



**IN THE NAME OF THE PEOPLE**

**In the proceedings  
on  
the constitutional complaint**

of the collecting society (Verwertungsgesellschaft) W...,  
represented by the members of the board of management...,

- authorised representatives: Rechtsanwälte Redeker, Sellner, Dahs,  
Leipziger Platz 3, 10117 Berlin -

against a) the order of the Federal Court of Justice of 3 April 2008 - I ZR 94/05 -,

b) the judgment of the Federal Court of Justice of 6 December 2007 - I ZR  
94/05 -

the Second Chamber of the First Senate of the Federal Constitutional Court, sitting  
with with the participation of

Justices Hohmann-Dennhardt,  
Gaier, and  
Paulus

on 30 August 2010 unanimously held as follows:

1. The judgment of the Federal Court of Justice (Bundesgerichtshof) of 6 December 2007 - I ZR 94/05 - violates the complainant's right, equivalent to a fundamental right, under Article 101.1 sentence 2 of the Basic Law (Grundgesetz - GG). The judgment is reversed. The matter is referred back to the Federal Court of Justice. Thus, the order of the Federal Court of Justice of 3 April 2008 - I ZR 94/05 - no longer applies.
2. The Federal Republic of Germany must reimburse the complainant's necessary expenses.

**Grounds:**

**A.**

In essence, the constitutional complaint relates to the question as to whether the Federal Court of Justice, in rejecting a payment obligation (reprographic levy) for

printers and plotters on the basis of § 54a of the Copyright Act (*Urheberrechtsgesetz* - UrhG) in the version applicable until 31 December 2007 on the basis of the Act for the Reform of the Patent Fee Act and Other Acts (*Gesetz zur Änderung des Patentgebührengesetzes und anderer Gesetze*) of 25 July 1994, Federal Law Gazette (*Bundesgesetzblatt* - BGBl) I p. 1739 (hereinafter UrhG old), violates constitutional rights of copyright holders or of the complainant as a copyright collecting society.

## I.

Under the copyright limitation provision of § 53 UrhG, reproductions of a work for private and other personal use are permissible within certain limits. In return - under the law applicable in the contested case -, manufacturers and importers of devices which are intended to make reproductions must pay equitable remuneration to the authors for the possibility created by the sale or other marketing of the devices to make such reproductions if it is to be expected from the nature of a work that under § 53.1 to § 53.3 UrhG it will be reproduced by photocopying or in a procedure with comparable effect, § 54a.1 UrhG old. This claim may only be asserted by a collecting society, § 54h UrhG old. Under § 54d.1 UrhG old, equitable remuneration means the rates laid down in the annex to this provision, unless otherwise agreed. The Federal Constitutional Court has held that this form of reprographic levy is constitutional (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE) 31, 255 <265 ff.>; 79, 1 <26-27>; Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG), Order of the First Chamber of the First Senate of 19 September 1996 - 1 BvR 1767/92 -, *Gewerblicher Rechtsschutz und Urheberrecht* - GRUR 1997, p. 123). For according to the Court, the appropriation of another person's work as author is "directly occasioned" by the device manufacturers (see BVerfGE 79, 1 <26>).

2

In earlier decisions, the Federal Court of Justice held that the reprographic levy applied *inter alia* to reader printers, that is, devices with which microfilmed material can be read and copied (see Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ) 121, 215). For the intended purpose within the meaning of § 54a.1 sentence 1 UrhG old, the Court held that it was sufficient if the devices, in accordance with their purpose, were, at any rate, sometimes used to copy protected material. Here and in a further decision on fax machines (see BGHZ 140, 326 <329 ff.>), the Federal Court of Justice emphasised that the review of the payment obligation under § 54a UrhG old did not depend on the extent of use with copyright implications, but on the possibility created by the sale of the devices to make such reproductions. However, in the case of fax machines with a manual or automatic document feeder, the Federal Court of Justice assumed that there was a low degree of use with copyright implications, and therefore the remuneration owed was not the amount of the statutory remuneration rates in the annex to § 54d UrhG old, but a lower "equitable remuneration"; another reason for this was the low prices at which such devices were usually sold (see BGHZ 140, 326 <333-334>). Finally, in another legal dispute, the Federal Court of Justice had to de-

3

cide how the payment obligation is to be established in the case of a functional entity incorporating several devices, i.e. PC, scanner, and printer. In this case, the copyright remuneration was to apply to the device that was most clearly intended to be used as a reprographic device, i.e., the scanner (see BGH, judgment of 5 July 2001 - I ZR 335/98 -, GRUR 2002, p. 246).

With effect from 1 January 2008, copyright law was fundamentally reformed by the Second Act to Govern Copyright Law in the Information Society (*Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*) of 26 October 2007 (BGBl I p. 2513), in particular with regard to the remuneration for permitted private copies under consideration here. Under the new version of § 54.1 UrhG, printers and plotters may be among the devices subject to remuneration (so argued, for example, by Dreier, in: Dreier/Schulze, UrhG, 3rd ed. 2008, § 54, marginal nos. 6-7). For a transitional period, the earlier rates under § 27.1 sentence 3 of the Copyright Administration Act of 9 September 1965 (BGBl I p. 1294) as amended by the Second Act to Govern Copyright Law in the Information Society of 26 October 2007 (*Urheberrechtswahrnehmungsgesetz - WahrnG new*) continued to apply until 1 January 2010, insofar as no specific tariffs had yet been introduced.

