Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 6 September 2011 [1]

Case C-277/10

Martin Luksan
v
Petrus van der Let

(Reference for a preliminary ruling from the Handelsgericht Wien (Austria))

(Directive 93/83/EEC — Directive 2006/116/EC — Directive 2001/29/EC — Directive 2006/115/EC — Principal director's authorship of a film — Allocation of exclusive exploitation rights to the film producer — Conditions — Article 14bis of the Revised Berne Convention — Article 17 of the Charter of Fundamental Rights — Fair compensation for the author — Article 5(2)(b) of Directive 2001/29 — Rights to remuneration for private copies — Fair compensation)

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1 — Language of the Case: German. Original language: German

I – Introduction

1. This reference for a preliminary ruling from the Handelsgericht Wien (Commercial Court, Vienna; 'the national court') concerns the field of film copyright and essentially raises three questions relating to the rights of the author and the producer of the film.

2. First, the national court wishes to ascertain whether Article 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2] ('the Term of Protection Directive') defines the concept of the author of the film only for the purposes of that directive or whether that definition is of broader application going beyond that directive.

3. The national court further raises the question whether it is compatible with European Union law for national legislation to provide for the exclusive exploitation rights of reproduction, of satellite broadcasting and of other communication of the film to the public, in particular through making it available to the public, to originate with the film producer and not the author or authors of the film. This question is raised by the national court in the light of Article 2 of Directive 93/83/EEC of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights

2 — OJ 2006 L 372, p. 12.

related to copyright applicable to satellite broadcasting and cable retransmission [3] ('the Satellite and Cable Directive') and Articles 2 and 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [4] ('the InfoSoc Directive'). Under those provisions, the aforementioned exclusive exploitation rights belong in principle to the author of the cinematographic work.

4. A further question arising in the present case is to whom fair compensation under Article 5(2)(b) of the InfoSoc Directive is payable where the Member States restrict the right to reproduction of films under Article 2 of that directive as regards copies for private use.

II – Applicable law

A – *International law*

5. Article 14*bis* of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971) [5] (known as the Revised Berne Convention; 'the RBC') provides:

'(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)

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

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

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

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

3 — OJ 1993 L 248, p. 15.

4 — OJ 2001 L 167, p. 10.

5 — This footnote is not material to the English version of the Opinion.

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

B – *European Union law*

1. Charter of Fundamental Rights

6. Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter') governs the right to property and provides as follows:

'1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.'

2. Satellite and Cable Directive

7. Recitals 24 to 26 in the preamble to the Satellite and Cable Directive state:

'(24) … the harmonisation of legislation envisaged in this Directive entails the harmonisation of the provisions ensuring a high level of protection of authors, performers, phonogram producers and broadcasting organisations; … this harmonisation should not allow a broadcasting organisation to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual productions;

(25) … the protection provided for rights related to copyright should be aligned on that contained in Council Directive 92/100/EEC ... for the purposes of communication to the public by satellite; …, in particular, this will ensure that performers and phonogram producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms;

(26) the provisions of Article 4 do not prevent Member States from extending the presumption set out in Article 2(5) of Directive 92/100/EEC to the exclusive rights referred to in Article 4; …, furthermore, the provisions of Article 4 do not prevent Member States from providing for a rebuttable presumption of the authorisation of exploitation in respect of the exclusive rights of performers referred to in that Article, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations'.

8. Article 1 of the Satellite and Cable Directive contains definitions. Article 1(5) provides:

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

9. Article 2 of the Satellite and Cable Directive is in the chapter on broadcasting of programmes by satellite and governs the broadcasting right. It provides as follows:

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

10. Article 4 of the Satellite and Cable Directive relates to the rights of performers, phonogram producers and broadcasting organisations. It provides as follows:

‘1. For the purposes of communication to the public by satellite, the rights of performers, phonogram producers and broadcasting organisations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive 92/100/EEC.

2. For the purposes of paragraph 1, “broadcasting by wireless means” in Directive 92/100/EEC shall be understood as including communication to the public by satellite.

3. With regard to the exercise of the rights referred to in paragraph 1, Articles 2(7) and 12 of Directive 92/100/EEC shall apply.’

3. Term of Protection Directive

11. Recital 4 in the preamble to the Term of Protection Directive states:

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

12. Article 2 of that directive relates to cinematographic or audiovisual works and provides as follows:

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

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

13. Directive 93/98/EEC was codified in Directive 2006/116. Any reference to the Term of Protection Directive is a reference to Directive 2006/116. Since there however are no differences between the abovementioned provisions and those of Directive 93/98, my observations apply *mutatis mutandis* to Directive 93/98.

4. InfoSoc Directive

14. Recital 20 in the preamble to the InfoSoc Directive states:

‘This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC ..., 92/100/EEC ..., 93/83/EEC ..., 93/98/EEC ... and 96/9/EC ..., and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.’

15. Article 1(2) of the InfoSoc Directive provides:

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

…

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

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

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

…’

16. Article 2 of the InfoSoc Directive provides:

‘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;

(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 these broadcasts are transmitted by wire or over the air, including by cable or satellite.’

17. Article 3 of the InfoSoc Directive provides:

‘Right of communication to the public of works and right of making available to the public other subject-matter

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

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

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

(b) for phonogram producers, of their phonograms;

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

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

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

18. Article 5(2)(b) of the InfoSoc Directive provides:

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

…

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

5. Rental and Lending Rights Directive

a) (a) Directive 92/100

19. Article 2 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[6] concerns the rightholders and subject-matter of rental and lending right. Article 2(2) provides:

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

b) (b) Directive 2006/115

20. Directive 92/100 was consolidated in Directive 2006/115/EC of the European Parliament and of the Council of 12 May 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)[7] ('the Rental and Lending Rights Directive').

21. Article 2 of that directive is headed 'Definitions'. Articles 2(1) and (2) provide:

1. For the purposes of this Directive the following definitions shall apply:

…

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

6 — OJ 1992 L 346, p. 61.
7 — OJ 2006 L 376, p. 28.

22. Articles 3(4) and (5) of Directive 2006/115 provides:

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

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

23. Article 5(1) to (3) of Directive 2006/115 provides:

‘Unwaivable right to equitable remuneration

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

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

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.’

C – *National law*

24. Paragraph 16a(5) of the Austrian Federal Law on copyright in works of literature and art and related rights (Urheberrechtsgesetz; ‘the UrhG’) provides:

‘Where a person entitled to exploit a work, or the film producer entitled under Paragraph 38(1), permits other persons for remuneration to rent or be lent works, the author has an unwaivable claim against the person entitled to exploit the work or the film producer to a reasonable share of such remuneration. If another person is entitled under the law or a contract to the remuneration for the lending of works, the author shall have an unwaivable claim to a reasonable share of the remuneration.’

25. Paragraph 38(1) of the UrhG provides:

‘The exploitation rights in commercially produced cinematographic works shall vest in the owner of the undertaking (film producer) subject to the limitation provided for in Paragraph 39(4). The author’s statutory rights to remuneration shall be shared equally by the film producer and the author, provided that they are not unwaivable and the film producer and the author have not agreed otherwise. This provision shall be without prejudice to copyright in the works used in the creation of the cinematographic work.’

