas of Article 5(2)(a) and (b) of the Directive. They also extend at least partially to certain other exceptions, such as those relating to educational and scientific purposes, in respect of which fair compensation is optional rather than compulsory. Paragraphs 54a(1) and 54d, read together with Annex II, impose a single scale of levies on devices capable of making photocopies, or their equivalent, of protected material in any of the circumstances set out in Paragraph 53(1) to (3). (35) The consequent lack of parallelism between the Directive and the UrhG does not make it easier to verify whether an interpretation of the latter is consistent with the former. Where national legislation blends different exceptions, the question of its compatibility with the Directive might even be raised in certain cases. (I would add that the use of the term 'angemessene Vergütung' in Paragraph 54a(1) of the UrhG, which seems to invite confusion with concepts other than that of 'fair compensation' within the meaning of the Directive, (36) complicates matters further.)

42. However, to the extent that the levy applies only to devices capable of making 'reproductions on paper or any similar medium … by the use of any kind of photographic technique or by some other process having similar effects', the acts of reproduction concerned all fall within Article 5(2)(a) of the Directive, even if some of them may also fall within other exceptions, such as that for private copying. Consequently, in order to ensure consistency, the conditions governing that levy must in all cases be consistent with Article 5(2)(a).

The relationship between the levy and the fair compensation

43. Questions 4 and 5 concern, broadly speaking, the repercussions of certain behaviour on the part of rightholders – failure to apply technological measures which are available to prevent or restrict copying, and the implicit or explicit granting of authorisation to copy – on their entitlement to fair compensation in a situation covered by an exception or limitation enacted pursuant to Article 5(2) or (3) of the Directive. Those issues arise with regard to the calculation of the amount of the levy charged on devices to finance such fair compensation and not in the context of any dispute concerning an individual rightholder's entitlement. The questions are none the less predicated on the assumption that the amounts levied will serve to pay rightholders and will therefore be calculated on the basis of the amount of fair compensation to be paid out overall.

44. It should, however, be noted that in several Member States (though not, apparently, in Germany) levies on devices and blank media are used not only to pay fair compensation to rightholders but also for collective or cultural purposes, such as the promotion of literary, musical or audiovisual production. (37)

45. The issue of the relationship between levies, fair compensation and such collective or cultural purposes is not raised in the present cases but has been referred to the Court in another currently pending reference from the Oberster Gerichtshof (Supreme Court) of Austria. (38) It would not be appropriate to prejudge that issue in the present case, but it may be desirable to bear it in mind when examining the questions in the present proceedings. To the extent that levies are calculated on the basis of a need to provide fair compensation to rightholders within the meaning of the Directive, the degree of freedom which Member States may have in determining what can constitute fair compensation is relevant – whether such compensation is confined to making good the 'harm' referred to in recital 35 in the preamble to the Directive and paragraph 39 et seq. of the judgment in *Padawan* (39) or whether it can also be provided by a more general contribution to the collective benefit of rightholders.

46. I turn now to consider the Bundesgerichtshof's questions, beginning with the four substantive questions.

Question 2: the criteria in Article 5(2)(a)

47. In Article 5(2)(a) of the Directive, do 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects' include those made using printers or personal computers (essentially in combination)?

48. The question turns on the distinction between copies of an original 'analogue' document (essentially, one which is itself on paper or a similar medium, copied by an 'analogue to analogue' process, for example, a photocopy) and reproductions of a 'digital' document (one which exists in electronic form, printed out by 'digital to analogue' copying, for example printing out a web page). When dealing with that question, since the reproductions referred to are defined according to technical criteria, it seems desirable to have in mind some notions of how the processes and devices in issue operate. (40)

49. Photography, as generally understood, consists essentially in capturing by optical means a particular view (what one would have seen through the lens of the camera at the relevant moment) and storing the result with the object of subsequent reproduction as an image. The image may be of a document, and I shall use the term 'image' to include a reproduction of any kind of document, whether text or graphic.

50. In traditional photography, photosensitive negative film is exposed to light from an actual view and, after development, is used as a filter to project the corresponding image on to photosensitive paper, on which positive copies are printed. The image captured and reproduced is an analogue of the view seen through the lens.

51. Digital photography records the image not in analogue form but as a very large number of pixels which vary in colour and intensity. The digital information can then be

transferred (by a direct link, including a wireless link, or via a portable device such as a memory card) to other devices which can reproduce an analogue image on various types of medium. Digital cameras are nowadays also to be found on other devices, including many (perhaps the majority of) mobile phones and 'tablet' PCs.

52. In xerographic (that is to say, most modern) photocopiers, bright light is projected on to a document and reflected on to an electrostatic cylinder which attracts or repels toner (powdered ink) according to the intensity of light falling on each part, forming an analogue image which is then transferred to paper. It is not disputed by any party submitting observations, nor does it seem in any way open to dispute, that such a process is a 'photographic technique' or 'process having similar effects' within the meaning of Article 5(2)(a) of the Directive.

53. A scanner captures a view of a document (also from a projection of light) in the form of digital information, which can be transferred to other devices able to store it and/or to reproduce an analogue image on various types of medium.

54. A printer produces images from digital information which it receives from some other source, such as a computer, a digital camera or a portable memory device (for example, a memory card, USB stick or CD-Rom). Different types of printer use different processes: from a digital source, laser printers produce on a cylinder an analogue image which is then transferred to paper, much as with xerographic photocopiers, whereas inkjet printers create the image directly on paper from the digital information. Most printers produce images on various types of paper; some can print on other media such as cloth or transparent film. Plotters are, essentially, specialised printers designed for certain graphic applications; originally, they produced images by the movement of a stylus over paper but they may now use techniques more similar to those of other printers.

55. A scanner and a printer, operated together, perform the same overall function as a photocopier. In some cases they may both need to be linked to a computer for that purpose, while in others they may be linked together directly, or information may be carried from one to the other on a portable memory device. Multifunction printers or all-in-one ('AIO') devices combine the functions of (inter alia) scanner, printer and photocopier; they have limited and specialised memory and processing capacity, those of a computer being much greater and less specialised.

56. Digital image information can be entered into a computer (directly, for example from a digital camera or scanner, or indirectly, via a portable memory device or the internet) where it can be memorised, perhaps manipulated and sent to a peripheral device (such as a screen or a printer) to reproduce an analogue image. A scanned image is normally stored in such a way that the reproduction will be a visual representation of the original; however, optical character recognition (OCR) software may be used to convert printed text into neutral digital information, from which it can be reproduced in a form visually different from the original. Digital information representing a text

document or a graphic image can also be created in a computer without an original image, using a keyboard or mouse together with appropriate software. Without input and output peripherals, however, a computer cannot itself capture or reproduce any image.