## II.

1. The complainant protects the copyright of the authors of written works affiliated with it. In the original proceedings, it also acted on behalf of the B-K... collecting society in a representative action. The defendant in the original proceedings imports and sells, *inter alia*, printers and plotters (hereinafter sometimes simplified as “printers”).

The parties disputed as to whether printers and plotters are among the reprographic devices subject to remuneration under § 54a.1 UrhG old. The complainant filed a claim against the defendant for information on the type and number of the printers and plotters sold or otherwise put on the market in Germany by the defendant since 1 April 2001, on the performance of these devices and on the defendant's suppliers in Germany. It also applied for a declaratory judgment that the defendant was obliged to compensate the complainant for every device in accordance with the rate set by the complainant together with the B-K... collecting society and published in the Federal Bulletin (*Bundesanzeiger*) no. 63 of 30 March 2001, p. 5667.

The arbitration board at the German Patent and Trademark Office (*Deutsches Patent- und Markenamt - DPMA*), in its proposal for a settlement, in essence affirmed a payment obligation of manufacturers and importers of printers and plotters, and suggested remuneration rates which were lower than the rates provided in the annex to § 54d UrhG old and also lower than the rates set by the collecting societies. The defendant did not accept this proposal.

The Regional Court (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*) allowed the complainant's claims for information in full; and issued a declaratory judgment regarding the justification of the claim for compensation.

2. In contrast, the Federal Court of Justice, in its judgment of 6 December 2007, reversed the appeal judgment and dismissed the action (published *inter alia* at BGHZ 174, 359). It stated that the complainant had no claim to compensation and therefore also no claim to information. For printers and plotters were not devices which, within the meaning of § 54a.1 sentence 1 UrhG old, were intended to make reproductions by photocopying or in a procedure with comparable effect. 9

a) Where a printer was used together with a scanner and a PC, it was capable of making copies in a procedure with an effect comparable to photocopying, but this was not its primary function. Within the functional entity consisting of scanner, PC and printer, only the scanner was intended to make copies and therefore subject to remuneration. If devices could only perform the function of a reprographic device in cooperation with other devices, then, in principle, not all the devices in question were subject to remuneration under § 54a.1 UrhG old. If the payment obligations were split up in this manner, this would contravene the statutory provision, because the Act provided for fixed rates of payment. The (old) statutory provision applicable in the contested case did not permit a proportional breaking down of the remuneration depending on the degree to which the devices, according to their type, were actually used to make reproductions. If the payment rate laid down by statute for a reprographic device were payable for all or several devices in such a functional entity, this would result in an inequitable remuneration contrary to § 54a.1 sentence 1 UrhG old, because the performance of the whole functional entity would be equivalent to the performance of only one reprographic device. The copyright remuneration was to apply to the device that was most clearly intended to be used, together with the other devices, as a reprographic device, i.e., the scanner. 10

b) If, in contrast, a printer was only used in combination with a PC, it was not suitable for making copies within the meaning of § 54a.1 sentence 1 UrhG old. 11

aa) The provision of § 54a.1 sentence 1 UrhG old applied directly only to copies which were made by photocopying or in a procedure with comparable effect. According to the legislative materials, photocopying meant photomechanical copying by means of the reprographic techniques of photocopying and xerocopying, which were subsumed under the single term reprography. If copies were made with a functional entity consisting of PC and printer, this was also not being done in a procedure with comparable effect. For the latter meant only procedures to reproduce printed works. A chain of devices consisting of PC and printer could not reproduce any (analogue) print works, but only digital originals. But the determining factor was the effect of the reproduction, which was similar to photocopying in that analogue copies (above all on paper) could be made from an analogue copy of a work (for example a book). The structure of the statute also indicated that § 54a.1 sentence 1 UrhG old applied only to copying print works. 12

It could be inferred from the materials of the legislative process that the legislature in 1985 intended § 54.2 UrhG - the earlier provision equivalent to § 54a UrhG old - to in- 13

introduce a payment obligation for devices which could be used to copy print works. If the classification of a procedure under copyright law that had not yet been known at the date when the statute was adopted was at issue, it was often impossible to make a determination on the basis of the terminology alone; instead, one should ask whether the procedure in question was functionally equivalent to what the legislature had regarded as in need of regulation. The functionality of a combination of devices consisting of PC and printer was not equivalent to that of a traditional copier, because such a functional unit could copy only digital originals, not analogue ones.

bb) Nor could § 54a.1 UrhG old be applied analogously (i.e., *mutatis mutandis*). For the nature of the interests involved in the copying of digital originals - possible only with a combination of PC and printer - was not comparable to the nature of the interests involved in the copying of print originals which the legislature regarded as requiring regulation.

14

The right to remuneration under § 54a.1 sentence 1 UrhG old required copies to have been made under § 53.1 to 3 UrhG. It was intended to give the author compensation for the income from individual licensing agreements lost by reason of the statutory licence. The claim to remuneration therefore did not exist where the copies did not require the statutory licence of § 53.1 to 3 UrhG because they were already permissible on the basis of the consent of the rightholder. Unlike in the case of print works, such consent often existed in the case of digital originals. Apart from this, a rightholder who made text or images freely accessible on the internet without restrictions must at least have expected that these contents would be downloaded or printed out; bearing this in mind, one might assume an implied consent to reproduction in certain circumstances. In addition, the author of digital works could implement technological protection measures (known as digital rights management systems) to at least render unauthorised copying of digital works more difficult, whereas for print works there were no corresponding protective measures against reproduction, e.g. by photocopying or scanning.