26. Paragraph 39(1) of the UrhG provides:

‘Any person who has participated in the creation of a commercially produced cinematographic work in such a way that the overall conception of the work thereby acquires the status of an individual intellectual creation may ask the producer to be credited in the film and in announcements about the cinematographic work as its author.’

27. Paragraph 42b(1) of the UrhG provides:

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

III – Facts, proceedings before the national court and questions referred for a preliminary ruling

A – *Facts*

28. The applicant in the main proceedings is the scriptwriter and principal director of the documentary film entitled 'Photos from the Front' on German war photography in the Second World War. The film takes a critical view of the ambivalence of war photography. To this end, the applicant made a personal choice from the extensive visual material available. The documentary is a cinematographic work.

29. The defendant in the main proceedings is a producer, producing cinematographic and other audiovisual works commercially. He is the (commercial) producer of the aforementioned film.

30. On 13 March 2008, the parties in the main proceedings concluded a 'directing and authorship agreement' under which the applicant in the main proceedings acts as scriptwriter and principal director, while the defendant in the main proceedings produces and exploits the film.

31. Without prejudice to his moral rights, the applicant granted to the defendant all copyright and/or related rights in the film. However, the right to make available to the public on digital networks and the right to television broadcasting by closed-circuit television, that is to say transmission to closed circles of users, as well as pay TV, that is to say (encrypted) transmission for separate remuneration, remained excluded from the grant of rights. No express provision was made concerning statutory rights to remuneration.

32. The applicant in the main proceedings assigned the statutory rights to remuneration, in particular the 'blank cassette remuneration' under Paragraph 42b of the UrhG, in advance, that is to say before the conclusion of the abovementioned directing and authorship agreement, to a collecting society on a fiduciary basis.

33. The film was premiered on 14 May 2009. It was first broadcast by BRalpha on 7 September 2009; the film is available on DVD too.

34. The defendant in the main proceedings also made the film available on the internet and assigned rights in that connection to 'Movieeurope.com'. The film can be downloaded from this platform by means of video on demand. In addition, a trailer of the film was made available by the defendant on the internet through 'YouTube'. Furthermore, the defendant assigned the pay TV rights to 'Scandinavia.tv'.

B – *Proceedings before the national court*

35. The applicant brought an action against the defendant in the main proceedings before the national court.

1. Exclusive exploitation rights

36. The applicant in the main proceedings views the defendant's use and/or the granting of rights in respect of the kinds of use contractually reserved to the applicant as a breach of contract and of copyright. He seeks, firstly, a declaration that, as regards the screenplay and the cinematographic work created by him as principal director, he owns the right to make them available to the public (video on demand) and the right to make television broadcasts to closed circles of users and by means of pay TV.

37. In contrast, the defendant in the main proceedings submits that all exclusive exploitation rights in the film belong to him as the film producer. Under the first sentence of Paragraph 38(1) of the UrhG, the exclusive exploitation rights pleaded by the applicant belonged from the outset to the defendant as producer and not to the applicant. The reservation by the applicant in the directing and authorship agreement is therefore void.

38. The national court states in that connection that, under the first sentence of Paragraph 38(1) of the UrhG, the exploitation rights in commercially produced cinematographic works vest in the producer. It explains that this national provision is understood by the Supreme Court in its case-law not as a (presumed) transfer of rights, but as an original, direct conferral of the exploitation rights upon the film producer exclusively. On that interpretation of the first sentence of Paragraph 38(1) of the UrhG, any agreements to the contrary are void and the rights cannot be revoked by the author of the film.

39. The national court has doubts as to whether that interpretation of the first and second sentences of Paragraph 38(1) of the UrhG is consistent with European Union law.

2. Statutory rights to remuneration

40. Secondly, the applicant in the main proceedings seeks a declaration that he is entitled to one half of the statutory rights to remuneration, in particular the 'blank cassette remuneration' under Paragraph 42b of the UrhG.

41. By contrast, the defendant in the main proceedings submits that he as film producer is also entitled in full to the statutory rights to remuneration provided for in the UrhG, in particular the 'blank cassette remuneration', since these share the fate of the exploitation rights. He states that this applies not only to the half-share to which the film producer is entitled pursuant to the second sentence of Paragraph 38(1) of the UrhG, but also to the other half-share, to which authors of films are entitled under the same provision. An agreement which departs from the statutory rules is permissible and is covered by the directing and authorship agreement.

42. The national court points out that, under the second sentence of Paragraph 38(1) of the UrhG, the statutory rights to remuneration are shared equally by the film producer and the author, provided that they are not unwaivable and the film producer and the author have not agreed otherwise. The inability to waive rights which is referred to in the second sentence of Paragraph 38(1) of the UrhG applies, pursuant to Paragraph 16b(5) of the UrhG, only to remuneration for lending for the purposes of Article 5 of the Rental and Lending Rights Directive, which is not relevant to the present proceedings. It is possible to waive other rights to remuneration, especially the 'blank cassette remuneration'.

43. The national court considers that the provision on statutory rights to remuneration in the second sentence of Paragraph 38(1) of the UrhG, under which the film author is entitled to half of the rights, is reasonable. However, it has doubts as to the compatibility of this provision with European Union law, since the film author's right is not unalterable.

C – *Questions referred for a preliminary ruling*

44. By an order for reference lodged at the Registry of the Court of Justice on 3 June 2010, the national court referred the following questions for a preliminary ruling:

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

If the answer to Question 1 is in the affirmative:

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

   b Must the original ownership of rights which is enjoyed by the principal director of a cinematographic or audiovisual work or other authors of films who are designated by the legislature of a Member State also be applied to the rights granted by the legislature of a Member State to equitable remuneration, such as 'blank cassette remuneration' pursuant to Paragraph 42b of the UrhG, or to rights to fair compensation within the meaning of Article 5(2)(b) of the InfoSoc Directive?

If the answer to Question 2b is in the affirmative:

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

If the answer to Question 3 is in the affirmative:

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

IV – Proceedings before the Court of Justice

45. Written observations were submitted by the applicant and the defendant in the main proceedings, the Austrian and Spanish Governments and the Commission.

46. There was a hearing on 5 May 2011 attended by representatives of the applicant and the defendant in the main proceedings, of the Austrian Government and of the Commission, who supplemented their written submissions and answered questions.

V – First question referred and first part of the second question referred

47. The national court has doubts as to the compatibility of national legislation such as the first sentence of Paragraph 38(1) of the UrhG with European Union law. It explains in its order for reference that this national provision is regarded by national case-law and the prevailing legal literature not as a presumed transfer of the exploitation rights to the film producer, but as an original, direct allocation of the exploitation rights to the film producer exclusively.

48. The first question and the first part of the second question are concerned with this provision.

49. The national court seeks in the first instance to ascertain whether Article 2(2) of the Rental and Lending Rights Directive, Article 1(5) of the Satellite and Cable Directive, Article 2(1) of the Term of Protection Directive and Article 3(1) of the InfoSoc Directive give rise to an obligation on the part of the Member States to initially confer the exclusive exploitation rights in respect of satellite broadcasting, reproduction and communication to the public, in particular making available to the public, on the principal director as the author of the film and, where appropriate, on other authors of films who are designated by the relevant Member State.