57. The ways in which an image can be reproduced using one or more of the above devices may thus be described schematically as comprising an input stage, an intermediate stage and an output stage. The input stage may involve optical input of an analogue original or non-optical creation of a digital original. The intermediate stage may comprise one or more operations of storage, transfer or manipulation, in either analogue or digital form. The output stage involves the production of an image in visible, analogue form. (41)

58. With that in mind, how are 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects' to be interpreted in the context of Article 5(2)(a) of the Directive? The Bundesgerichtshof asks whether such reproductions (it should be remembered that they are not confined to private copying) include those made using printers (including plotters) or computers. The underlying question is whether they include copies made from a digital source or only those of an analogue original.

59. VG Wort, Austria, the Czech Republic and the United Kingdom consider that copies from a digital source are included. Germany does not address the question. The remaining Member States, the Commission and the suppliers all take the opposite view (which appears to be favoured also by the referring court).

60. At one level, the answer seems relatively simple.

61. Taking the definition as a whole, it seems to me that the core meaning covers essentially analogue to analogue copies made using a photocopier – by reprography, to use the term in recital 37 in the preamble to the Directive. (42) However, there is no essential difference between such copies and those made using, for example, a scanner or a digital camera linked to a printer (via a computer or otherwise), or an AIO device. Even if the image goes through an intermediate stage of digital encoding and storage, the input and output remain analogue, just as with a photocopier. The process differs from xerographic photocopying no more than digital photography differs from traditional photography. It cannot be said that the effects are not 'similar' for the purposes of Article 5(2)(a).

62. Consequently, computers and printers may be used in making reproductions as defined in Article 5(2)(a) of the Directive. However, the question which needs to be answered in order to resolve the dispute in the main proceedings goes further than that. If the digital information from which the printer produces the printed document comes not from a scanner to which it is linked but simply from a computer, which may have received the information from a remote source (for example, as a download from a

website or as an email attachment), does that situation also fall within Article 5(2)(a)? That question is related to the third question, which raises the issue whether it is correct to consider that, in a chain consisting of scanner, computer and printer, it is the scanner which is most clearly typical of the photographic technique or process having similar effects and which should thus, alone, serve as the basis for any levy intended to provide fair compensation for authors.

63. First, I would dismiss the suggestion made by VG Wort that, for the purposes of Article 5(2)(a) of the Directive, a copy made on a digital recording medium can be regarded as a reproduction 'on paper or any similar medium' because it may serve as a precursor to or functional substitute for the latter. Such an interpretation would simply ignore the meaning of 'paper' and 'similar' and would imply that any recording medium at all could be used. In my view it is clear that, in order to be similar to paper as a medium for reproduction, a substrate must be capable of bearing and must in fact bear a physical representation capable of perception and interpretation by human senses.

64. However, for the purposes of Article 5(2)(a) of the Directive, it is not sufficient that an image reproducing a copyright original is made on 'paper or any similar medium'; it must also be made 'by the use of any kind of photographic technique or by some other process having similar effects'. A scanner captures images using a photographic technique but cannot, on its own, reproduce them; a simple printer may reproduce them but cannot capture them; and a computer cannot, on its own, do either but may perform an intermediate function between the two.

65. If a chain of devices such as a scanner linked to a printer via a computer can in principle be considered to make reproductions falling within Article 5(2)(a) of the Directive, can the same be said when the digital information representing the original copyright material enters the computer from a different source (for example, as a download from the internet or as an attachment to an email), or where it is processed (for example by OCR software) so that the output is not a facsimile of the original?

66. My first observation here would be that such situations are not obviously covered by the terms of the provision, taking those terms in their ordinary meaning. Nor does anything in the legislative history suggest that it was ever contemplated to extend those terms beyond the sphere of reprography as it is normally understood or even (in contrast to Article 5(2)(b), which refers to the use of technological measures) to allow for future technical developments in reprography.

67. Second, providing as it does for an exception to the general rule conferring an exclusive reproduction right on authors in Article 2, Article 5(2)(a) of the Directive is, as a matter of principle, to be interpreted strictly.

68. Third, Article 5(5) explicitly requires a restrictive rather than an extensive interpretation. (43) Its importance in the present regard seems all the greater in that, of all the exceptions and limitations which are permissible under Article 5(2) and (3), only

those under Article 5(2)(a) can cover reproductions made for commercial purposes. Looking specifically at the three-step test in Article 5(5), an interpretation of Article 5(2)(a) which imposed no restriction as to the nature of the source document would be unlikely to meet the first-step criterion of 'certain special cases' – in practice, absolutely any reproduction (other than of sheet music) which could be made on paper or a similar medium would fall within the exception. To the extent that such reproductions are not limited in number or as regards the purpose for which they are made, there would in addition be a greatly increased likelihood of conflict with normal exploitation of the work and the author's legitimate interests, and thus with the second and third steps of the test.

69. I therefore have little difficulty in agreeing with the majority of the submissions to the Court on this question that Article 5(2)(a) of the Directive covers only analogue to analogue copying. The word 'photographic' necessarily requires optical input of an analogue original, and the need for paper or a similar output medium means that the output must also be analogue. To argue that the phrase 'having similar effects' means simply 'the result of which is similar to a result which could have been produced by a photographic technique' would be simply to deny any meaning to the word 'photographic' – absolutely any reproduction on paper or a similar medium can be described as 'similar' to one produced by a photographic technique. In my view, effects which are similar to those of a photographic technique must be regarded as those which are similar to those of the technique viewed as a whole; there must be a perceptible reproduction of something which is perceptible in the physical world. And, in addition to the clear wording of the provision itself, the notion of analogue to analogue copying is evident from the use of the word 'reprography' in recital 37 in the preamble, and in the *travaux préparatoires*, (44) and is confirmed by the fact that references to digital copying are confined to the sphere of private copying (in recital 38 and, via the mention of 'technological measures', in Article 5(2)(b)).

70. VG Wort appears to be concerned that large-scale copying of digital copyright material might not be subject to any levy designed to provide fair compensation for authors if Article 5(2)(a) of the Directive is interpreted to cover only analogue to analogue copying. It is true that, under the interpretation which I advocate, digital to analogue copying does not give rise to an obligation to provide fair compensation unless it is done by a natural person for private and non-commercial purposes within the meaning of Article 5(2)(b). That is because such copying does not fall within an exception or limitation provided for in accordance with the Directive. It must therefore be the subject either of negotiated remuneration or of proceedings to obtain reparation for infringement, in the context of the exclusive reproduction right which is the general rule under the Directive. That seems justified if it is remembered that the scope of Article 5(2)(a), in so far as it does not overlap with the scope of any of the other permissible exceptions or limitations to the reproduction right, is confined essentially to reproductions for purposes other than private copying or public-interest uses – in short, its specific scope is likely to be confined to reproductions for ends which are directly or indirectly commercial. By contrast, it does not seem justified, on what must necessarily

be a strict, and even restrictive, interpretation, to deprive authors of their exclusive reproduction right in respect of a significant body of copying for such ends.

71. I have reached the view, so far, that Article 5(2)(a) of the Directive must be interpreted as restricted to analogue to analogue copying, to the exclusion of digital to analogue copying. However, I have also considered that the notion of analogue to analogue copying cannot be so narrow as to exclude methods which comprise an intermediate digital stage – for example, where a scanned document is memorised in a computer, or a digitally photographed document is transferred to a computer via a memory card, before being printed out by a connected printer – in other words, analogue to digital to analogue copying.