15

The probability that printouts of digital originals were made without the consent of the rightholder was therefore appreciably less than the probability that print works would be copied without the consent of the rightholder. In these circumstances, analogously applying § 54a.1 sentence 1 UrhG old to the copying of digital originals was not justified. Otherwise the manufacturers, importers and dealers, and ultimately the purchasers of printers, would have to bear the financial burden of copyright remuneration, although printers, in comparison to the copiers covered by the statutory provisions, were used only to a considerably lesser proportion for copies with copyright implications. In addition, in any case the statute imposed a payment obligation on copier manufacturers, importers and dealers only for reasons of practicability, although it was not they themselves, but at most the purchasers, who made copies with copyright implications with the devices. For this reason too, the courts were barred from extending the payment obligation affecting manufacturers, importers and dealers to devices not covered by the statutory provisions. The principle of participation, by

16

which the author should, if possible, have a reasonable share in the exploitation of his or her work (see § 11 sentence 2 UrhG), also did not justify burdening a third party, which itself was not a user of the copyrighted work, over and above the scope laid down in the statute.

3. In its order of 3 April 2008, the Federal Court of Justice rejected the complaint that alleged that this judgment violated the right to a hearing in court. It held as follows: 17

The complainant unsuccessfully asserted that the Senate had not considered the fact that it had submitted a study which showed that printers were used to a quite considerable degree to produce copies with copyright implications. The Federal Court of Justice stated that the study submitted related not only to files with copyright implications, but all files of third-party content or origin, and thus, for example, also to material that was not subject to copyright protection. The study had therefore not been of relevance. 18

Nor did the judgment in any sense assume a general consent to copying, or that authors waived their rights to levies, but it assumed instead that the printouts from digital originals were predominantly made with the consent of the rightholder. With consideration for the fact that a rightholder who made texts or images freely accessible on the internet without restrictions must at least expect that these contents would be downloaded or printed out, the Senate had also not assumed, for example, that an implied consent to copying could be inferred, but had merely pointed out that in certain circumstances it might be assumed that there was an implied consent to reproduction. 19

Finally, the complainant asserted without success that it had pointed out in the hearing that it was for the national legislature to decide how to implement the fair compensation requirement of Directive 2001/29/EC of 22 May 2005 [intended meaning: 2001], and that it had also suggested that the matter should be referred to the Court of Justice of the European Communities (now Court of Justice of the European Union; hereinafter ECJ) for a preliminary ruling. The Federal Court of Justice stated that under Article 103.1 of the Basic Law the courts were only obliged to take notice of and consider the submissions of the parties. It was not necessary, however, to comment expressly on all individual points of the parties' submissions in the grounds of the decision. 20

### III.

In its constitutional complaint, the complainant asserts a violation of Article 3.1, Article 14.1, Article 101.1 sentence 2 and Article 103.1 of the Basic Law, and submits as follows: 21

1. The constitutional complaint was of fundamental constitutional significance, because the challenged judgment called into question the principle that under Article 14.1 sentence 1 of the Basic Law the proceeds of the work of authors are to be assigned to them in the form of a claim to remuneration. The judgment left authors without compensation for all copies of a digital original. This issue was controversial 22

in the case-law of the non-constitutional courts. In addition, it was relevant to further cases before the Federal Court of Justice. These cases, with regard to printers, related to a large amount of copying with copyright implications. Furthermore, the constitutional complaint was expedient to enforce the fundamental rights of the complainant and the authors.

2. The complainant submits that the constitutional complaint was admissible, in particular with regard to the complainant's standing to sue, and well-founded. 23

a) The Federal Court of Justice thoroughly misjudged the fundamental right to property when it interpreted and applied non-constitutional law. On the one hand, Article 14.1 sentence 1 of the Basic Law guaranteed the author a right of disposal and interdiction, and on the other hand a right of exploitation. In particular, authors had a right to receive the proceeds of the exploitation of their work. The Federal Court of Justice encroached upon the constitutionally guaranteed right of exploitation in denying that there was a claim to remuneration for analogue copies of digital originals. Pursuant to the case-law of the Federal Constitutional Court, this encroachment might only be justified by increased public interest. 24

In the opinion of the complainant, there could be no doubt that it would not have contravened legal methodology to affirm a claim to remuneration, as was shown by the decisions of the lower courts, the remarks of the arbitration board and the greatly prevailing opinion in the legal literature. The encroachment which nevertheless took place was not justified by increased public interest. The Federal Court of Justice fundamentally misjudged this criterion. Even from its analysis of the wording of the norm, the system of the legislation, the legislative materials, and of the categorisation of the new technological process in question under existing copyright law, it could be inferred that there were no cogent arguments against a remuneration claim; the Federal Court of Justice did not consider an interpretation in conformity with the Basic Law. The Federal Court of Justice also failed to consider constitutional aspects in its analysis of the possibility of an analogous application of § 54a UrhG old. On the basis of disputed facts which were not established by taking evidence, it reached the result that the nature of the interests involved in the reproduction of digital originals was not comparable to the nature of the interests involved in the reproduction of print originals. 25