50. In the event that there is such an obligation to make an initial conferral on the author of the film, the national court also wishes to ascertain whether a national provision whereby the principal director is presumed to have transferred the abovementioned exploitation rights to which he is entitled as author of the film to the film producer or to have granted the film producer corresponding user rights is compatible with European Union law.

51. If such a presumption were to be ruled permissible under European Union law, the referring court would also wish to ascertain what the conditions to which the presumption must be subject are and whether, in this context, recourse may, where appropriate, be had to the requirements in Article 3(4) and (5) of the Rental and Lending Rights Directive.

A – *Essential arguments of the parties*

52. In the view of the *applicant in the main proceedings* and of the *Spanish Government*, a national rule such as the first sentence of Paragraph 38(1) of the UrhG is not compatible with European Union law.

53. According to the provisions of European Union law cited by the national court, a Member State is obliged to allocate the aforementioned exclusive exploitation rights initially to the author of the film.

54. So far as concerns the exclusive rights of reproduction and of communication to the public, and in particular of making available to the public, which belong to the author under Articles 2 and 3 of the InfoSoc Directive, that follows from Article 2(1) of the Term of Protection Directive. According to that provision, the principal director at least is the author of the cinematographic work. This rule, unlike the corresponding provisions in Article 2(2) of the Rental and Lending Rights Directive and Article 2(5) of the Satellite and Cable Directive, is not limited to the purposes of the directive, but is of horizontal, that is to say, general, application.

55. In this context, the applicant in the main proceedings first of all points out that there is no indication in Article 2(1) of the Term of Protection Directive that that provision is limited to the purposes of the directive. Furthermore, to interpret that provision as being limited in application to the purposes of the Term of Protection Directive would significantly limit its practical effect. For it is plain from Article 2(2) of that directive that the term of protection does not depend on the determination as to the author of the film. It would furthermore be inconsistent with the general scheme if related rights were conferred on performers under the Rental and Lending Rights Directive but no rights whatsoever were conferred on the principal director of a film.

56. So far as concerns the exclusive satellite broadcasting right, that follows from Articles 2 and 1(5) of the Satellite and Cable Directive.

57. According to the applicant in the main proceedings, a national provision which conferred the exclusive exploitation rights in a cinematographic work on the film producer would render the provisions of European Union law meaningless. The Spanish Government observes that it is admittedly open to Member States to confer copyright in the cinematographic work on the film producer too. The producer may also be entitled to the copyright in a cinematographic work initially, though never exclusively.

58. However, the *applicant in the main proceedings* and the *Spanish Government* are of the view that a national provision creating a statutory presumption that the principal director has contractually granted the producer the corresponding user rights is compatible with European Union law.

59. It is true that neither the Term of Protection Directive nor the Satellite and Cable Directive contains rules on the permissibility of statutory presumptions. It must, however, be noted that such rules as to presumption facilitate trade in intellectual property rights in the film industry considerably. Otherwise the film producer runs the risk that, once production of the film is complete, he does not own the rights necessary to exploit the cinematographic work, which would hinder investment in film production.

60. Such a rule laying down a presumption is nevertheless permissible only if the requirements provided for in Article 2(5) and (6) of Directive 92/100 have been adopted. The analogous application of Article 2(5) and (6) of Directive 92/100 is supported, in the view of the applicant in the main proceedings, by the fact that those requirements are to apply, according to the 19th recital in the preamble to that directive, not only to rental and lending right, but also to the related rights of performers under the directive. That must be so a fortiori as regards a principal director's copyright. Furthermore, the Court of Justice also drew an analogy in *Infopaq*,[8] with the result that such an approach is permissible at the level of secondary legislation.

8 — Case C-5/08 *Infopaq International* [2009] ECR I-6569.

61. There must therefore firstly be a contractual relationship between the director of the film and its producer. Secondly, the rule must provide for a presumption that is rebuttable. Thirdly, it must provide for an unwaivable right to equitable remuneration within the meaning of Article 4 of Directive 92/100.

62. At the hearing, the applicant in the main proceedings advanced additional observations on the reasons why only the Rental and Lending Rights Directive contains rules on the presumption. It was necessary to lay down such rules expressly in the Rental and Lending Rights Directive because Article 14*bis* of the RBC does not apply to rental and lending rights.

63. In contrast, the *defendant in the main proceedings*, the *Austrian Government* and the *Commission* consider that a provision such as the first sentence of Paragraph 38(1) of the UrhG is compatible with European Union law.

64. In the view of the *defendant in the main proceedings*, the provisions of European Union law referred to by the national court which provide for copyright of the principal director are limited in scope in each case to the matters regulated by the directives. They cannot be viewed as a general adoption of the creator principle.

65. In the alternative, it submits that national rules which provide for a presumption that the exploitation rights are transferred by the principal director to the film producer are compatible with European Union law.

66. Nor are there, in the case of such rules, any requirements of European Union law comparable with Article 3(4) and (5) of the Rental and Lending Rights Directive, as there are no such requirements in the Term of Protection Directive.

67. In the view of the *Austrian Government*, the provisions of European Union law mentioned by the national court do not require that the exploitation rights mentioned by it be conferred initially on the author of the film. The questions of authorship and of initial acquisition of rights were not definitively settled there.

68. Firstly, this view accords with the report of the Commission of 6 December 2002 on the question of authorship of cinematographic and audiovisual works, according to which Member States may take Article 14*bis*(2) and (3) of the RBC as a basis. Under Article 14*bis*(2)(a) of the RBC it is reserved to the parties to determine who owns the copyright in cinematographic works.

69. Secondly, the fact that the European Union legislature did not, in Article 2(1) of the Term of Protection Directive, limit the scope of the definition of an author to the 'purposes of the directive' does not necessarily mean that the directive effected a harmonisation extending beyond the field of term of protection. The fact that the scope of the definition of 'author' is restricted to the Term of Protection Directive may be inferred from the fact that determination of the author of the cinematographic work is essential for calculating the term of protection.

70. Thirdly, Article 1(4) of the Term of Protection Directive refers to cases in which a Member State lays down particular provisions on copyright in respect of collective works or of legal persons as the rightholder. This recognises the possibility that Member States may lay down special provisions in those cases for establishing authorship. It is paradoxical not to permit this for cinematographic works despite the fact that there is a great practical need for the rights to be concentrated in the film producer.

71. In the alternative, the Austrian Government submits that national rules laying down presumptions in favour of the transfer of the exploitation rights to the film producer are compatible with European Union law. Such presumptions are not definitively governed by the provisions of European Union law referred to by the national court. The Term of Protection Directive refers in recital 5 in its preamble to Article 14*bis*(2) and (3) of the RBC, which forms the basis for divergent rules in relation to the presumed transfer of rights. The InfoSoc Directive has not changed this.

72. Also, further requirements for framing rules on presumption were laid down only in the context of the Rental and Lending Rights Directive, for example that there must be a right to remuneration. In other areas there are therefore no corresponding provisions of European Union law.