72. That being so, it seems necessary to distinguish the latter category (which in my view is included within the definition in Article 5(2)(a) of the Directive) from simple digital to analogue copying (which in my view is not). Digital documents derived from an analogue original may be stored on a computer and subsequently printed out in circumstances far removed from what would normally be thought of as reprography – for example, when a scanned original is uploaded to a website by one person and subsequently downloaded to another person's computer. Such circumstances do not, in my view, fall within the definition in Article 5(2)(a), even though the process as a whole might be viewed as analogue to digital to analogue copying. If they were considered to do so, there would again be a danger that the first step of the three-step test in Article 5(5) would not be met, as the definition would become too broad to be regarded as confined to 'certain special cases'.

73. In order to draw the necessary distinction, it is not appropriate to rely on the criterion of 'transient or incidental' acts of reproduction used in Article 5(1) of the Directive, as it is clear that storage of a digital image on a hard disc or other memory device, while it may be merely an intermediate stage between input (scanning or photography) and output (printing), cannot be described as 'transient'. (45)

74. Consequently, it seems to me, the scope of the exception or limitation permitted by Article 5(2)(a) of the Directive, while including situations in which an analogue to analogue reproduction involves an intermediate digital phase, should be construed so as to exclude situations in which the process as a whole is carried out neither by the same person nor as a single operation.

Question 3: reproductions involving a chain of devices

75. If (as I believe) the reproductions covered include those made using printers or computers, can a charge to provide fair compensation be levied – having regard to the principle of equal treatment – from the manufacturers, importers or distributors not of the printers or computers but of one or more other items in a chain of devices capable of making the relevant reproductions?

76. The national court's third question is phrased formally so as to be posed only if the second question – which concerns only Article 5(2)(a) of the Directive – is answered in the affirmative. It refers, none the less, to all cases in which a Member State has opted, under Article 5(2) or (3), to implement an exception or limitation to the reproduction right, with fair compensation for rightholders. However, as I have pointed out, (46) the national levy concerned applies entirely within the limits set by Article 5(2)(a) and may apply outside those set by other subparagraphs. Consequently, in order to ensure an application which is consistent both internally and with the Directive, it is necessary to give an answer based above all on Article 5(2)(a).

77. The basic issue before the national court appears to be whether, as the suppliers argue, the Bundesgerichtshof's previous case-law to the effect that, in respect of analogue to analogue copying using a chain of devices (for example, scanner, computer and printer), the levy should be charged only on the device capable of forming an image of the original document (in the example, the scanner) is compatible with the Directive or whether, as VG Wort argues, the levy should be spread over all the devices in the chain, according to the extent to which they are used. The Bundesgerichtshof is concerned that a levy on all devices would infringe the principle of equal treatment, particularly as it is difficult to determine the extent to which personal computers and printers are used in analogue copying. VG Wort, by contrast, considers that the determination is not difficult and that to impose the levy on scanners, to the exclusion of computers and printers, would make scanners prohibitively expensive while allowing reproductions to be made from a digital source without any contribution to fair compensation for authors.

78. In *Padawan*, (47) the Court accepted, in the context of Article 5(2)(b) of the Directive, that Member States enjoy broad discretion in determining how fair compensation should be organised; that such compensation is in principle due to authors who have suffered harm by the introduction of the private copying exception from persons who make copies pursuant to that exception; but that it is legitimate to levy a charge for that purpose on those who make copies for others, or who make equipment, devices or media available to them in order to do so, on the basis that the levy can be passed on in the price charged. If those principles apply in the context of Article 5(2)(b), they must in my view also apply where Article 5(2)(a) is concerned.

79. The Court further held, however, that indiscriminate application of a private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Article 5(2)(b) of the Directive, although, where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work. (48) Thus, a levy may be applied to equipment, devices or media on the basis not of actual use for the reproduction of protected material but of potential use, and it must

be excluded where any such use is itself excluded. Again, it would seem that the same must apply where analogue copying within the scope of Article 5(2)(a) is concerned.

80. Consequently, in the light of the answer which I propose to question 2, it should in principle be legitimate to charge a levy on the manufacture, import or sale not only of devices such as photocopiers and AIO devices which can make analogue to analogue copies on their own, but also of devices which can be used when linked together in a chain, but not individually, to make such copies.

81. To the extent that such a levy is charged pursuant to the Directive, and thus in implementation of EU law, Member States must respect the general principles of that law in the exercise of the options available to them. (49)

82. Where there is a levy in respect of a chain of devices, it would seem inconsistent with the principle of equal treatment or of proportionality – or, indeed, with any concept of fair compensation or of fair balance between rightholders and users (50) – for each component of the chain to bear the same levy as a standalone device such as a photocopier. Such an approach would mean that a user could be liable to pay widely varying contributions to fair compensation depending on his choice of equipment, which does not seem 'fair' but which does seem likely to distort competition between suppliers of different devices.

83. VG Wort's approach of spreading the levy between devices thus does not seem at first sight inconsistent with the Directive. Nor, however, does it seem at first sight inconsistent with the Directive for the levy to be borne by only one device in the chain. But matters are more complicated than that, particularly if the principle of equal treatment, referred to by the Bundesgerichtshof, is to be taken into account.

84. First, statistical data on the average extent to which photocopiers or AIO devices are used to reproduce protected material can no doubt be obtained, and it is only on the basis of such data that any levy (or at least any levy of the kind contemplated in *Padawan*) on those devices, destined to provide fair compensation for authors, can be calculated. However, it must be considered whether such data can be extrapolated to a chain of devices such as a scanner, a computer and a printer. Such a chain seems unlikely to be primarily intended for analogue to analogue copying, for which photocopiers or AIO devices are much better suited. If it is used at all for that purpose, the use seems likely to be confined to the specific scope of Article 5(2)(b) of the Directive rather than that of Article 5(2)(a), since persons other than natural persons, or those making copies for purposes which are not private and non-commercial, seem more likely to opt for less cumbersome methods of analogue to analogue copying – in other words, for photocopying or perhaps even some type of offset printing. In terms of actual (understood as statistical average) use for such copying, therefore, it seems difficult to equate a chain of three devices each performing a part of the process with a single device carrying out the whole process.

85. Second, if a scanner, personal computer and printer can be used together to make analogue to analogue copies, the input device need not necessarily be a scanner. Digital cameras, including those on other devices, can also be used for the purpose. If a levy is to be charged on scanners (whether proportionately to their share of function within the chain or otherwise), should it not be charged also on equivalent input devices?

86. Third, the chain of three devices to which the Bundesgerichtshof refers can also be seen (and may be more likely to be used) as two pairs of devices – scanner and computer, computer and printer – each making copies which are not analogue to analogue and therefore, in accordance with my proposed answer to question 2, not falling within Article 5(2)(a) of the Directive. To the extent that such use falls within other exceptions in Article 5(2) or (3), it seems clear that a levy to provide fair compensation may be justified – but that is different from a levy to provide fair compensation for analogue to analogue copying (reproduction by photocopying or a process having similar effects, in the terms of the UrhG).