The Federal Court of Justice failed to distinguish the question of whether remuneration was owed at all from the possible amount of such remuneration when it states that in the functional chain of scanner, PC and printer only the scanner was subject to a payment obligation, since otherwise there would be over-compensation. For according to the Federal Court of Justice's own case-law, remuneration rates could be treated flexibly, and in deciding whether devices are subject to a payment obligation, the relevant factor was not the scope of the actual use with copyright implications, but the mere possibility of making such copies. At all events, a reduction of the claim to remuneration was a more lenient means than the complete refusal of remuneration. 26

The Federal Court of Justice based its interpretation on the state of the art prevalent during the 1980s. It ignored the legislature's later clarification that digital copies were also covered by § 53 UrhG. But Article 14.1 of the Basic Law creates an obligation to interpret the Copyright Act in a way that is open to new technology. Technological advances should not undermine the protections afforded by copyright law. 27

The Federal Court of Justice could not permissibly base its argument on the alleged frequency of consent to the copying of digital originals. The fact that such copies are permissible followed from the statutory licence of § 53 UrhG. Even the imputed consent of the author would not remove the author's claim to remuneration; under § 63a UrhG, this claim was in fact unrenounceable. Moreover, there could be no justification to deny the author compensation in cases in which consent was withheld. The reference of the Federal Court of Justice to the possibility of technological protection measures against unauthorised copies was beside the point. The author could not be put under an obligation to take precautions against third-party copyright infringements. The state was not permitted to shift its obligation of protection onto the subject of a fundamental right. The reprographic levy was not a necessary evil whose area of application should be reduced to a minimum, but rather the only practicable - and therefore, constitutionally mandated - means to protect the author's remuneration claims for private reproduction. There should not be any concern that the manufacturers and importers would be disproportionately burdened, since ultimately the remuneration would be borne by the end user. 28

b) In addition, the challenged judgment violated the principle of equality. Compared to the authors of analogue originals, the authors of digital originals were treated unequally even though, in both cases, the end product of the copying process was a paper copy. There was no apparent justification for this unequal treatment. In particular, it was not comprehensible why the authors of digital originals who had not consented to a printout should be denied a claim to remuneration, while even the authors of analogue originals who had consented to copying had such a right. 29

c) Further, the Federal Court of Justice had committed an evidently arbitrary breach of its obligation to refer the matter to the ECJ for a preliminary ruling and thus denied the complainant a lawful judge. The Federal Court of Justice should have referred to the ECJ the question as to whether its interpretation contravened the mandatory requirements of 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 (Copyright Directive; OJ EC L 167/10), which mandate that reproductions on paper effected by the use of any kind of photographic technique or by some other process having similar effects are only permissible provided that the rightholders receive fair compensation. The Federal Court of Justice completely failed to mention European Union law, although the question whether reproduction by means of a printer was a process having similar effects within the meaning of the Directive had been discussed in the original proceedings. An interpretation of § 54a UrhG old in conformity with the Directive would have to result in 30



an obligation of remuneration for printers.

d) Finally, the challenged judgment violated the complainant's right to a fair hearing and was based on this violation. The judgment failed to address a study by the Gesellschaft für Konsumforschung (GfK study) that was submitted by the complainant, which found that three out of four people used their PC at their place of employment for private copying and storage of material with copyright implications, and of these in turn two-thirds printed out the material on their printers at work. It was only in the order rejecting the complaint alleging a violation of the right to a hearing that the Court stated for the first time that the study also related to the use of material that was not subject to copyright and was therefore not relevant. However, this did not alter the fact that on the basis of real-world experience alone - and as held in the two lower-court judgments and the settlement proposal of the arbitration board - at least a rather significant percentage of files with third-party content were subject to copyright protection. At all events, the Federal Court of Justice had an obligation to take account of the evidence offered by the complainant in both trial courts, which concerned obtaining a further opinion from a judicially appointed independent expert should the Court have believed that the submitted study did not adequately show that images and texts with copyright implications had been reproduced. Notwithstanding the fact that the complainant had denied this, the Federal Court of Justice imputed implied consent to the reproduction of digital originals and assumed that printers, in comparison to copiers, were only used to a substantially lesser degree for purposes with copyright implications.

31

#### IV.

Opinions on the constitutional complaint were submitted by the defendant in the original proceedings, the Federal Association for Information Technology, Telecommunications and New Media (*Bundesverband Informationswirtschaft, Telekommunikation und neue Medien e.V.* - BITKOM) and the German Association for the Protection of Industrial Property and Intellectual Property (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.* - GRUR). In the proceedings 1 BvR 2742/08, 1 BvR 2760/08, 1 BvR 3461/08 and 1 BvR 506/09, which were based on comparable facts and were decided by the Federal Court of Justice with the same result, the defendants of the various original proceedings made submissions which are also relevant to the present proceedings. The Federal Government did not submit an opinion.

32

1. In the opinions submitted by each defendant and by the trade association BITKOM, the fundamental importance of the matter is disputed in view of the fact that § 54a UrhG old, as a result of the 2008 copyright law amending statute, had been replaced by a different provision and therefore had no further relevance for future cases. Nor, it is stated, was the acceptance of the constitutional complaint for decision by the Federal Constitutional Court necessitated to enforce fundamental rights of the complainant or of authors represented by it. The constitutional complaint was inad-

33

missible, *inter alia* for lack of standing to file a specific constitutional complaint, insofar as the complainant represented the B-K... collecting society. It was also unfounded; at any rate, even on the basis of the complainant's own submissions, one could not ascertain a gross misconstruction of the constitutional requirements. It is submitted as follows:

a) In particular, no violation of Article 14.1 of the Basic Law was apparent. The courts had a duty of restraint corresponding to the legislative discretion of parliament with regard to "intellectual property" as defined by statute. In this sense, the Federal Court of Justice correctly refused to read into § 54a UrhG old a meaning which the legislature had not intended until the 2008 copyright law amending statute. Before this - from 1985 and continuing until the legislative process began in the year 2006 - the legislature had always been concerned with the remuneration obligation for copies of print works.