73. At the hearing, the Austrian Government also stated that Paragraph 38(1) of the UrhG does not preclude the producer and the author of the film from agreeing something different. The producer and the author of the film can thus agree between them that the author of the film is entitled to the exclusive rights.

74. The *Commission* observes firstly that the Rental and Lending Rights Directive is not relevant. The rules in Article 2(2) of that directive for determining the author of a cinematographic work are thus not pertinent, since they were adopted for that directive only. In so far as Directive 2006/115 is less clear in this regard than Directive 92/100, it should be borne in mind that Directive 92/100 was codified by Directive 2006/115 and this should not have resulted in any substantive changes.

75. Secondly, the Satellite and Cable Directive contains no indications that the principal director of a cinematographic work is granted a harmonised copyright initially. It merely contains references to substantive legal rules to be observed in the case of public satellite communication and of cable transmission.

76. First of all, Article 2 of that directive admittedly provides that authors, and thus, pursuant to Article 1(5) of the directive, also the principal director, have the exclusive right to authorise the communication to the public by satellite of the cinematographic work. However, it contains no explicit indication as to whether this exclusive reservation can be granted by means of copyright or of another exclusive right.

77. Further, Article 8(1) of the Satellite and Cable Directive requires Member States to ensure only that in the event of cross-border cable transmission of programmes 'the applicable copyright and related rights' are observed. It argues that this also follows from recital 27 in the preamble to the directive, which refers to existing provisions governing copyright and rights related to copyright. Article 4 of the directive also refers, in relation to the definition of the applicable substantive related rights, to the relevant provisions of the Rental and Lending Rights Directive.

78. In this context, the Commission further states that the relevant substantive copyright of authors upon the adoption of the Satellite and Cable Directive was not yet governed by European Union law but by Article 11*bis* and 14*bis* of the RBC. Today Article 3(1) of the InfoSoc Directive contains a comprehensive right of communication to the public which also includes communication to the public by satellite within the meaning of Article 1(1)(a) of the Satellite and Cable Directive. The question whether the principal director is entitled to a corresponding right therefore arises only from the InfoSoc Directive and not from the Satellite and Cable Directive.

79. Thirdly, the provision as to determination of the author of cinematographic works in Article 2(1) of the Term of Protection Directive cannot be construed as harmonising authorship of a cinematographic work for the purposes of the entire copyright *acquis*. This provision relates only to the question of the term of protection. Since there are so many possible authors of cinematographic works, it is essential that it be laid down who the possible authors are where the rule on term of protection is connected to the death of the author.

80. Fourthly, the InfoSoc Directive admittedly relates to the disputed rights. Articles 2, 3 and 5(2)(b) are, however, of no assistance, because they do not determine who are the authors and holders of a given right. There is no basis for making a link to the definitions in Article 2(2) of the Rental and Lending Rights Directive, Article 2(1) of the Term of Protection Directive and Article 1(5) of the Satellite and Cable Directive. Article 1(2) of the InfoSoc Directive, according to which those directives remain intact, governs the relationship to those directives exhaustively.

81. Lastly, the Commission points out that these observations accord with its observations in its report on authorship of cinematographic or audiovisual works of 6 December 2002, in which it concluded that European Union legislation had not fully harmonised the concept of authorship of cinematographic and audiovisual works.

B – *Legal appraisal*

82. The national court asks, first, whether the provisions of European Union law mentioned by it require that certain exclusive exploitation rights be allocated initially to the principal director of a cinematographic work. Should that question be answered in the affirmative, it would also like to know whether, and under what conditions, it is compatible with those rules for national legislation to apply the presumption that those exploitation rights are transferred to the film producer.

83. I propose to deal with the national court's questions in the following way. First I shall examine whether, for the purposes of the provisions of European Union law relevant to this case, the principal director of a film is to be considered to be the author of a cinematographic work (1). Since this is to be answered in the affirmative, I shall go on to examine whether European Union law mandatorily demands that the exclusive rights in question be allocated initially to the principal director as the author of the film (2). To my mind it does not, but a Member State which does not allocate the pertinent exclusive rights initially to the principal director as author of the film must take into account certain requirements (3). Finally, I shall deal with the conditions subject to which a national provision such as the first sentence of Paragraph 38(1) of the UrhG is compatible with European Union law (4).

1. Authorial status of the principal director of a cinematographic work

84. The first question to arise is whether the principal director of a film is to be considered the author of the cinematographic work for the purposes of the exclusive rights at issue in this case. A distinction must be drawn in that connection between the exclusive rights governed by the Satellite and Cable Directive and those governed by the InfoSoc Directive.

a) Satellite and Cable Directive

85. The national court has referred, inter alia, to the right of communication of the cinematographic work to the public by satellite. According to Article 2 of the Satellite and Cable Directive, that right belongs to the author or authors of the cinematographic work. Article 1(5) of that directive determines who the authors are for the purposes of Article 2. Article 1(5) states that, for the purposes of the directive, the principal director of a cinematographic work is to be considered its author or one of its authors, whilst the Member States may provide for other persons to be considered its co-authors.

b) Term of Protection and InfoSoc Directives

86. The national court refers to the reproduction right and the right of communication to the public, including making available to the public, which are governed by Articles 2 and 3 of the InfoSoc Directive. These articles provide that those rights belong to the author. However, the term 'author' is not defined in the InfoSoc Directive itself.

87. In this connection, the question arises whether, in the context of Articles 2 and 3 of the InfoSoc Directive, recourse may be had to the definition of the author of the film in Article 2(1) of the Term of Protection Directive. Under that provision, at least the principal director of a cinematographic work is to be considered its author, whilst the Member States may provide that other persons are to be considered authors in addition.

88. It would be possible to have recourse to this definition if, first, the InfoSoc Directive were to allow recourse to other copyright directives and, secondly, Article 2(1) of the Term of Protection Directive were to contain a definition of the author which has validity beyond the scope of that directive, and thus also applies to the InfoSoc Directive.

89. In my view both these requirements are fulfilled.

90. First, the InfoSoc Directive permits recourse to other copyright directives.

91. That is apparent from recital 20 in the preamble, according to which the InfoSoc Directive is based on principles and rules already laid down in the directives in force in the area. The Term of Protection Directive is specifically mentioned in this connection. Reference to the provisions of the Term of Protection Directive is therefore expressly envisaged.

92. Nor, contrary to the view of the Austrian Government and the Commission, can anything to the contrary be inferred from Article 1(2) of the InfoSoc Directive. The fact that that article provides that the InfoSoc Directive is in principle to leave intact and in no way affect the provisions, in particular, of the Term of Protection Directive does not mean that recourse cannot be had to the principles and rules contained in such directives. It simply means that the provisions of the InfoSoc Directive may not be interpreted in such a way as to override the provisions contained in the Term of Protection Directive.

93. Secondly, Article 2(1) of the Term of Protection Directive contains a definition which also applies to Articles 2 and 3 of the InfoSoc Directive.

94. Support for this view is found, first, in the wording of the provision. Unlike the otherwise comparable definitions in Article 2(2) of the Rental and Lending Rights Directive[9] and Article 1(5) of the Satellite and Cable Directive, Article 2(1) of the Term of Protection Directive does not restrict the scope of the definition which it contains of author of the film to the purposes of the directive.