87. Fourth, in relation to the specific application of the levy as detailed in Annex II to the UrhG, it is difficult to see how the criteria of number of copies per minute and availability of colour can be easily applied to a chain of devices, whether the levy is spread over the chain or is applied to a single device unless, in the latter case, that device is the printer.

88. A number of difficulties thus arise with regard to the question to be resolved in the main proceedings. They stem largely from the overlapping nature of the exceptions in Article 5(2) and (3) of the Directive, together with the way in which the German levy in issue sits awkwardly astride a number of those exceptions. Yet they also highlight a certain tension within the Court's approach in *Padawan*, which may not have been immediately apparent in the context of that case.

89. In that judgment, the Court essentially took the view that there was (i) a necessary link between the act of copying and liability to finance fair compensation for rightholders, (ii) a presumption that devices which can be used for copying are so used and (iii) a prohibition on applying a levy to devices which clearly fall outside the scope of the particular exception authorised by the Directive. (51)

90. That view was, I would suggest, easier to reach and to maintain in the context of *Padawan* than in that of the present proceedings. In particular, *Padawan* concerned only the private copying exception under Article 5(2)(b) of the Directive and only items intended principally for copying which could fall within that exception. Underlying the dispute in the national proceedings and the Court's reasoning in response to the questions posed was the assumption (no doubt justified in the circumstances) of a clear distinction between private copying, which falls within the definition in Article 5(2)(b), and professional copying, which does not. The present cases, however, concern a levy designed to finance fair compensation over a range of loosely overlapping exceptions, many of which may fall outwith the definition in Article 5(2)(b) but all of which must

fall within the definition in Article 5(2)(a). Moreover, it is sought to apply that levy to devices whose intended and actual uses commonly extend beyond the range concerned by the exceptions in question, and which are often used in different configurations which fall exclusively outside the common area of overlap, without there being any clear way of identifying, when a device is purchased, the uses to which it will be put.

91. If the approach taken in *Padawan* is to be maintained as a whole, it seems to me that it may need to be confined to national exceptions which fall exclusively within the definition in Article 5(2)(b) of the Directive, and to levies on devices or media which can be differentiated according to their use for private or non-private copying. With regard to the levy in issue here, I feel that a more nuanced approach may be desirable, perhaps allowing more latitude to the Member States.

92. I would tend to agree with the Commission and Kyocera that, while fair compensation within the meaning of the Directive is undoubtedly intended to offset the harm caused by copying over which, as a result of an exception or limitation to the reproduction right, rightholders are deprived of any control, there is nothing in the Directive which requires that compensation to be financed always by those who carry out the copying in question. Nor, of course, is such financing excluded in any way, but whether it is the most appropriate approach may depend on the circumstances of each exception or limitation. And, where it is appropriate, whether a levy on copying devices or media is the most appropriate means of achieving it may also depend on the circumstances. For example, a levy on blank DVDs may be appropriate to provide fair compensation for private copying of films, whereas a levy on blank paper might be less appropriate than a levy on photocopiers in the context of a photocopying exception. In the case of other exceptions – for example, quotations for purposes such as criticism or review, or use for the purpose of caricature, parody or pastiche – there may well be no element on which a levy could usefully be imposed.

93. In the light of the type of difficulties which I have outlined above, it seems to me that it will be for the national court to examine the levy set up by the UrhG in greater detail than it is possible for this Court to do. It should look at the way in which the levy is calculated with regard to photocopiers and examine how far that calculation can be carried across to a chain of devices which can together make comparable copies but in which no single device can do so independently and each device is commonly used for other purposes. It should consider whether the application of the levy to such a chain of devices, or to individual devices within the chain, provides a fair balance of rights and interests between rightholders and users. With regard to the principle of equal treatment, which is the Bundesgerichtshof's principal concern, it should in my view consider in particular the aspect of equal treatment of the purchasers of devices (including other devices with comparable functions) and not merely that of importers or distributors, since the burden of the levy will be borne ultimately by those purchasers.

Question 4: technological measures to combat unauthorised copying

94. In relation to private copying, Article 5(2)(b) of the Directive requires that rightholders receive fair compensation which takes account of the application or non-application of technological measures (52) to the protected material concerned. Technological measures are those designed to prevent or restrict acts not authorised by the rightholder, and are deemed effective where the use of material is controlled by an access control or protection process (such as encryption or scrambling) or a copy control mechanism. Does the possibility of applying such measures – as opposed to their actual application – suffice to render the condition relating to fair compensation in Article 5(2)(b) inapplicable?

95. In the context of the national provisions in issue in the main proceedings, this question is relevant to the calculation of the levy (on the basis of the determination of those entitled to receive fair compensation). (53)

96. However, I would stress again that those provisions relate to a levy applied in respect of acts of reproduction which fall both within and outwith the scope of the private-copying exception in Article 5(2)(b) of the Directive, which alone requires the application or non-application of technological measures to be taken into account. Moreover, the acts in question are, if my suggested response to question 2 is correct, confined to analogue to analogue copying. It is true that certain measures can be taken to render such copying difficult, (54) but they are largely employed to combat falsification of official documents or to secure business secrets rather than to protect copyright material. The technological measures with which the Directive is concerned are more particularly those which prevent or restrict reproduction from digital sources. As one example, a document may be made available for viewing on a computer in a form which prevents any storing or printing without a password; users may be provided with the password after registering with the rightholder, agreeing to certain conditions and paying a fee.

97. I consequently doubt whether the answer to question 4 is relevant to the levy in issue in the main proceedings. (I do not, however, agree with Fujitsu's submission that it is irrelevant on the ground that Article 5(2)(b) concerns reproductions not on 'any medium' but only on 'audio, visual or audiovisual analogue/digital recording media', which was the original wording of the Commission's proposal, amended by the Council only 'in order to simplify the wording'. (55) The Directive uses the words 'any medium' and cannot be interpreted contrary to their clear meaning. In any event, paper is in fact a 'visual analogue recording medium', even if few would normally describe it thus.) None the less, despite my doubts, I shall address the question as posed.

98. With the exception of Fujitsu's submission as to the irrelevancy of the question, the proposed answers form three main groups. Hewlett Packard, Kyocera, Lithuania, the Netherlands and the United Kingdom all consider that the mere possibility of resorting to 'technological measures' to protect a work is sufficient to rule out any requirement to provide fair compensation in respect of reproductions of the work; Ireland is broadly of the same view but advocates a case-by-case approach. By contrast, VG Wort, Germany,

Poland and the Commission consider that only actual use of such measures should have that effect. Spain and Finland, on the other hand, consider that the Directive is not sufficiently explicit and that the issue is to be decided by the Member States. (All parties appear to agree, however, that when effective technological measures are actually implemented there is no entitlement to fair compensation.)