34

There was no room for a development of law *praeter* or *contra legem*. On the one hand, the Federal Court of Justice had no obligation to react to new technologies in place of the legislature. On the other hand, the one-dimensional perspective taken by the complainant, according to which the decision of the non-constitutional courts infringed upon fundamental rights of authors, was erroneous; instead, it was in the domain of the legislature, within the scope of its discretion, to strike a fair balance in the complex tangle of interests of authors, users of works and manufacturers of devices. This was not tantamount to the most copyright-friendly interpretation in each respective case. Thus, the reprographic levy on devices - justified only by considerations of practicability - also required a constitutional justification concerning the rights of manufacturers.

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It was not apparent - even bearing in mind that scanner manufacturers were subject to the reprographic levy - that there was ultimately a disproportionate and unconstitutional discrimination against authors. Users gained first access to digital content by visualisation on the monitor or by creating a printout, which was a fundamental distinction from the re-production by copying, e.g. of a book. In addition, a person who placed content online expected that the content would be printed out and further disseminated in this way. If authors did not want this to happen, they could use technical safeguards to prevent the printout entirely or charge the user prior to allowing the content to be printed out. If the author of content placed online thus reserved his or her sole and exclusive right, then from the outset there was no encroachment upon the author's right of exploitation that needed to be compensated for. If, nevertheless, in a few cases, copies were made by the chain of devices referred to in a way having copyright implications, and no remuneration was payable for the involvement of the scanner, this remained within the limits of the unavoidable categorisation permitted to the legislature and the Federal Court of Justice.

36

b) The challenged decisions also did not violate the principle of equality. The Federal Court of Justice presented sufficient factual arguments for its differentiation be-

37

tween the various types of devices and between the authors of analogue and digital works, in particular the availability of technological protection measures to prevent the reproduction of digital content.

c) There was no obligation to refer the matter to the ECJ. As required by the Copyright Directive, the Federal Court of Justice regarded the author's right of interdiction as higher-ranking than the right to make a private digital copy; this had been held to be in accordance with the constitution by the Federal Constitutional Court. But if the authors had the option - as called for by the Directive - to prohibit reproduction in the private sphere in any case, then the interpretation of the Directive with regard to the restrictions of this option and, accordingly, the question of "fair compensation" was not relevant. Moreover, fair compensation, which in any case had to be put into specific terms by the national legislature, was guaranteed by the charge imposed on scanner manufacturers. Which specific devices were to be subject to the charge was a question of expedience which was not determined by European Union law.

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2. The German Association for the Protection of Industrial Property and Intellectual Property asks whether, if authors of digital originals were also constitutionally entitled to remuneration, this must necessarily be collected by way of the reprographic levy, and whether the levy to be paid by the scanner manufacturers might not satisfy the constitutional right to property. From the point of view of copyright law, for several reasons it was not mandatory that the Federal Court of Justice regarded only the scanner as subject to a payment obligation.

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The Copyright Directive did not oblige the Member States to introduce uniformly structured remuneration systems, but left a broad latitude in this respect. However, it might be doubtful whether the fair compensation called for by the Directive was satisfied by the claim against scanner manufacturers.

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3. In its reply, the complainant points out that the rates for scanners were set at a low figure because the persons involved assumed that the printer and other devices were also subject to a payment obligation. The legal starting point of the defendant and the trade association BITKOM, that no claim to remuneration arised because there was no encroachment upon the author's right of disposal and interdiction, was incorrect. Technological protection measures against reproductions of digital content were at all events ineffective in the period under consideration in the present case, up to 2007, as was also found by the trial courts. Nor did the legislature require the authors to introduce such measures. This would also be contrary to international law. Article 5.2 of the Berne Convention for the Protection of Literary and Artistic Works prohibits subjecting the enjoyment and the exercise of copyright to any formality. This must be taken into account in an interpretation open to international law.

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## **B.**

The Chamber accepts the constitutional complaint for decision and grants it, such action being necessary to enforce the right, equivalent to a fundamental right, of the

42

complainant under Article 101.1 sentence 2 of the Basic Law (§ 93a.2.b of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG)). The further requirements of § 93c.1 sentence 1 BVerfGG are also satisfied; in particular, the Federal Constitutional Court has already decided the constitutional questions relevant in this case.

## I.

The constitutional complaint is admissible. In particular, the complainant, as the representative of the authors of written works, is, also in constitutional complaint proceedings, entitled to safeguard their property rights (see BVerfGE 77, 263 <269-270>). Insofar as the complainant was a party to court proceedings, even as a legal person it has the right to a fair hearing (see BVerfGE 12, 6 <8>) and to a lawful judge (see BVerfGE 18, 441 <447>). However, under § 90.1 BVerfGG the complainant may not act in a representative action for the B-K... collecting society (see BVerfGE 2, 292 <294>; 10, 134 <136>; established case-law), but in the present case this has no effect on the decision.

43

## II.

The constitutional complaint is obviously well-founded, § 93c.1 sentence 1 BVerfGG.