95. Further support for this view is provided by the broad logic of the provision. Contrary to the view of the Austrian Government and the Commission, the definition in Article 2(1) of the Term of Protection Directive of the author of the film cannot be limited to the purposes of that directive. That would severely restrict the practical effect of the provision. Contrary to the submissions of the Commission and the Austrian Government, the definition of author of the film in Article 2(1) is

9 — It is true that Article 2(2) of the Rental and Lending Rights Directive in its current version does not expressly restrict the definition to the purposes of the directive. However, the Commission rightly points out that the current version, that is to say, Directive 2006/115, is merely an official codification of Directive 92/100. Article 2(2) of the latter instrument, which was otherwise identical, did contain a corresponding restriction of the definition to the purposes of the directive. Since an official codification does not substantively amend the legal act replaced (see the interinstitutional agreement of 20 December 1994 on an accelerated working method for the official codification of legislative texts (OJ 1996 C 102, p. 2, paragraph 1)), the corresponding restriction is to be read into Article 2(2) of Directive 2006/115.

irrelevant to the duration and the beginning of the term of protection under Article 2(2).[10] According to Article 2(2) of the Term of Protection Directive, the period of protection begins to run upon the death of the last surviving person within an exhaustively listed group. Those persons comprise the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic work; it does not, however, matter whether those persons are authors of the cinematographic work.

96. Nor, moreover, does the drafting history of the Term of Protection Directive provide a countervailing argument. After the Commission's first draft of the Term of Protection Directive of 23 March 1992 had contained no rules on film authorship,[11] the European Parliament pressed for harmonisation in this connection as well.[12] The amendments proposed by the European Parliament provided for a system of co-authorship of all the intellectual creators of the cinematographic work, who were to be listed individually in the text of the directive.[13] However, in the further course of the legislative process it did not prove to be achievable to list all possible creators.[14] The Commission's amended proposal for a directive of 30 January 1993 therefore limited itself to the formulation subsequently reproduced — with only minor linguistic amendment — by Article 2(1) of the Term of Protection Directive under which the principal director is considered to be one of the authors of the cinematographic work and the Member States otherwise have discretion.[15] It is admittedly therefore true that Article 2(1) of the Term of Protection Directive did not definitively settle who is the author of a cinematographic work. However, the overriding requirement is certainly to be inferred therefrom that at least the principal director is to be regarded as an author of the cinematographic work. That view is corroborated by the report of 6 December 2002 from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community. The Commission expressly stated therein that the Term of Protection Directive determined the principal director to be author of the cinematographic work generally and to that extent effected a partial harmonisation of the concept of authorship.[16]

97. By way of supplementary observation only, it should be noted in this context that the Term of Protection Directive also contains further provisions which have validity beyond determination of the term of protection. Thus the question as to when photographs constitute works eligible for protection for the purposes of the InfoSoc Directive may be determined by reference to Article 6 of the Term of Protection Directive.[17]

98. It thus follows from Article 2(1) of the Term of Protection Directive that the principal director is to be considered the author of a film for the purposes of Articles 2 and 3 of the InfoSoc Directive.

10 — See Juranek, J., *Die Richtlinie der Europäischen Union zur Harmonisierung der Schutzfristen im Urheber- und Leistungsschutzrecht*, Manz, 1994, p. 34 et seq., in which the author points out that the questions of authorship and of the factual requirements pertaining to the term of protection have been separated by Article 2(1) and (2) of the Term of Protection Directive.

11 — COM(92) 33 final — SYN 395 (OJ 1992 C 92, p. 6): on this, see von Lewinski, S., 'Der EG-Richtlinienvorschlag zur Harmonisierung der Schutzdauer im Urheber- und Leistungsschutzrecht', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 1992, p. 724, 730.

12 — For the detailed background, see Dworkin, G., 'Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright', 5 *European Intellectual Property Review*, 1993, p. 151, 154; Juranek, J., *Harmonisierung der urheberrechtlichen Schutzfristen in der EU*, Manz, 1994, p. 33.

13 — See legislative resolution A-3-0348/92 (OJ 1992 C 337, p. 209).

14 — For the reasons, see again: Dworkin, G. (cited at footnote 12 above), p. 154, and Juranek, J. (cited at footnote 12 above), p. 33 et seq.

15 — COM(92) 602 final — SYN 395 (OJ 1993 C 27, p. 7), in particular Article 1a(2) of the amended proposal.

16 — COM(2002) 691 final, p. 7 et seq.

17 — See points 119 to 123 of my Opinion of 12 April 2011 in the pending case of *Painer* (C-145/10).

c) Interim conclusion

99. By way of interim conclusion it must be stated that, in relation to the exclusive rights regulated by Article 2 of the Satellite and Cable Directive and Articles 2 and 3 of the InfoSoc Directive, the principal director must at least also be regarded as author of the film.

2. Must the exclusive exploitation rights be allocated initially to the principal director as author of the film?

100. I now propose to consider whether the relevant provisions of European Union law contain a mandatory requirement on the Member States to confer the pertinent exclusive exploitation rights initially on the principal director as author of the cinematographic work.

101. In this context, it must first be noted that the provisions cited by the national court in principle confer the exploitation rights concerned on the author of a cinematographic work (a). However, regard must also be had to recital 5 in the preamble to the Term of Protection Directive, according to which the application of Article 14*bis*(2)(b), (c) and (d) and (3) of the RBC remains unaffected by the provisions of the Term of Protection Directive. Thus, Member States retain the power to lay down rules under which in certain circumstances the principal director cannot oppose certain means of exploiting the film (b). I believe that this empowers the Member States to provide that the exclusive exploitation rights originate with the producer (c), provided that in so doing they take into account the mandatory requirements stemming from Article 14*bis*(2)(b) to (d) and (3) of the RBC and from the provisions relating to fundamental rights under European Union law (d).

a) Allocation in principle of exclusive exploitation rights to the author of the film

102. As a starting point, it should be noted that the following exclusive exploitation rights are conferred in principle on the principal director as author of the film within the meaning of Article 2 of the Satellite and Cable Directive and Article 2(1) of the Term of Protection Directive:

— under Article 2 of the Satellite and Cable Directive, the right to authorise the cinematographic work to be communicated to the public by satellite;

— under Article 2 of the InfoSoc Directive, the right to authorise or prohibit direct or indirect, temporary or permanent reproduction of his cinematographic work by any means and in any form, in whole or in part;

— under Article 3(1) of the InfoSoc Directive, the right to authorise or prohibit any communication to the public of his cinematographic work, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them.

b) Power to limit the exclusive exploitation rights of the author of the film

103. However, recital 5 in the preamble to the Term of Protection Directive makes it clear that the provisions of the Term of Protection Directive, hence, in particular, also the definition of the author of a cinematographic work in Article 2(1), must be interpreted as not affecting the application by the Member States of Article 14*bis*(2)(b), (c) and (d) and (3) of the RBC.

