

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 10 March 2011¹

1. This case concerns the analysis of ‘fair compensation’ used in Article 5(2)(b) of Directive 2001/29/EC.² Whilst the definition of who is liable to pay such compensation has recently been dealt with in *Padawan*,³ the present preliminary reference differs from that case since it contains a cross-border element. Thus, the novel question it asks is whether, as a result of Article 5(5) of Directive 2001/29, national legislation implementing that directive must be given an interpretation obliging a company involved in a distance selling arrangement whereby it sells goods via the internet to customers in a Member State which provides for fair compensation in its national law, to pay that compensation in one of the two Member States.

I — Legal framework

*EU law*⁴

2. Article 17(2) of the Charter of Fundamental Rights of the European Union states that intellectual property shall be protected.⁵

3. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect. Article 30 EC contains justifications to such restrictions and explicitly allows for a justification based on the protection of industrial and commercial property.

1 — Original language: English.

2 — Directive 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).

3 — Case C-467/08 [2010] ECR I-10055.

4 — Since the reference in the present case was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

5 — OJ 2000 C 364, p. 1.

4. Recitals 35, 38 and 39 in the preamble to Directive 2001/29 state:

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

...

(38) Member States should be allowed to provide for an exception or limitation

to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) 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. Such exceptions or limitations should

not inhibit the use of technological measures or their enforcement against circumvention.’

6. Article 5 sets out the exceptions and limitations. It states in the relevant parts:

5. Article 2 of Directive 2001/29 sets out the general rule with respect to reproduction rights. It states:

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

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

...

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

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

...

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

National law

7. Article 16c of the Law on Copyright (Auteurswet) states as follows:

‘1. The reproduction of a literary, scientific or artistic work on an item designed for ... the reproduction of a work ... shall not be regarded as an infringement of the copyright in that work if the reproduction is made for ends that are neither directly nor indirectly commercial and serves exclusively for the own practice, study or use of the natural person making the reproduction.

2. Payment of a fair remuneration in respect of the reproduction referred to in paragraph 1 shall be due to the maker of the work or his legal successor. The manufacturer or importer of the items referred to in paragraph 1 shall be liable for payment of the remuneration.

3. The manufacturer’s payment obligation arises when the items manufactured by him are put on the market. The importer’s obligation arises at the time of importation.

...’

8. Under Article 16d of the Auteurswet Stichting de Thuis kopie (‘Thuis kopie’) is responsible for the recovery of fair remuneration provided for under Article 16c(2) of the Auteurswet.

II — Facts and questions referred

9. Opus GmbH is established in Germany, and offers for sale blank media, inter alia, via Dutch-language websites and websites aimed at the Netherlands. Its general terms of business, which can be viewed on its websites, state:

‘Orders are placed by the customer directly with Opus Supplies Deutschland GmbH in Heinsberg, Germany.

...

Prices do not include Levy, Auvibel, Thuis kopie, GEMA or other charges. Goods are dispatched by order of the customer via TPG Post or DHL Express and always in the name of the customer. Accordingly, you may be regarded in your own country as the importer ...’

10. Since the end of 2003 Opus GmbH has been offering blank media at prices which, according to the referring court, do not include remuneration for private copying since the prices are generally below the amount fixed in the Netherlands for the remuneration for private copying in respect of the relevant category of media.

11. Orders received via the websites are confirmed by Opus GmbH by email to the customer. The order is processed in Germany, and the goods are delivered by post to, inter alia, the Netherlands, via carriers engaged by Opus GmbH.

12. The purchase of the media via websites occurs without the consumer being required to acknowledge the general terms of business posted on Opus GmbH's website. Payment can be made into a Netherlands bank account, and goods can be returned to an address in the Netherlands.

13. No remuneration is paid by Opus GmbH nor by the customers in the Netherlands to the *ThuisKopie* in respect of that media. Opus GmbH does not pay any comparable remuneration for private copying in Germany either in relation to the blank media sold to customers in the Netherlands.

14. In addition to Opus GmbH, the other parties to the proceedings are Opus Supplies BV, which was engaged in the sale of blank media to customers in the Netherlands, and Mijndert and Hananja van der Lee, who are indirectly managing directors of the two companies.

15. On 26 July 2005, *ThuisKopie* applied to the *Rechtbank 's-Gravenhage* (District Court, The Hague) for an interim order against all three parties. The judge responsible dismissed the application by order of 16 September 2005. *ThuisKopie* appealed to the *Gerechtshof 's-Gravenhage* (Regional Court of Appeal, The Hague). By judgment of 12 July 2007, the *Gerechtshof* upheld the order of the judge responsible for hearing applications for interim measures. *ThuisKopie* brought an appeal in cassation to the *Hoge Raad der Nederlanden* against the judgment of the *Gerechtshof*, which made a reference to this Court.