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1. The challenged judgment fails to discuss the duty to refer the matter to the ECJ (Article 267.3 TFEU, formerly Article 234.3 EC Treaty) and therefore violates Article 101.1 sentence 2 of the Basic Law.

45

a) The ECJ is the lawful judge within the meaning of Article 101.1 sentence 2 of the Basic Law. Subject to the requirements of Article 267.3 TFEU, the national court must of its own accord refer the matter to the ECJ (see BVerfGE 82, 159 <192-193>).

46

Under the case-law of the ECJ, a national court of last instance must comply with its obligation to refer if a question of European Union law arises in proceedings pending at that court, unless the court has found "that the question raised is irrelevant to the issue or that the Community provision in question has already been interpreted by the court or that the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt" (ECJ, judgment of 6 October 1982, Case 283/81 *CILFIT*, European Court Reports 1982 p. 03415). The relevance of the question of European law for the original proceedings, on the other hand, is assessed solely by the national court (see BVerfGE 82, 159 <194>).

47

However, the Federal Constitutional Court reviews only whether the interpretation and application of the rule of jurisdiction of Article 267.3 TFEU, on reasonable construction of the concepts determining the Basic Law, no longer appears comprehensible and is obviously untenable (see BVerfGE 82, 159 <194-195>; BVerfG, Order of the Second Senate of 6 July 2010 - 2 BvR 2661/06 -, marginal nos. 88 ff.; retrievable (in German) from the BVerfG website). If there is as yet no case-law of the ECJ on a

48

question of European Union law relevant to the decision, or if existing case-law has possibly not yet exhaustively answered the question relevant to the decision, or if it appears more than a distant possibility that the case-law of the ECJ will be further developed, then Article 101.1 sentence 2 of the Basic Law is only violated if the court of last instance in the principal proceedings has unjustifiably overstepped the scope of judgment necessarily accorded to it in such cases (see BVerfGE 82, 159 <195-196>; BVerfG, Order of the Second Senate of 6 July 2010, *ibid.*, marginal no. 90; Order of the Third Chamber of the First Senate of 25 February 2010 - 1 BvR 230/09 -, *Neue Juristische Wochenschrift* - NJW 2010, p. 1268 <1269>). In this regard, when reviewing whether a violation of Article 101.1 sentence 2 of the Basic Law has occurred, the decisive factor is not primarily the justifiability of the non-constitutional courts' interpretation of substantive European Union law relevant to the case in question, but the justifiability of the courts' treatment of the obligation to refer under Article 267.3 TFEU (see BVerfG, Order of the Third Chamber of the First Senate of 25 February 2010, *ibid.*). This conforms with the Order of the Second Senate of 6 July 2010 (*ibid.*, marginal no. 90), which calls for a justifiable answer to the question relevant to the decision and thus gives effect to the standard of Article 101.1 sentence 2 of the Basic Law, by which compliance with the non-constitutional courts' obligation to refer under Article 267.3 TFEU must be monitored by the Federal Constitutional Court.

Pursuant to the established case-law of the chambers of the Federal Constitutional Court, the non-constitutional court's reasoning must demonstrate that it has sufficiently taken European law into account, and thereby enable a review by the Federal Constitutional Court under the standard of Article 101.1 sentence 2 of the Basic Law (see Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK) 8, 401 <405>; 10, 19 <31>; BVerfG, Order of the Second Chamber of the First Senate of 9 January 2001 - 1 BvR 1036/99 -, NJW 2001, p. 1267 <1268>; Orders of the Third Chamber of the First Senate of 14 May 2007 - 1 BvR 2036/05 -, *Neue Zeitschrift für Verwaltungsrecht* - NVwZ 2007, p. 942 <945>, of 20 February 2008 - 1 BvR 2722/06 -, NVwZ 2008, p. 780 <781> and of 25 February 2010, *ibid.*).

49

b) The challenged decisions do not even show whether the Federal Court of Justice took European law into account and whether it actually considered a reference to the ECJ. And yet an obligation to make a reference suggests itself. For, on the basis of the Copyright Directive, it appears by no means impossible or indefensible to hold a different view on the question decided by the Federal Court of Justice.

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aa) The two-stage question on European Union law arises as to whether the term "process having similar effects" (such as any kind of photographic technique) in Article 5.2.a of the Copyright Directive may be interpreted to mean that only reproductions of analogue originals, not of digital originals, are covered, and whether, therefore, the condition that the rightholders receive "fair compensation" may be understood to mean that for reproductions made by a functional unit consisting of PC and printer (without a scanner being involved), European Union law does not man-

51

date such compensation. If - as held by the Federal Court of Justice - one finds that this is not a "process having similar effects" within the meaning of Article 5.2.a of the Copyright Directive, the question still arises as to whether Article 5.2.b is applicable to the facts of the present case ("reproductions on any medium made by a natural person for private use"), with the consequence that the condition of "fair compensation" would also apply, now with the distinction that "technological measures" under Article 6 of the Copyright Directive would have to be taken into account.

These questions of interpretation are relevant to the decision even if European Union law does not oblige the Member States to introduce uniformly structured remuneration regimes but leaves broad latitude in this respect. If, as in German law, the remuneration of the authors in certain cases is, exclusively or at least predominantly, ensured indirectly by way of levies on the device manufacturers, then under the Copyright Directive an interpretation of German law might be prohibited which bars this method of remuneration for particular types of copyrighted works, or for particular methods of reproduction. In other words, the question raised here is not whether the Copyright Directive obliges the printer manufacturers to pay a reprographic levy, but whether - assuming that a national reprographic levy system exists - authors of digital originals may in certain circumstances be excluded from the enjoyment of this system.