104. Article 14*bis*(2)(b) of the RBC lays down a special rule for the case where persons, by reason of their contributions to the production of a cinematographic work, are recognised as authors of the cinematographic work. If such persons have contractually undertaken to bring such a contribution, they are in principle [18] to be unable, in spite of their status as authors, to object to the exploitation of the cinematographic work, in particular by way of reproduction or communication to the public. It is true that Article 14*bis*(3) of the RBC provides that this rule is not in principle applicable to the principal director of a cinematographic work. However, it is open to the States party to the RBC to apply the rule to the principal director too.

105. The aim of Article 14*bis*(2)(b) to (d) and (3) of the RBC is to enable the film producer to exploit the film even if he has made no express agreement with the persons involved therein concerning the transfer or exploitation of the rights to which they are entitled. [19] Account is thus taken of the fact that films have a dual nature. On the one hand, they are the results of intellectual creation and presuppose such creation. On the other hand, they are costly industrial products. The provisions in Article 14*bis*(2)(b) to (d) and (3) of the RBC are intended to ensure that the fact that there are so many authors and copyrights does not adversely affect the possibilities of exploiting a film.

106. Indeed, if the exploitation of a film required the consent of each individual author, that would compromise legal certainty in dealings in films and adversely affect not only the film producer but ultimately also the other persons involved. The financing of film production could also be made more difficult in the absence of sufficient guarantees.

107. The idea which is contained in recital 5 in the preamble to the Term of Protection Directive is to be taken into account in the context of the reproduction right under Article 2 of the InfoSoc Directive and the right of communication to the public under Article 3 of the InfoSoc Directive. Those rights connect to the definition of the author of the film in Article 2(1) of the Term of Protection Directive.

108. The same is true of the right of communication to the public by satellite governed by Article 4 of the Satellite and Cable Directive, which admittedly does not contain a recital corresponding exactly to recital 5 in the preamble to the Term of Protection Directive.

109. However, the first argument in support of that idea being taken into consideration is provided by recital 35 in the preamble to the Satellite and Cable Directive. This states that the Member States are granted discretion to supplement the general provisions needed to achieve the objectives of the directive by taking legislative and administrative measures in their domestic law, provided that these do not run counter to the objectives of the directive and are compatible with European Union law. On the basis of the above considerations, this discretion should encompass in particular the adoption of national provisions as envisaged in Article 14*bis*(2)(b) to (d) and (3) of the RBC. Their objective of guaranteeing exploitation of a film by the film producer even if he has made no agreement with the persons involved in the cinematographic work with regard to their copyright in the work resulting from participation in it is in fact compatible with the objectives of the Satellite and Cable Directive. It is clear from Article 4 of, and recitals 25 and 26 in the preamble to, the Satellite and Cable Directive, which make reference to analogous provisions in the Rental and Lending Rights Directive — provisions which however concern only the related rights of performers and phonogram producers — that that idea is not fundamentally alien to the Satellite and Cable Directive.

18 — The following applies, under Article 14*bis*(2)(b) and (d), subject to any contrary or special stipulation in the agreement in which they have undertaken to bring the contribution. See, on this, point 126 of this Opinion.

19 — Katzenberger, P., 'Urheberrechtsverträge im Internationalen Privatrecht und Konventionsrecht', in Beier et al. (editors), *Urhebervertragsrecht — Festgabe für Gerhard Schricker zum 65. Geburtstag*, Beck 1995, p. 225, 237; Nordemann, W./Vinck, K./Hertin, P.W./Meyer, G., *International Copyright and Neighboring Rights Law: commentary with special emphasis on the European Community*, VCH 1990, Articles 14/14*bis* paragraph 10.

110. Secondly, it should be noted that, in Article 2(1) of the Term of Protection Directive, the European Union legislature adopted a rule on the authorship of the principal director which applies to the entire copyright *acquis* of the European Union and which was enacted after the provisions of the Satellite and Cable Directive had been adopted. I think that it can also be inferred from this that the reference, in recital 5, to Article 14*bis*(2)(b) to (d) and (3) of the RBC applies to all cases which concern the exclusive rights of the principal director as the author of the film.

c) Permissibility of initial allocation of the exclusive exploitation rights to the film producer

111. In the view of the applicant in the main proceedings, only a national rule which allocates the pertinent exclusive exploitation rights initially to the author of the film is compatible with the requirements of European Union law. Thus, only a national rule under which it is presumed that those rights are transferred to the film producer or that he is granted the right to exploit them can be compatible with European Union law.

112. That view cannot be accepted.

113. Firstly, the wording of Article 14*bis*(2)(b) to (d) and (3) of the RBC seems open enough to cover also a national rule under which the exclusive exploitation rights originate not with the principal director, but only with the film producer. Article 14*bis*(3) of the RBC, in conjunction with Article 14*bis* 2(b), provides that a State party to the Berne Convention may enact provisions under which the principal director may not object to reproduction and communication to the public. This wording seems to me to cover not only a rule under which these rights originate with the author of the film and then their transfer to the film producer is presumed, but also a rule under which such rights originate with the producer.

114. Secondly, depending on the way in which the national legal system is structured, such an approach may be appropriate in order to attain the objective pursued in Article 14*bis*(2)(b) to (d) and (3) of the RBC. If the exclusive exploitation rights originate with the author of the film, they are at risk, depending on the structuring of the national legal system, of being assigned in advance. In such a case, the presumption of a transfer of the rights to the film producer does not suffice to eliminate the risk that exploitation might be prevented.

d) Interim conclusion

115. As an interim conclusion it is to be stated that the exclusive exploitation rights of reproduction, communication to the public including making available to the public, and communication to the public by satellite are in principle conferred on the principal director as the author of the cinematographic work, as well as possibly other authors. Notwithstanding this conferral in principle, a Member State has the power to adopt a national rule whereby these exclusive exploitation rights originate with the film producer. Such a rule is only permitted, however, if the Member State takes into consideration the requirements of European Union law to which such a rule is subject. I shall consider those requirements below.

3. Conditions governing initial allocation of exclusive exploitation rights to the film producer

116. Even if a Member State is entitled to lay down a national rule whereby the exclusive exploitation rights originate exclusively with the film producer, it must in so doing comply with certain conditions. Contrary to the opinion of the applicant in the main proceedings, in this context there can be no analogy with Article 3(4) and (5) of the Rental and Lending Rights Directive (a). However, Article 14*bis* (2)(b) to (d) and (3) of the RBC and fundamental rights considerations give rise to requirements which, although somewhat less specific compared to those provisions, are none the less essentially comparable (b).

a) Impermissibility of an analogy with Article 3(4) and (5) of the Rental and Lending Rights Directive

117. In the view of the applicant in the main proceedings and the Spanish Government, in a case such as this one the conditions in Article 3(4) and (5) of the Rental and Lending Rights Directive can be applied by analogy. Under those provisions, Member States may lay down a presumption that the author of a cinematographic work who has concluded a film production contract with a film producer has assigned his rental right. The prerequisite for this is however that, firstly, the contractual clauses do not provide otherwise, and, secondly, the author be granted an unwaivable right to equitable remuneration under Article 5 of the Rental and Lending Rights Directive.

118. That view cannot be upheld. No analogy with Article 3(4) and (5) of the Rental and Lending Rights Directive is conceivable in this case.