99. The submissions favouring the first view rely significantly on recitals 35 and 39 in the preamble to the Directive, which refer to the need to take account of, respectively, the 'degree of use of technological protection measures' and technological developments 'when effective technological protection measures are available'. It is also pointed out that rightholders, if they could claim compensation simply on the basis of not having chosen to put such measures in place, would not be encouraged to protect or otherwise exercise their intellectual property rights in accordance with the principal objective of the Directive but could merely rely on a general levy to obtain compensation possibly unrelated to actual demand for their material. Several parties refer to a draft Commission staff working document (56) which appears to support that view. They also stress the Court's statement in *Padawan* (57) that fair compensation must be regarded as intended to offset the harm suffered by the author and must be calculated on that basis; where a rightholder has made a digital copy of his work available and has not sought to protect it from copying by technological means, he cannot be said to have suffered harm if it is copied.

100. Those favouring the opposite view point in particular to the clear use of the words 'application or non-application' (58) in Article 5(2)(b) of the Directive, and to the reference to 'effective' technological measures in Article 6(3), both of which appear to exclude the taking into account of a mere possibility of application of technical measures.

101. I can appreciate the attraction of a policy under which a rightholder who allows public access to his work, but who does not implement the available means of controlling copying in accordance with his reproduction right, which is the primary right in the scheme of the Directive, should forfeit the entitlement to fair compensation, which is a secondary right, when private copying takes place. However, it is not the Court's role to decide for or against such a policy but to interpret the terms of the Directive as enacted.

102. The terms of Article 5(2)(b) of the Directive make no reference to any criterion of availability or non-availability of technological measures: the provision refers explicitly and exclusively to their application or non-application (or to whether they are applied or not). And, if taking account of the application of such measures to copyright material has a particular effect as regards the rightholder's entitlement to fair compensation, then taking account of their non-application (for whatever reason) cannot have the same effect if the final clause in Article 5(2)(b) is to make sense at all.

103. There are, it is true, certain indications in the preamble which could support a different view. However, I cannot read the expression 'degree of use' in recital 35 as implying any consequences whatever when measures are available but not used. Recital 39 does speak of availability. It states: 'When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available.' However, that is still far, it seems to me, from an assertion that fair compensation must be excluded when measures are available but not used. Nor can I find any indication elsewhere in the Directive or in the *travaux préparatoires* that such a result was intended. Finally, I do not think any reliance can be placed on a staff working document which seems never to have progressed beyond the draft stage and which clearly does not represent the views of the Commission as presented to the Court.

104. Nor, however, am I convinced that the Directive requires fair compensation to be provided for in all Member States where rightholders have failed to prevent or restrict unauthorised copying by means available to them. The words 'fair compensation which takes account of the … non-application of technological measures' could also encompass the possibility that non-application of available measures does not necessarily lead to fair compensation. The wording of recital 39 in the preamble is equally, or even more, capable of including such a possibility. In addition, I note that the latter does not (as recital 35, for example, does) make a general statement about the content of the Directive but, rather, states that 'Member States should take due account …'. Such wording is typical of those recitals in the preamble which refer to a degree of discretion available to the Member States. (59) Since the question here is, essentially, one of policy, and of a matter of policy that is not clearly laid down in the Directive, I consider that the correct interpretation is that Article 5(2)(b) allows Member States to choose whether and to what extent fair compensation should be provided for where technological measures are available to rightholders but not applied by them.

Question 5: fair compensation in the event of authorisation for copying

105. Where a Member State has implemented an exception or limitation to the reproduction right, with entitlement (whether compulsory or optional) to fair compensation, does that entitlement apply where rightholders have expressly or implicitly authorised reproduction of their works?

106. Again, this question is relevant to the calculation of the levy by reference to the identification of those entitled to receive fair compensation. It also raises an issue of principle concerning the relationship between, on the one hand, the basic right to authorise or prohibit reproduction, with its concomitant right to negotiate remuneration for copying or seek reparation for infringement, and, on the other hand, the exceptions which may be provided for in national law, with their concomitant entitlement to fair compensation.

107. The Bundesgerichtshof points out that the judgment in *Padawan* (60) stresses the link between compensation and the harm caused to rightholders by copying their works, but that no harm can be caused to a rightholder by copying his work with his authorisation. However, it inclines to the view that an exception or limitation to the reproduction right pursuant to Article 5(2) or (3) of the Directive deprives the rightholder of his right to authorise or prohibit reproduction pursuant to Article 2, so that any authorisation would be without effect in the scheme of the Directive.

108. Essentially, VG Wort, Germany and Poland agree with the Bundesgerichtshof's provisional view; the Commission takes a similar but somewhat nuanced approach; whereas the suppliers and all the remaining Member States submitting observations consider, essentially, that any rightholder who, in the exercise of his right guaranteed by Article 2 of the Directive, authorises copying of his work (whether explicitly or implicitly, and whether for consideration or not) forfeits any entitlement to fair compensation which might otherwise have been due by virtue of an exception or limitation of his right enacted in conformity with Article 5(2) or (3).

109. The issue of principle can be stated simply. If a rightholder purports to exercise his right to authorise or prohibit reproduction in circumstances covered by a national-law exception to that right, which of the two takes precedence: the reproduction right or the exception?

110. The answer too seems rather simple, at least in principle. When a person enjoys a right conferred by law, but that right is subject to exceptions or limitations also laid down by law, the right cannot be exercised where and to the extent that the exceptions or limitations apply. Any purported exercise of the right will have no legal effects beyond those provided for in whatever rules govern those exceptions or limitations. That is precisely the situation as between the reproduction right which Member States must provide for under Article 2 of the Directive and the exceptions or limitations which they may provide for under Article 5(2) and (3), to the extent that they do provide for the latter.

111. For example, if a Member State lays down a simple exception to the reproduction right, with no provision for fair compensation, where photocopies are made in schools and used for teaching purposes (as it is entitled to do under Article 5(2)(c) of the Directive), then rightholders have no say in the matter. They cannot prohibit photocopying, and any authorisation which they may purport to grant is both superfluous and without legal effect. That situation cannot change if, instead, the Member State chooses to enact the same exception but with an entitlement to fair compensation. The only difference is that rightholders will be entitled to that compensation under whatever terms are provided for in national law. Nor can the situation differ in cases (such as those in Article 5(2)(a) and (b)) where the Member State has no choice but to provide for fair compensation.

112. Put yet another way, if a Member State provides, in accordance with Article 5(2) or (3) of the Directive, for an exception to the reproduction right provided for pursuant to Article 2, rightholders cannot, in principle, simply reassert that right and override the exception.

113. That must, in my view, be the basic position and at least the starting point for the answer to be given to question 5. It may none the less be appropriate to qualify that position in the light of one or more of the other arguments put forward.

114. First, Fujitsu and Hewlett Packard argue that the Bundesgerichtshof's interpretation interferes with the right to property guaranteed by Article 17 of the Charter of Fundamental Rights, (61) in that it prevents rightholders from granting free licences to copy their works. However, while it does indeed interfere with that right, such interference is in my view clearly permitted by the second sentence of Article 17(1) of the Charter, in so far as it is 'in the public interest and in the cases and under the conditions provided for by law' and fair compensation is paid.