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The terminology "process having similar effects" and "fair compensation" is not explained in the Copyright Directive. At all events, Article 5.2 does not expressly distinguish between analogue and digital originals. The wording of the provision and the recitals do not exclude the possibility that the Directive is aimed solely at the result (German "*Wirkung*", French "*ayant des effets similaires*") of the process of reproduction and not at the nature of the original.

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Concerning its application in time, the Directive is relevant to the present case, since the Directive entered into force during the period to which the original proceedings related (beginning in April 2001) on 22 June 2001 by publication in the Official Journal of the European Communities. From the date when the Directive entered into force, the Federal Court of Justice also had a duty to interpret national law in conformity with the Directive, irrespective of the fact that the relevant provision was enacted before the Copyright Directive (see ECJ, judgment of 4 July 2006, Case C-212/04 *ELOG*, European Court Reports 2006 p. I-06057). The subject matter of the original proceedings is affected insofar as there was a request to establish remuneration claims from 22 December 2002 (see Article 10.2 of the Copyright Directive).

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bb) No exception from the obligation to refer is apparent (see ECJ, judgment of 6 October 1982, *ibid.*), nor has the possibility of an exception been discussed by the Federal Court of Justice.

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On the above question to be referred to the ECJ, there exists no confirmed case-law of the ECJ. Nor has the question raised hitherto been the subject of a preliminary ruling in a comparable case ("*acte éclairé*"). Admittedly, in its judgment of 6 February

56

2003 (Case C-245/00 *SENA*, European Court Reports 2003 p. I-01251), the ECJ expressed an opinion on the term "equitable remuneration" in Article 8.2 of Council Directive 92/100/EEC of 19 November 1992 on lease and lending rights and on certain rights related to copyright in the field of intellectual property. The Directive requires the Member States to pass legislation ensuring that the user pays equitable remuneration if a phonogram is broadcast. However, the criteria cited by the ECJ to define the term "equitable remuneration" cannot be transferred to the term "fair compensation" in Article 5.2 of the Copyright Directive *ceteris paribus*.

Finally, an exception from the obligation to refer may also not be assumed on the grounds that the correct application of European Union law is so obvious as to leave no scope for reasonable doubt about the outcome ("acte clair"). Such certainty must be ruled out in this case simply because the legal question decided by the Federal Court of Justice is and has been highly disputed in view of the similarly worded German law. The Member States have differing provisions as to whether devices are to bear any charges, and if so which devices, and what "fair compensation" the rightholders receive (see Ullrich, *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* - GRUR Int. 2009, p. 283 <291>). Thus, for example, the legal position in Austria, which has recently been clarified by the Austrian Federal Supreme Court (*Oberster Gerichtshof*) - with legislative wording similar to that in Germany - is that there is a payment obligation for printers, but not for PCs (judgment of 24 February 2009 - 4 Ob 225/08d -, GRUR Int. 2009, p. 754).

In particular, the reference for a preliminary ruling of Audiencia Provincial de Barcelona in a legal dispute between Sociedad General de Autores y Editores de España (SGAE) and Padawan S.L. on questions of "fair compensation" within the meaning of Article 5.2.b of the Copyright Directive (Case C-467/08) illustrates the persistent need for interpretation. The Advocate General delivered her Opinion on 11 May 2010 (retrievable at <http://curia.europa.eu>). She established that the question as to how a compensation system should be organised could not be answered on the basis of the wording of the Directive. But the extent to which the Directive regulates the issue, taking into account the recitals, allowed, at least, to define the contours of "fair compensation" as required by European Union law. She stated that this was an autonomous concept of European Union law which must be interpreted uniformly in all Member States and transposed by each Member State; it was, however, for each Member State to determine - with considerable discretion - the most appropriate criteria for ensuring, within the limits imposed by European Union law, compliance with said Community concept in its own territory. The Directive did not determine who has a payment obligation. There must be a sufficiently close link between the levy on the devices or storage media and the use of the devices and storage media to make private copies, although the possibility of such use was sufficient. In this sense, lump-sum levies on devices that are objectively suitable to make private copies were to be regarded as in conformity with European Union law.

2. In the course of reviewing whether the matter is to be referred to the ECJ under Article 267.3 TFEU, the Federal Court of Justice will, when discussing the issue of whether the aforementioned question is relevant for the decision, also have to consider to what extent Article 14.1 sentence 1 of the Basic Law requires an interpretation of § 54a UrhG old which could result in granting the complainant's claim and thus render a reference to the ECJ unnecessary. 59

a) The constituting elements of copyright as property within the meaning of the constitution include the axiomatic allocation of the proceeds of creative activity to the author by way of the provisions of private law, and the author's freedom to dispose of his or her rights in his or her own responsibility. Specifically, it is the duty of the legislature, in establishing the extent of copyright under Article 14.1 sentence 2 of the Basic Law, to lay down appropriate standards which ensure use and exploitation of the right in conformity with its general nature and social significance (see BVerfGE 31, 229 <240-241>; 79, 1 <25>). In this regard, the legislature is afforded a relatively wide margin of discretion (see BVerfGE 21, 73 <83>; 79, 29 <40>), while encroachments upon the author's right of exploitation may be justified only by significant public interest (see BVerfGE 31, 229 <243>; 49, 382 <400>; 79, 29 <41>). 60