16. In motivating its request for a preliminary reference the *Hoge Raad* explains that, under the contract, the delivery takes place upon the transfer of possession and that according to the contract this occurs in Germany as the customer is responsible for the transport of goods. Since the Netherlands legislation states that it is the importer that is responsible for paying the fair compensation, this means that the obligation in the present case is placed on the customer in the Netherlands and not on Opus GmbH. The referring court therefore wishes to know whether Directive 2001/29 requires the term 'importer' used in national legislation to be interpreted in a manner contrary to its normal meaning.

17. In those circumstances the Hoge Raad requests the Court of Justice to make a preliminary ruling on the following questions:

(1) Does [Directive 2001/29], in particular Article 5(2)(b) and (5) thereof, provide any assistance in determining who should be regarded under national law as owing the “fair compensation” referred to in Article 5(2)(b)? If so, what assistance does it provide?

(2) In a case of distance selling in which the buyer is established in a different Member State to that of the seller, does Article 5(5) of [Directive 2001/29] require national law to be interpreted so broadly that a person owing the “fair compensation” referred to in Article 5(2)(b) of the directive who is acting on a commercial basis owes such compensation in at least one of the Member States involved in the distance selling?’

stipulates who should be responsible for paying fair compensation in cases where an exemption to the general rule in Article 2 of that directive is applicable.

19. It is true that Directive 2001/29 does not expressly state who fair compensation should be paid by. It merely states the result that is to be achieved by it, namely, that if a Member State decides to grant an exception to the general rule set out in Article 2 of that directive, it must achieve the result of obtaining fair compensation, except where the harm to the rightholder is minimal.

20. Therefore, Member States have a large margin of appreciation when defining who is to pay such compensation.

21. According to the Court’s case-law the question of who is liable to pay fair compensation must be interpreted uniformly throughout the EU in order to achieve the aims of Directive 2001/29, namely the harmonisation of certain aspects of copyright law in order to ensure that competition in the internal market is not distorted.⁶

22. This must be done with due regard to the aim of the directive and provision in question. The aim of the fair compensation provision in Article 5(2)(b) of Directive 2001/29 is

III — Analysis

A — Question 1

18. By its first question the referring court essentially asks whether Directive 2001/29

⁶ — *Padawan*, cited in footnote 3, paragraphs 32, 33 and 35.

to compensate authors adequately for the use made of their protected works without their authorisation and the harm they suffer as a result.⁷

23. Very recently, in *Padawan* the Court addressed the question of who should be liable to pay compensation. The Court stated that in general, the person who has caused the harm to the holder of the exclusive reproduction right is the person who reproduced the protected work without seeking prior authorisation, and therefore the one that should make good the harm.⁸ However, the Court also accepted that, considering the practical difficulties in identifying private users, it was permissible for Member States to provide that those who have the digital reproduction equipment, devices and media and who make it available to private users could also be liable to pay fair compensation.⁹

24. Therefore, from that judgment it seems clear that fair compensation may in principle be owed by both the private individual as well as the company selling the product in question which causes or is likely to cause harm to the rightholder.

25. A Member State cannot allow private copying and impose the obligation of compensation on private individuals unless they establish systems that effectively ensure that the compensation is paid. The *effet utile* of Articles 2 and 5(2) of Directive 2001/29 could not otherwise be achieved. Moreover, the rightholders would be deprived of the protection afforded to them by Article 17(2) of the Charter of Fundamental Rights.

26. In my opinion the *effet utile* of those provisions cannot be achieved in practice unless the Member State creates a system where the rightholders are compensated through a collective arrangement. Bearing in mind the finding of the Court in *Padawan* that it is in principle the individual that should make good the harm, it seems logical that economically the compensation should originate from them. Therefore the system of compensation established by a Member State allowing for the exception provided in Article 5(2)(b) of Directive 2001/29 should ensure that the compensation is collected from the end-users, which in practice means that it should be included in the price these individuals pay when they acquire such media.

27. This conclusion is not affected by the Commission's arguments relating to restrictions of the free movement of goods.

7 — *Padawan*, *ibid.*, paragraphs 39 and 40.

8 — *Padawan*, *ibid.*, paragraphs 44 and 45.

9 — *Padawan*, *ibid.*, paragraph 46.