119. Firstly, there is no unintended legislative lacuna.

120. It should be noted first of all that the amended Commission proposal for the Term of Protection Directive of 7 January 1993[20] expressly provided in Article 1a(3) for the possibility of adopting a presumption rule under which authors of films who had contractually undertaken to produce a film consented to the exploitation of their works; the legislative proposal also contained express reference to the corresponding provision of the Rental and Lending Rights Directive. However, this element of the proposal was ultimately not taken up. The conscious legislative decision not to adopt the corresponding rules of the Rental and Lending Rights Directive in my view precludes any application by analogy.

121. Nor can one, in my view, speak of a legislative lacuna in a case such as this. Member States wishing to restrict the exclusive exploitation rights of the film's author are bound both by the conditions of Article 14*bis*(2)(b) to (d) and (3) of the RBC and by fundamental rights considerations. That is sufficient to rule out a legislative lacuna at the level of European Union law. It must further be taken into account that competence in the field of copyright is concurrent as between the European Union and the Member States. In so far as a matter is not regulated at European Union level, the Member States continue to be responsible. So, where European Union law is silent on a question, the Member States are called on, where appropriate, to close existing gaps and to avoid contradictory appraisals.[21]

122. Secondly, the objection of the applicant in the main proceedings that the Court also proceeded by analogy in its judgment in *Infopaq*[22] must be dismissed. That case involved the interpretation of an autonomous concept of European Union law, that is to say the concept of a work eligible for protection for the purposes of the InfoSoc Directive. In interpreting this autonomous concept of

20 — COM(92) 602 final — SYN 395 (OJ 1993 C 27, p. 7).

21 — On the question of the Court's jurisidiction to develop the law — particularly in regard to the prohibition in European Union law on denying justice — see in particular Calliess, C., 'Grundlagen, Grenzen und Perspektiven des Europäischen Richterrechts', *Neue Juristische Wochenschrift* 2005, p. 929, 932.

22 — Cited in footnote 8 above.

European Union law, which is not defined in the InfoSoc Directive and for which in this instance no definition was provided by other directives, the Court of Justice drew on specific provisions establishing the conditions for the copyright protection of certain works. However, the present case does not involve the definition of an autonomous concept of European Union law. Rather, the applicant in the main proceedings is in effect proposing the application of provisions of the Rental and Lending Rights Directive in the context of the Term of Protection Directive too, notwithstanding that they were intentionally not included therein.

123. By way of conclusion, therefore, it must be stated that, in a case such as the present one, the provisions in Article 3(4) and (5) of the Rental and Lending Rights Directive cannot be applied by analogy.

b) Requirements under European Union law

124. As already mentioned, however, Article 14*bis*(2)(b), (c) and (d) and (3) of the RBC and Article 17 of the Charter give rise to conditions which the Member States must take into account if they wish to confer the exclusive exploitation rights to which the principal director as the author of the film is in principle entitled on a film producer. Those provisions give rise to the following requirements: firstly, such conferral requires a contract between the principal director as the author of the film and the film producer (i). Secondly, it must be possible to agree otherwise (ii). Thirdly, it is imperative under the film author's right of property that he be guaranteed fair remuneration if his exclusive exploitation rights are restricted (iii).

i) Existence of a contract

125. A prerequisite under Article 14*bis*(2)(b) of the RBC for the allocation of the exclusive exploitation rights to the film producer is that the principal director has entered into a contract with the film producer whereby he has undertaken to bring his contribution to the production of the cinematographic work.

ii) Precedence of contrary stipulations

126. Secondly, it must be possible to stipulate otherwise. This follows from Article 14*bis*(2)(b) and (d) of the RBC. Article 14*bis*(2)(b) provides that it must be possible to make contrary or special stipulations and Article 14*bis*(2)(d) provides that that means any restrictive condition relevant to the contract whereby the author of the film has undertaken to bring his contribution to the production of the cinematographic work.

iii) Right to fair compensation

127. Finally, a Member State which wishes to confer on the film producer the exclusive exploitation rights to which the principal director is in principle entitled as author of the film must ensure that the principal director receives fair compensation in return for that restriction.

128. It is true that Article 14*bis*(2)(b) to (d) and (3) of the RBC does not contain such a requirement. However, allocation to the film producer of the exclusive exploitation rights to which the principal director as the author of the film is in principle entitled constitutes an encroachment upon a fundamental property right that is protected under Article 17 of the Charter. Such allocation can be justified only if the author of the film receives fair compensation in return.

– The copyright of the principal director as author of the film *qua* property right protected under fundamental rights

129. When European Union law, in Article 2(1) of the Term of Protection Directive and in Article 1(5) of the Satellite and Cable Directive, recognises the principal director as the author of the film and accords him corresponding exclusive exploitation rights in principle, it confers property rights on him. These are protected under Article 17 of the Charter, paragraph 2 of which expressly makes clear that the protection of property also encompasses intellectual property in particular. [23]

130. It cannot be argued against that that the Member States are entitled under Article 14*bis*(2)(b) to (d) and (3) of the RBC to provide that the principal director as author of the film may not object to the film being exploited. The selective reference in recital 5 in the preamble to the Term of Protection Directive shows that it was not intended to entitle the Member States to call into question the allocation of the copyright ownership as such. Recital 5 in the preamble to the Term of Protection Directive only refers to Article 14*bis*(2)(b) to (d) and (3) of the RBC. Reference is not made to Article 14*bis*(2)(a), according to which it is a matter for the parties to the RBC to determine ownership of the copyright in a cinematographic work. The fact that there is no reference to Article 14*bis*(2)(a) of the RBC plainly demonstrates, I believe, that the Member States must observe the principal director's authorship laid down in European Union law. Therefore, the Member States must also have regard in the exercise of the power which they retain under recital 5 in the preamble to the Term of Protection Directive, in conjunction with Article 14*bis*(2)(b) to (d) and (3) of the RBC, to the authorship of the principal director, which is a property right protected as a fundamental right. [24]

– Conditions for justifying encroachment upon that property right

131. A Member State which exercises the power granted to it under Article 14*bis*(2)(b) to (d) and (3) of the RBC and restricts the exclusive exploitation rights to which the film director is entitled as author of the film encroaches upon the property right of the principal director. Such an encroachment is justified only if it meets the requirements for justification under the second sentence of Article 17(1) and Article 52 of the Charter.

132. According to the second sentence of Article 17(1) of the Charter, any encroachment must be on the grounds of public interest. This can be considered to be the case by reference to the foregoing considerations where the exclusive exploitation rights to which the principal director is in principle entitled as author of the film are conferred on the film producer in order to ensure that it is possible for the film to be exploited effectively by the film producer.

133. The second sentence of Article 17(1) of the Charter also requires that fair compensation be paid in good time for loss of the property. In a case such as this one, that requirement also follows from Article 52(1) of the Charter, as allocation of the exclusive exploitation rights to the film producer without fair compensation would be disproportionate and substantially affect the essence of the right of ownership. If there is no fair compensation, the principal director's authorship, which is protected by fundamental rights, risks being undermined by the allocation of the exclusive exploitation rights to the film producer. [25]

23 — See also recital 9 in the preamble to the InfoSoc Directive which emphasises that intellectual property is an integral part of property.