115. Second, the suppliers and several of the Member States put forward arguments concerning certain statements in *Padawan*. At paragraph 39 of that judgment, the Court stated that the purpose of fair compensation is to compensate authors for use made of their protected works *without their authorisation*; at paragraph 40, it confirmed that that fair compensation is linked to the harm resulting for the author from the reproduction for private use of his protected work *without his authorisation*; and at paragraph 45, that a person who causes harm to the holder of the reproduction right is one who reproduces a protected work *without seeking prior authorisation from the rightholder*. Consequently, it is argued, fair compensation cannot be due where authorisation has been sought and granted, whether gratuitously or for consideration. In no such case, therefore, can harm be incurred or should the rightholder be entitled to any (further) compensation, which could not, in any event, be 'fair'.

116. I am not convinced that the passages quoted should necessarily be read in quite the way suggested. In point 2 of the operative part of the judgment, the Court ruled that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works *by the introduction of the private copying exception*. It is in that light that I read the earlier references to an absence of authorisation. Authorisation cannot be given because the right to grant or refuse it has been withdrawn from the rightholder and it is in respect of that withdrawal that fair compensation is due.

117. Third, however, and more importantly, attention is drawn to several passages in the preamble to the Directive. Recital 30 states: 'The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.' Speaking of exceptions or limitations, recital 35 contains the sentence: 'In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due.' According to recital 44,

'exceptions and limitations may not be applied in a way which … conflicts with the normal exploitation of his work or other subject-matter.' Recital 45 states: 'The exceptions and limitations referred to in Article 5(2), (3) and (4) should not … prevent the definition of contractual relations designed to ensure fair compensation for the rightholders in so far as permitted by national law.' With regard to the use of technological measures designed to prevent or restrict copying, recital 51 states: 'Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive.' And recital 52 adds: 'When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation.'

118. Moreover, Article 5(5) of the Directive specifies that the exceptions or limitations provided for in, in particular, Article 5(2) and (3) are to be applied only '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'. (62) And Article 6(4), in relation to technological measures designed to prevent or restrict copying and in the context of exceptions or limitations provided for in accordance with Article 5(2)(a), (c), (d) or (e), or (3)(a), (b) or (e), mentions 'voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned'.

119. In the light of those recitals and provisions, it seems necessary to qualify the basic position to some extent. While I do not consider that recital 30 was meant to refer to exceptions and limitations provided for pursuant to the Directive, the legislature clearly intended there to be some possibility for contractual arrangements to coexist with such exceptions or limitations. However, the limits of that coexistence are not clearly defined, or even broadly indicated. Some discretion must therefore, in my view, be available to the Member States.

120. There must none the less be limits to that discretion, and it seems to me that the Commission's approach is correct, having regard in particular to the basic principle which I have identified as a starting point for the assessment. That approach is, essentially, as follows. Any exceptions or limitations enacted must remain just that. Where they apply and within the limits of their application, rightholders are no longer legally in a position to authorise or prohibit copying by others, or to seek reparation for unauthorised copying. Where no fair compensation is required or provided for, there is nothing further to be said. But where fair compensation is provided for (either because it is required by the Directive or because the Member State has opted to provide for it), it is open to Member States to provide that rightholders may either renounce any claim to fair compensation or make their works available for copying subject to contractual arrangements (such as an appropriate increase in the basic price) which enable them to receive fair compensation for future copying from those who acquire their works.

121. Clearly, rightholders who opt for either of those courses of action can lay no claim to any payment from funds such as those constituted by the levy in issue in the main proceedings, and the levy must be calculated in such a way as to provide fair compensation only to rightholders who have not opted for them. It must also be the case that whatever contractual arrangements are agreed between rightholders and those acquiring their works must neither restrict the rights which the latter derive from any applicable exception or limitation nor involve payments which exceed 'fair compensation' within the meaning of the Directive.

Question 1: relevance of the Directive ratione temporis

122. It remains to be considered to what extent the interpretation of the Directive falls to be taken into account over the period relevant to the disputes in the main proceedings.

123. According to the case-files, those proceedings concern devices marketed between 1 January 2001 and 31 December 2007.

124. The Directive was not published, and did not enter into force, until 22 June 2001. It is consequently of no relevance to the interpretation of national law with respect to events before that date.

125. Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 22 December 2002. It appears, however, that Germany completed that process only on 13 September 2003. (63)

126. None the less, when it applies domestic law, a national court is bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. (64) But that obligation applies only once the period for the transposition of the directive has expired. (65) Until then, and from the date of entry into force, the only requirement is that national courts must refrain as far as possible from any interpretation which might seriously compromise, after the period for transposition has expired, the attainment of the objective pursued by the directive. (66) Furthermore, not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within the scope of that directive. (67)

127. Consequently, any relevant provision of national law must be interpreted in conformity with the Directive in respect of all periods subsequent to 22 December 2002. In respect of the period from 22 June 2001 to 22 December 2002, it does not have to be interpreted in that way, provided that its interpretation does not seriously compromise the subsequent attainment of the objective pursued – although there is no general principle or provision of EU law which precludes a national court from interpreting its

domestic law in conformity with a directive before the period for its transposition has expired.

128. That means *inter alia* that, where a Member State has provided for an exception or limitation to the reproduction right in accordance with Article 5(2)(a) and/or (b) of the Directive, it is required to ensure that rightholders receive fair compensation in respect of relevant events after 22 December 2002 but, in principle, not necessarily before.

129. However, under Article 10(2), the Directive applies without prejudice to any acts concluded and rights acquired before that date. That is a specific rule which does appear to preclude interpreting national law in conformity with the Directive if such interpretation would affect 'acts concluded' before 22 December 2002.

130. It is not immediately obvious what 'acts concluded' means when fair compensation is achieved by a levy on sales of devices designed to make reproductions rather than on the making of the reproductions themselves. The vast majority of devices marketed between 22 June 2001 and 22 December 2002 will have been capable of, and used for, making reproductions after the latter date. (68)

131. At the hearing, the Commission referred the Court to the legislative history of the Directive.

132. In both the original and the amended proposals (neither the Economic and Social Committee nor the Parliament having commented on the provisions in question), Article 9(2) to (4) read:

'2. This Directive shall apply without prejudice to any acts of exploitation performed before the [deadline for transposing the Directive].

3. This Directive shall not affect any contracts concluded or rights acquired before the date of its entry into force.

4. Notwithstanding paragraph 3, contracts concerning the exploitation of works and other subject-matter which are in force on the [deadline for transposition] shall be subject to this Directive as from five years after its entry into force if they have not expired before that date.'

133. It was stated in the explanatory memorandum to the original proposal that:

'2. Paragraph 2 reflects a general principle, ensuring that the Directive has no retroactive effect and does not apply to acts of exploitation of protected works and other subject-matter which occurred before the date on which the Directive has to be implemented ...