28. The Commission argues that Directive 2001/29 must be interpreted in a way that does not conflict with primary law,¹⁰ that is with Articles 28 EC and 30 EC on free movement of goods. According to it, there are different ways of ensuring that effective compensation is paid, and Directive 2001/29 appears to favour forms of fair compensation that have no link to the goods themselves so that they do not affect cross-border trade.¹¹ Thus, the question of who should pay fair compensation must not exceed what is necessary for the attainment of the objective that the fair compensation in Article 5(2)(b) of Directive 2001/29 aims to achieve.

29. The first aspect in this respect concerns whether the relevant provisions of Directive 2001/29 are compatible with the EC Treaty provisions on free movement of goods.

30. In my view there cannot be any doubt, as Article 30 EC authorises national restrictions justified in view of protecting intellectual property rights, that the EU legislator is

entitled to harmonise the conditions relating to the exercise of such rights in view of ensuring their effective enforcement.

31. The second aspect concerns whether a compensation scheme applying to reproduction media imported from other Member States is compatible with the free movement of goods bearing in mind that allegedly less restrictive means exist in order to achieve the aim of fair compensation.¹²

32. It is true that secondary legislation must be interpreted in accordance with the Treaty. However, this does not mean that Member States are excluded from benefiting from the leeway of transposition afforded to them by the EU legislator unless, by giving such leeway, the directive itself conflicts with the Treaty.

10 — Case C-135/93 *Commission v Spain* [1995] ECR-I 1651, paragraph 37.

11 — In support of this see recitals 1, 3 and 6 in the preamble to Directive 2001/29 which state that (i) harmonisation of copyright laws contributes to the achievement of the internal market, (ii) Directive 2001/29 will help to implement the four freedoms and ensure compliance with the fundamental principles of law, and (iii) harmonisation will ensure that there is no fragmentation of the internal market as a result of significant differences in protection between the Member States.

12 — *Opus GmbH* has referred to the possibility of establishing a compensation fund in favour of the rightholders as a less restrictive alternative for the free movement of goods. In so far as such a fund would be funded by the domestic manufacturers or traders only it seems problematic from the point of view of non-discrimination. If it were funded by the taxpayers, there seems to be an issue in terms of State aid law since a selective aid scheme would thus be established in favour of economic operators which are marketing reproduction media which would not have to include in the prices of such products compensation for the harm caused by the buyers being able to use them for private copying of protected works and other subject-matter.

33. To conclude otherwise would, in my view, contradict the very nature of a directive. There are often many different ways in which a directive may be implemented in national law. In such cases arguments that these alternatives are not equal in view of the principles embodied in the Treaty would be contrary to the express choice of the EU legislator to allow more than a single method of transposition. It would also put into question the constitutional principles governing the exercise of legislative competences of the EU legislature and the division of competences between the Union legislature and the Member States.

that compensation fees must be paid for imported reproduction media as well.

35. Thirdly it must be emphasised that Article 2 of Directive 2001/29 provides rightholders with the right to authorise or prohibit reproduction. An exception to that right can only be provided on condition that the rightholders receive fair compensation.

36. It follows that the right of the rightholders to receive such compensation as a matter of EU law cannot be denied only because there may have been better alternatives to implement that right than the one adopted by the Member State concerned. Moreover, Directive 2001/29 does not give any indication that a certain part of the reproduction media marketed in the Member State could be exempted from the scope of the right to fair compensation only because it has been put on the market using a commercial technique not ensuring the payment of the compensation.

34. In my opinion, neither the EC Treaty nor Directive 2001/29 prohibit compensation schemes based on the principle that the sellers of reproduction media pay the compensation to the collecting societies that represent the rightholders. That directive does not provide that imports of reproduction media from other Member States should be exempted from fair compensation, and I doubt whether the EU legislature could have provided so without infringing the international conventions on copyright law that bind also the Union. Hence that cannot be disproportional. Having said that, it has to be emphasised that this preliminary reference only concerns the interpretation of the notion of ‘importer’ in the case of distant selling, not the principle

B — Question 2

37. The second question concerns the application of the three-step test envisaged in Article 5(5) of Directive 2001/29, and the obligation that this test entails for the referring court when interpreting its national legislation. It essentially asks whether that test

implies that, in a distance selling arrangement, the seller who is established in another Member State, owes fair compensation in at least one of the Member States involved in the distance selling.

would suggest, by also taking into account the ultimate use of the media, a use which is also evident to commercial sellers.