In cases where the interpretation and application of non-constitutional law allow for more than one interpretation, courts must give preference to the one which corresponds to the values enshrined in the constitution (see BVerfGE 8, 210 <220-221>; 88, 145 <166>) and which, in keeping with the principle of *Praktische Konkordanz* (consistency in practice), grants the fundamental rights of all persons involved the broadest possible effect. In this regard, respect for the legislature (Article 20.2 of the Basic Law) requires an interpretation in conformity with the Basic Law which is consistent with the wording of the statute and preserves the fundamental aim of the legislature (see BVerfGE 86, 288 <320>). The interpretation may not lead to an essential element of the legislative purpose being missed or distorted (see BVerfGE 8, 28 <34>; 54, 277 <299-300>). 61

b) The interpretation of § 54a UrhG old must also be based on these standards. 62

aa) In its judgment, the Federal Court of Justice reaches the conclusion that only the reproduction of analogue originals, not digital originals, is subject to the payment obligation under § 54a.1 UrhG old. For this reason, printers in combination with other devices are not subject to remuneration. Even in civil law, the argument of the Federal Court of Justice does not appear compelling. It leaves the authors of digital originals completely without remuneration and does not consider less drastic means, in this case a limitation of the amount of remuneration. The Federal Court of Justice itself had posited such a limitation in its decision on the payment obligation of fax machines (see BGHZ 140, 326 <333-334>). It is true that the complainant can be expected to receive a certain amount of remuneration from the levy on scanners. But it does not follow that the extent of this payment is sufficient to guarantee equitable remuneration of digital authors, at least not on the basis of the findings of the non- 63



constitutional courts. The complainant and the German Association for the Protection of Industrial Property and Intellectual Property point out that when the scanner levy was assessed, it was assumed that other devices would be subject to a payment obligation as well. In addition, a levy on scanners leaves unprotected the property rights of authors who only create digital originals.

bb) The interpretation and application of copyright law must, in particular in view of the large number of technological innovations in this area, guarantee the property rights of authors under Article 14.1 of the Basic Law. As the result of a development in fact or in law, a provision which has previously been unambiguous and complete may become incomplete, in need of, and at the same time be capable of, amendment. It is constitutionally justified to seek and close gaps, *inter alia* because statutes are susceptible to aging. The courts are therefore entitled and obliged to review how statute law can be applied to new circumstances (see BVerfGE 82, 6 <12>; 96, 375 <394>). In the present case, this includes a review as to how far a restrictive interpretation of § 54a UrhG old, in view of the rapid proliferation of digital data storage and data reproduction, results in a complete gap in the protection of certain authors.

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In the case at issue, an interpretation in light of Article 14.1 of the Basic Law must proceed from the assumption that the legislature intended § 54a UrhG old to ensure that the author retained his constitutionally guaranteed right to exploitation in those cases where the user of the work cannot be charged, creating the necessity to charge the device manufacturer instead. This corresponds to the concern of the legislature, which felt compelled to amend the § 54.1 UrhG of the time (the earlier provision equivalent to § 54a UrhG old) because new technologies in the field of reprography had led to an extraordinary increase of reproductions of works protected by copyright (Bundestag printed paper - BTDrucks 10/837, p. 10). In its Draft Act to Govern Copyright in the Information Society (*Entwurf eines Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft*), prepared in 2002, the Federal Government saw a need only for "clarification" that § 53 UrhG also applies to digital reproduction; this required no change in substance from the existing law (BTDrucks 15/38, p. 20; see also BVerfG, Order of the Third Chamber of the First Senate of 7 October 2009 - 1 BvR 3479/08 -, GRUR 2010, p. 56). The introduction to the Federal Government's bill for the "second basket" of Copyright Act amendments of the year 2006 states that the Act retains the permissibility of private copies - including private copies in the digital realm - and clarifies the law currently in force (BTDrucks 16/1828, p. 1). The general section of the legislative materials refers to the "digital private copy subject to remuneration under §§ 54, 54a UrhG" of the old law (*ibid.*, p. 15).

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cc) The Federal Court of Justice further argues that in the case of digital originals, unlike print works, the rightholder has often consented to the reproduction. In a recent decision of the Federal Court of Justice (judgment of 29 April 2010 - I ZR 69/08 -, juris, marginal nos. 33-34), the conduct of digital authors in this regard is interpreted as straightforward consent. Such consent would merely mean that an act of reproduction of a copyrighted work would cease to be unlawful; the provisions of §§ 53, 54a, 63a

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UrhG would still apply. At all events, the assumption that instances of legally binding consent are numerous leaves the question unanswered as to why on the one hand authors receive no remuneration in cases of lack of consent, and on the other hand why the imputed consent to reproduction should at the same time imply a waiver of any remuneration whatsoever. With regard to the constitutional requirement that the proceeds of creative activity should in principle be assigned to the author (see BVerfGE 31, 229 <240-241>), such an assumption meets with considerable objections.

3. The remaining challenges made by the complainant need not be decided. 67

### III.

The judgment of the Federal Court of Justice is therefore reversed pursuant to § 93c.2 in conjunction with § 95.2 BVerfGG. The matter is referred back to the Federal Court of Justice. As a result, the order challenged no longer applies. 68

The decision on the reimbursement of expenses is based on § 34a.2 of the Federal Constitutional Court Act. 69

Hohmann-Dennhardt

Gaier

Paulus

**Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 30. August 2010 - 1 BvR 1631/08**

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