3. Paragraphs 3 and 4 [set] out another general principle according to which contracts which have been concluded and rights which have been acquired before the adoption of the Directive could have been known by parties, are not affected by the latter, thereby excluding certain "old contracts" from the scope of application of the Directive. ...'

134. The formulation finally adopted reflected the Council's common position of 28 September 2000, in which it stated: 'In Article 10, the Council preferred to merge part of paragraph 3 of Article 9 of the Commission's amended proposal with paragraph 2 and to delete the rest of paragraph 3, as well as the whole of paragraph 4, as it was felt that issues relating to the interpretation of contracts should rather be left to national law.' (69)

135. It thus seems clear that the intention of the legislature in Article 10(2) was that the Directive should not affect acts of exploitation, that is to say, in the present context, of reproduction, carried out before 22 December 2002.

136. It is moreover necessary to have regard to the fact that Germany ensures such compensation by means of a levy on the marketing of devices which are capable of being used for reproduction for several years, to the fact that it operated such a system even before the Directive entered into force and to the Court's case-law precluding interpretation during the period for transposition which might seriously compromise, after the period for transposition has expired, the attainment of the objective pursued. It therefore seems to me that the most logical interpretation is that the Directive must be taken into account, as from the date of its entry into force on 22 June 2001, when interpreting national legislation providing for fair compensation, in such a way as to ensure that the aim of providing such compensation in respect of acts of reproduction which take place on or after 22 December 2002 is not seriously compromised by the way in which any levy designed to provide fair compensation is charged on sales of devices prior to the latter date; the Directive does not, however, concern acts of reproduction which took place before 22 December 2002.

Conclusion

137. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the Bundesgerichtshof's questions to the following effect:

– In Article 5(2)(a) 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, the words 'reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects' are to be interpreted as referring only to reproductions of analogue originals, of which an image is captured by optical means. They encompass reproduction by processes which involve, as an intermediate stage, the

storage of a digital image on a computer or memory device, provided that the process as a whole is carried out by a single person and/or as a single operation.

– Where, pursuant to Article 5(2) or (3) of Directive 2001/29, a Member State has provided for an exception or limitation to the reproduction right provided for in Article 2 of the same directive, and where fair compensation for analogue copying under that exception or limitation is provided for by means of a levy on devices capable of making such copies, a national court wishing to ascertain whether that levy is compatible with the principle of equal treatment in cases where the copies are made using a chain of devices linked together should examine how the levy is calculated with regard to photocopiers and how far that calculation can be transposed to such a chain of devices. It should consider whether the application of the levy to such a chain of devices, or to individual devices within the chain, provides a fair balance of rights and interests between rightholders and users. It should verify in particular that there is no unjustified discrimination not only between importers or distributors of devices (including other devices with comparable functions) but also between purchasers of different types of device, who bear the ultimate burden of the levy.

– Article 5(2)(b) of Directive 2001/29 allows Member States to choose whether and to what extent fair compensation should be provided for where technological measures are available to rightholders but not applied by them.

– Where, pursuant to Article 5(2) or (3) of Directive 2001/29, a Member State has provided for an exception or limitation to the reproduction right provided for in Article 2 of the same directive, it is no longer possible for rightholders concerned to exercise any control over copying of their works by granting or refusing authorisation. When providing for fair compensation in such circumstances, Member States may none the less allow rightholders either to renounce any claim to fair compensation or to make their works available subject to contractual arrangements which enable them to receive fair compensation for future copying. In either of the latter cases, the rightholder's entitlement to fair compensation should be considered to be exhausted, and should not be taken into account when calculating the financing of any general scheme of fair compensation.

– Directive 2001/29 must be taken into account, as from the date of its entry into force on 22 June 2001, when interpreting national legislation providing for fair compensation, in such a way as to ensure that the aim of providing such compensation in respect of acts of reproduction which take place on or after 22 December 2002 is not seriously compromised by the way in which any levy designed to provide fair compensation is charged on sales of devices prior to the latter date. The Directive does not, however, concern acts of reproduction which took place before 22 December 2002.

---

1 – Original language: English.

2 – 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) ('the Directive').

3 – In this Opinion, I shall use the terms 'copy(ing)' and 'reproduction' as essentially interchangeable.

4 – Article 5(2) concerns exceptions and limitations only to the reproduction right under Article 2. Article 5(3) concerns also exceptions and limitations to the right of communication or making available under Article 3, which is not specifically in issue in the main proceedings. With the exception of Article 5(2)(a), all the limitations or exceptions permissible under Article 5(2) or (3) (there are 20 in all) are defined according to the purpose for which the reproduction is made; in several cases, the identity of the person making it is a criterion (for example, natural persons, public libraries, educational establishments or museums, broadcasting organisations or the press); in only two cases apart from Article 5(2)(a) is reference made to any technical criteria (ephemeral recordings in Article 5(2)(d) and communication by dedicated terminals in Article 5(3)(n)).

5 – Article 5(2)(e) concerns 'reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons'.

6 – Article 5(1), which is not in issue here, *requires* exemption from the reproduction right in respect of certain temporary reproductions which are an integral and essential part of a technological process and which have no independent economic significance. However, no compensation is envisaged in such cases.

7 – Berne Convention for the Protection of Literary and Artistic Works (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), at Brussels (1948), at Stockholm (1967) and at Paris (1971), and amended in 1979 (Berne Union). All the Member States are parties to the Berne Convention.

8 – Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

9 – WIPO Copyright Treaty (WCT), Geneva (1996) (OJ 2000 L 89, p. 8). It entered into force with respect to both the EU and all its Member States, all being parties to the WCT, on 14 March 2010 (OJ 2010 L 32, p. 1).

10 – United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15 June 2000, point 6.97 et seq.

11 – Case C-467/08 [2010] ECR I-10055 (‘*Padawan*’), especially at paragraphs 38 to 50; see also Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-0000, paragraphs 18 to 29.

12 – CD-Rs, CD-RWs, DVD-Rs and MP3 players. Although such media may be used to store digital copies of text or graphic documents, they are more commonly used to make reproductions of audio or audiovisual material such as music or films.

13 – See the Opinion of Advocate General Trstenjak, point 32. That position is maintained by the Commission, and a similar view is advocated by Kyocera, in the present proceedings (see point 92 below). In *Stichting de Thuiskopie* (cited in footnote 11), however, the Court did stress the obligation to achieve a certain result (see paragraphs 34 and 39 of that judgment).

14 – Paragraphs 40 and 45 of the judgment; see also paragraphs 24 and 26 of *Stichting de Thuiskopie*, cited in footnote 11.

15 – Paragraph 52 of the judgment.

16 – Paragraphs 46, 55 and 56 of the judgment.

17 – Paragraph 59 of the judgment.

18 – Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) of 9 September 1965, in the version applicable prior to 1 January 2008 ('the UrhG'). According to the German Government, the UrhG was brought fully into line with the Directive, with effect from 13 September 2003, by the Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft (Law regulating copyright in the information society). In so far as is relevant to the provisions cited by the Bundesgerichtshof, that law appears to have amended Paragraph 53(1) to (3) of the UrhG.

19 – See point 48 et seq. below.