38. The referring court assumes by its question that the seller can be required to pay fair compensation in such a situation. Indeed, in *Padawan*, which was decided after the present reference was made, the Court ruled that a company could be liable under Directive 2001/29 for paying fair compensation.¹³ The present case is different, however, because the cross-border element brings up issues of the territoriality of the fair compensation due under Directive 2001/29.

40. It is true that, according to established case-law, the national court must, as far as possible, interpret the national legislation so that the aims of the pertinent directive are achieved.¹⁴ They are not, however, obliged to interpret national law *contra legem*.¹⁵

1. The applicability of the three-step test to the present case

41. The three-step test is, in general, aimed at national legislatures, which are to respect compliance with it when drafting into national law exceptions and limitations foreseen by Article 5 of Directive 2001/29.¹⁶

39. According to the referring court, the wording of the Netherlands legislation stipulates that a private buyer is subject, as the importer of the media into the Netherlands, to the obligation to pay the fair compensation. As a result it is, in practice, irrecoverable. The referring court is thus unsure whether this outcome is compatible with Directive 2001/29 or whether the directive requires the term 'importer' to be interpreted more broadly than its meaning pursuant to national law

42. However, when interpreting national provisions, national judges will have to do so in light of that test, to the extent that national laws are ambiguous or leave room for different results. Hence, though being primarily a

13 — *Padawan*, *ibid.*, paragraphs 46 to 49.

14 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 108; Case C-555/07 *Küçükdeveci* [2010] ECR I-365, paragraph 48.

15 — Case C-98/09 *Sorge* [2010] ECR I-5837, paragraph 52 and case-law cited there.

16 — Walter, M., *European Copyright Law: A commentary*, OUP, 2010, at 11.5.79.

norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that directive.

case no obligation for payment may arise.¹⁷ However, bearing in mind the partially-harmonised nature of Article 5 of Directive 2001/29, it is questionable whether and under what circumstances a company established in another Member State should be liable to pay such compensation.

2. Does Directive 2001/29 require that the seller in a distance selling arrangement pays fair compensation in at least one of the Member States?

43. First it should be noted that Directive 2001/29 does not allow for any exceptions to the protection of the rightholders' rights in respect of distance selling arrangements.

44. Article 5 of Directive 2001/29 is particular in that it provides for only a partially harmonised system. Under that system, Member States have a choice of whether they introduce an exception to the general rule by allowing private copying of protected works and other subject-matter without authorisation of the rightholders.

45. Once they do so they are, of course, obliged to ensure that fair compensation is paid, unless the harm is minimal, in which

46. In my view, there is no requirement under Directive 2001/29 to pay a fair compensation fee in *all* distance selling arrangements involving various Member States, particularly since they may target customers in Member States not allowing private copying.

47. Firstly, such a conclusion would threaten to distort competition in the internal market. For example, there are practical problems in identifying all the companies selling the blank media to customers in the Netherlands. Without the possibility of identifying all the Member State companies selling reproduction media in the Member State where the fair compensation is due, this distinction would take place on an arbitrary basis and would be contrary to the very objective of Directive

¹⁷ — Last sentence of recital 35 in the preamble to Directive 2001/29. See also *Padawan*, cited in footnote 3, paragraphs 39 and 46.

2001/29, which aims to ensure that competition in the internal market is not distorted.¹⁸

No 44/2001¹⁹ expressly aims to regulate such a situation by providing that it is only in cases where a company is targeting a particular territory that jurisdiction should exist.

48. Furthermore, it is not in my view necessary to require that all companies engaged in distance selling pay the fair compensation due in the Member State where the customers are located, since the harm in those cases may be minimal. Factors such as language differences, the use of different domain names with which consumers are unfamiliar and higher shipment costs will mean that consumers in one Member State will buy from companies established in other Member States in a limited number of cases. In the cases where a company is not targeting the consumers in a particular Member State and where the harm is minimal, practical problems also arise in terms of having to collect minimal sums from a company which has only sold one or two items to a customer in that Member State.

50. Although that regulation aims to regulate a different area of law to that of Directive 2001/29, it is appropriate to consider its interpretation since the nature of the problem is similar, namely, under what circumstances a company in another Member State may be liable or, in the present case under what circumstances it may be subjected to a fee, for goods it sells over the internet to a consumer in another Member State.

51. The issues of distance selling combined with the partial harmonisation envisaged in Directive 2001/29, means that it is only in situations where a company in another Member State is targeting the consumers of the referring court's Member State that it should be liable to pay fair compensation.