20 – The term 'angemessene Vergütung' is used in recital 10 in the preamble to the Directive, where it is rendered in English as 'appropriate reward' and in French as 'rémunération appropriée'. Recital 10 seems to refer to normal copyright exploitation, rather than to the exceptions in Article 5(2) and (3). The German for 'fair compensation' ('compensation équitable') in the Directive is 'gerechte Ausgleich'. To complicate matters further, 'angemessene Vergütung' is used in the German version of Articles 11bis(2) and 13(1) of the Berne Convention (cited in footnote 7 above) for what is rendered in English and French respectively as 'equitable remuneration' and 'rémunération équitable'; it is also used as equivalent to those terms in certain other EU directives in the field of intellectual property.

21 – KYOCERA Document Solutions Deutschland GmbH, Epson Deutschland GmbH and Xerox GmbH (Case C-457/11) and Canon Deutschland GmbH (Case C-458/11)

(together, 'Kyocera'); Fujitsu Technology Solutions GmbH ('Fujitsu') (Case C-459/11); and Hewlett Packard GmbH ('Hewlett Packard') (Case C-460/11).

---

22 – A plotter is a type of printer; see further point 54 below.

---

23 – The five questions referred in Cases C-457/11 and C-458/11 are identical and concern printers in questions 2 and 3; the same questions are referred in Case C-459/11, except that questions 2 and 3 concern personal computers rather than printers; in Case C-460/11, only the first three questions are referred, with reference to printers.

---

24 – 'angemessene Vergütung' – see footnote 20 above.

---

25 – See, for example, *Padawan* and *Stichting de Thuiskopie*, cited in footnote 11 above.

---

26 – See also *Padawan*, paragraphs 35 and 36.

---

27 – See, for example, recitals 5 to 7, 39, 44 and 47 in the preamble.

---

28 – See, for example, recitals 4 and 21 in the preamble.

---

29 – See, for example, Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 97.

---

30 – Of 22 December 1998 (OJ 1999 C 73, p. 1).

---

31 – See also, for example, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 92, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 76.

---

32 – See footnote 20 above.

---

33 – In that regard, reference may be made to Article 17 of the Charter of Fundamental Rights of the European Union, which protects the right, inter alia, to use and dispose of lawfully acquired property, including intellectual property, and states that no one may be deprived of it, '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 [its] loss'; see also Article 1 of the First Protocol to the European Convention on Human Rights.

---

34 – Recital 32 in the preamble states that the list is exhaustive and 'takes due account of the different legal traditions in Member States'; in other words, it seems to be in effect a compilation of pre-existing exceptions and limitations under various national laws, a feature which may explain the areas of overlap (the Commission's original proposal for the Directive contained only eight possible exceptions or limitations; the list became longer and more detailed during the legislative process).

---

35 – See points 15 to 21 above.

---

36 – See footnote 20 above.

---

37 – See *International Survey on Private Copying Law & Practice*, Stichting de Thuiskopie, 2012, p. 9.

---

38 – Case C-521/11 *Amazon.com International Sales and Others*. It appears that in Austria 50% of amounts collected are earmarked for social or cultural purposes by law.

---

39 – See points 13 and 14 above. In that judgment, I note, recitals in the preamble are referred to, perhaps inadvertently, as 'provisions' of the Directive.

---

40 – The description which follows is not intended to be authoritative or complete but rather to sketch an outline which covers for the most part the types of situation relevant to the consideration of the questions referred.

---

41 – In the above summary, I have written in visual terms with regard to analogue images, but comparable techniques apply in the case of reproductions for the visually impaired. Braille embossers produce text from digital data on much the same lines as printers, and use paper as an output medium. Other devices can produce embossed versions of images which would be perceived visually by the sighted. I do not consider that such reproductions fall outwith the reproduction right or, thus, outwith Article 5(2) or (3) of the Directive. They should be presumed to be included in my analysis even though, for the sake of simplicity of language alone, I shall continue to refer to analogue input and output primarily in visual terms.

---

42 – In the explanatory memorandum to its original proposal for the Directive, the Commission stated: 'This provision is limited to reprography, i.e. to techniques which allow a facsimile, or in other words a paper print. It does not focus on the technique used but rather on the result obtained, which has to be in paper form.' Although that statement concentrates on output rather than input, it seems to me that the term 'facsimile' necessarily implies an equivalence of form between input and output.

---

43 – See point 9 above.

---

44 – Green paper on copyright and related rights in the information society (COM(95) 382 final), Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society (COM(97) 628 final) (see also footnote 42 above), Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society (COM(99) 250 final).

---

45 – See also Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 64.

---

46 – See points 41 and 42 above.

---

47 – Paragraphs 38 to 50; see also *Stichting de Thuiskopie*, cited in footnote 11, paragraphs 18 to 29.

---

48 – *Padawan*, paragraphs 51 to 59.

---

49 – See, for example, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 68.

---

50 – See recital 31 in the preamble to the Directive.

---

51 – See points 13 and 14 above.

---

52 – It is noted in several of the observations that the German version of Article 5(2)(b) differs: it requires account to be taken of *whether* such measures *have been applied* ('ob technische Maßnahmen … angewendet wurden'). The Spanish version is similar ('si se aplican o no') but other versions are closer to the more neutral formulation in English or French.

---

53 – Recital 35 in the preamble to the Directive states: 'The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive.'

---

54 – The existence of such measures (which include the use of holograms, watermarks and special inks) may explain the reference to Article 5(2)(a) in the first

subparagraph of Article 6(4) of the Directive, in relation to the protection to be provided against the circumvention of effective technological measures.

---

55 – See Council Common Position (EC) No 48/2000 (OJ 2000 C 344, p. 1, point 24 of the Statement of the Council's reasons).

---

56 – *Fair compensation for private copying in a converging environment*, December 2006, produced by Fujitsu, pp. 60 and 61.

---

57 – Cited in footnote 11, paragraphs 40 and 42. (The English version of the judgment refers in paragraph 40 to 'recompense' for the harm suffered, but that does not seem to me to reflect the French 'contrepartie' or the Spanish 'contrapartida'.)

---

58 – See also footnote 52 above; the German version appears to support this view even more strongly.

---

59 – See point 35 above.

---

60 – Paragraphs 39, 40 and 45.

---

61 – See footnote 33 above.

---

62 – See point 9 above.

---

63 – See footnote 18 above.

---

64 – See, for a recent example, Case C-97/11 *Amia* [2012] ECR I-0000, paragraph 28.

---

65 – See Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 113 to 115.

---

66 – See *Adeneler and Others*, cited in footnote 65, paragraph 123, and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 39.

---

67 – See *VTB-VAB and Galatea*, cited in footnote 66, paragraph 35.

---

68 – Several observations state that printers and personal computers have a typical life-cycle of three to four years. The same type of consideration (though not necessarily the same typical life-cycle) would apply to levies on blank recording media to provide fair compensation for reproduction of audio or audiovisual material, when the levy is collected on the sale of the recording medium before the reproduction takes place.

---

69 – Point 51 of the statement of reasons.