49. In addition, the sale of goods over the internet raises many issues in terms of the obligations of companies whose products are available online. Since the internet makes goods instantly available all over the EU the question arises in what circumstances the company should be liable. In my view some restrictions must necessarily exist, otherwise a company will be liable in all the jurisdictions of the world. Council Regulation (EC)

52. It is in this situation, furthermore, that the harm is likely to be greatest, and that the imposition of fair compensation is merited. In the present case, for instance, Thuiskopie has stated, without being contradicted on the

18 — *Padawan*, cited in footnote 3, paragraph 35. See also Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraphs 26, 31 to 34.

19 — Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

point, that Opus GmbH's sales amount to about one third of all blank media sold in the Netherlands.

53. Concerning the criteria for determining whether a company is targeting a particular Member State's market, inspiration can be drawn from the Court's recent interpretation of the meaning of activities 'directed to' the Member State of the consumer's domicile within the meaning of Regulation No 44/2001, mindful of the fact that Directive 2001/29 does not use that term.

54. In that respect the Court in *Pammer and Hotel Alpelhof* set out a non-exhaustive list of criteria capable of constituting evidence that a trader's activity was directed at a particular Member State. According to that case it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile. The criteria to be taken into account which are particularly relevant for the present case include (i) the use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established, (ii) the possibility of making and confirming the reservation in that other language, (iii) mention of telephone numbers with an international code, (iv) outlay of expenditure on an internet

referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, (v) use of a top-level domain name other than that of the Member State in which the trader is established, and (vi) mention of international clientele composed of customers domiciled in various Member States.²⁰

55. In my opinion it should also be noted that a company should not be obliged to pay fair compensation if it has already done so in another Member State. Thus, if a Member State where the company is established requires fair compensation to be paid and the company pays that compensation, then the rightholders' rights under Directive 2001/29 are being sufficiently protected. This also applies if the seller has paid the compensation in its home State on a voluntary basis, thereby leaving it up to the receiving collecting organisation representing the rightholders in that State to distribute to organisations of the targeted countries. To provide otherwise would amount to the payment of double compensation, which would not be required to fulfil the aims of that directive.

56. Finally, it is important to emphasise that a company cannot contract out of its mandatory EU law obligations.

20 — Cases C-585/08 and C-144/09 *Pammer and Hotel Alpelhof* [2010] ECR I-12527, paragraphs 75 to 76, 80 to 81, and 84.

57. In the present case Opus GmbH and their clients are using their freedom of contract in order to stipulate that the contract is executed outside the Netherlands with the effect that the 'importer' liable to pay the compensation fee according to Auteurswet is not the seller but the buyer. It seems that this solution rests on the rather unusual construction where the seller arranges the transportation of the goods to the consumer as the agent of the latter and not on its own behalf.

58. In my opinion the right to fair compensation provided for in Article 5(2)(b) of Directive 2001/29 cannot be contracted out between sellers of the media and their customers. Such agreements aim at eluding the effects of EU law. In consequence, the national legislation implementing Directive 2001/29 applied together with the national provisions relating to contracts cannot be given an interpretation that leads to such an outcome.

3. Does the three-step test require that the seller in a distance selling arrangement pays fair compensation in at least one of the Member States?

59. National law must be interpreted in a way which ensures that the three-step test is observed, meaning that the exception remains limited, does not conflict with the normal

exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.

60. In the present case the first two criteria point to the conclusion that fair compensation should be due in all distance selling arrangements in at least one Member State. In relation to the first criteria, the issue of fair compensation does not affect the limits of the exception, but merely refers to the remedy stemming from the exception. In relation to the second criteria, if fair compensation is not due it certainly will conflict with the normal exploitation of the work since the rightholder will not have his right to authorise reproductions and use of his work, but will not get the right to compensation either.

61. However, in my view, unless the consumers of the Member State in question are being targeted, there is no unreasonable prejudice to the legitimate interests of the rightholders since, as discussed above, the harm suffered by them is minimal.

62. For those reasons the three-step test does not, in my view, require that fair compensation is paid by all companies engaged in cross-border distance selling of reproduction media between the Member States, but merely by companies that are targeting the Member State's consumers in question.

IV — Conclusion

63. In conclusion I propose to the Court to give a single answer to the two preliminary questions as follows:

Articles 5(2)(b) and 5(5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society do not impose on the Member States a single solution as to how the payment of fair compensation to the rightholders is ensured in the case where the Member State has availed itself of the option to allow for private copying of copyright protected works and other protected subject-matter. These provisions do exclude any interpretation of the relevant national legislation that does not ensure effective payment of such fair compensation by a distant seller of media for reproducing such works or other protected subject-matter that targets customers in that Member State unless the seller has already paid comparable compensation in the Member State where the transaction takes place.