24 — See, on the history of the rule, Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, Kluwer 1987, paragraph 10.26 et seq.

25 — Recital 10 in the preamble to the InfoSoc Directive, according to which the author must receive an appropriate reward, also supports that view. It is also clear from recital 11 in the preamble to the Term of Protection Directive, recital 24 in the preamble to the Satellite and Cable Directive and recital 9 in the preamble to the InfoSoc Directive that in order to achieve this objective in the field of copyright a high level of protection is to be presumed necessary.

iv) Interim conclusion

134. It should be stated by way of interim conclusion that the power of the Member States to allocate the exclusive exploitation rights of the principal director as author of the film to the film producer is subject to the following conditions:

— there must be a contract between the principal director and the film producer under which the principal director is obliged to provide services as a director;

— it must be possible to enter into contrary stipulations, under which the principal director reserves the exclusive exploitation rights or the exercise of those rights;

— the author of the film must be guaranteed fair compensation.

4. Compatibility of a national provision such as the first sentence of Paragraph 38(1) of the UrhG with the requirements of European Union law

135. On the basis of the foregoing, I shall now deal with the doubts expressed by the national court as to the compatibility with the requirements of European Union law of a national provision such as Paragraph 38(1) of the UrhG.

136. In so far as the national court, first of all, has doubts as to the compatibility of such a national provision with the requirements of European Union law because that provision is construed as an original, direct allocation of the exploitation rights to the film producer alone, those doubts are not justified. As stated above, European Union law does not mandatorily require an original, direct allocation of the exclusive exploitation rights to the author of the film. It is compatible with European Union law not only for a national rule to provide for a presumption that the principal director has transferred to the film producer the exploitation rights to which he is entitled as author or has granted him the corresponding user rights, but also for a rule to provide that the exclusive exploitation rights originate with the film producer.

137. A restriction of the exploitation rights allocated in principle to the principal director as author of the film, while not subject to the conditions as laid down in Article 3(4) and (5) of the Rental and Lending Rights Directive, must however meet requirements which are essentially comparable.

138. Firstly, the principal director must have entered into a contract with the film producer, in which he undertakes to provide his contribution to the production of the cinematographic work.

139. No such requirement seems to be expressly contained in a national provision such as the first sentence of Paragraph 38(1) of the UrhG. This should, however, have little effect since the principal director will normally provide his services on the basis of an express or at least implied contract. Should a case arise, which is atypical and difficult to imagine, in which the principal director has no agreement with the film producer, a national provision such as the first sentence of Paragraph 38(1) of the UrhG would be in conformity with European Union law only if it were so construed as not to apply in such a case.

140. Secondly, it must be possible under national law to conclude divergent contractual agreements under which the author of the film and not its producer is entitled to the exclusive exploitation rights.

141. It is true that a provision such as the first sentence of Paragraph 38(1) of the UrhG does not expressly provide for such a possibility. However, that does not necessarily render it inconsistent with European Union law. In so far as it is not a mandatory provision and should therefore be waivable, contracting parties may depart from it. A non-mandatory national provision under which the

exploitation rights may, in the event of contrary stipulations, originate with the author of the film and not the film producer is therefore compatible with the requirements set out in Article 14*bis*(2)(b) to (d) of the RBC. A national provision under which the exploitation rights originate with the film producer but can be transferred to the author of the film under a contrary stipulation would likewise be compatible with those requirements. Conversely, a provision such as the first sentence of paragraph 38(1) of the UrhG would run counter to European Union law if contrary stipulations were not permissible.

142. Thirdly, in such a case the Member State must ensure that fair compensation is guaranteed to the author of the film whose property right in the form of copyright is being restricted without his consent.

143. A national provision such as Paragraph 38(1) of the UrhG does not provide for fair compensation. Nor does there seem to be entitlement to fair compensation under other provisions of national law. The Austrian Government stated in this context that in its view it falls within the Member States' discretion freely to allocate not only the exclusive exploitation rights but also the property rights underpinning those rights; accordingly it is not necessary to provide for fair compensation for the principal director where the exclusive exploitation rights are allocated to the film producer.

144. As will be clear from the abovementioned considerations,[26] it seems to me that such an approach is not compatible with requirements of European Union law. By conferral of authorship in a cinematographic work upon the principal director, under European Union law a property right has been created in the form of copyright, to which the Member States must have regard. If that property right is encroached upon, the principal director must, as author of the film, receive fair compensation.

VI – Second part of the second question referred and third and fourth questions referred

145. The national court also has doubts as to the compatibility of national legislation such as the second sentence of Paragraph 38(1) of the UrhG with European Union law. According to that national provision, the producer and the author are entitled to the author's statutory rights to remuneration on a 50/50 basis, provided that they are not unwaivable and the producer has not agreed otherwise with the author. According to the information provided by the national court, that provision relates particularly to the 'blank cassette remuneration' under Paragraph 42b of the UrhG. According to the national court, this involves an entitlement under Article 5(2)(b) of the InfoSoc Directive which is intended to provide fair compensation for the fact that private copying is permitted to a certain extent under national law and the author's reproduction right under Article 2 of the InfoSoc Directive is correspondingly restricted.

146. This is the context in which the national court poses the second part of its second question, and the third and fourth questions.

147. First, the national court is uncertain whether European Union law requires the statutory rights within the meaning of the second sentence of Paragraph 38(1) of the UrhG and in particular the right to 'blank cassette remuneration' to be allocated initially to the principal director of a cinematographic work as its author. If that is the case, the national court also seeks to ascertain whether national legislation under which the statutory rights are presumed to be transferred to the film producer is compatible with European Union law. It further asks whether the conditions in Article 3(4) and (5) and Article 5 of the Rental and Lending Rights Directive apply to that presumption.

148. Finally, the national court specifically asks whether a national provision such as the second sentence of Paragraph 38(1) of the UrhG is compatible with European Union law.

26 — See points 127 to 133 of this Opinion.

A – *Essential arguments of the parties*

149. In the view of the *applicant in the main proceedings* and of the *Spanish Government*, a national provision such as the second sentence of Paragraph 38(1) of the UrhG is not compatible with the provisions of European Union law.

150. The applicant in the main proceedings and the Spanish Government state that the rights mentioned in Article 5(2)(a) and (b) of the InfoSoc Directive must belong to the principal director as the author of the film. The applicant in the main proceedings submits that this also covers those rights for which the Member State makes provision in other cases of free use. In that regard the creator principle provided for in Article 2(1) of the Term of Protection Directive applies. However, contractual arrangements may be made in respect of those rights.

151. According to the Spanish Government, the very presumption of a transfer of the exclusive exploitation rights is not compatible with European Union law. That presumption serves the purpose of facilitating commerce in those rights and thus safeguarding the film producer's position as an investor. That notion cannot apply to statutory rights to equitable remuneration because in such a case the transfer of those rights does not facilitate commerce in film rights. Therefore, a rule to the effect that the rights to equitable remuneration can be presumed to be transferred to the film producer is not permissible under European Union law.

152. In contrast, the applicant in the main proceedings considers that it is permissible to apply rules of presumption by analogy with the provisions of the Rental and Lending Rights Directive. Regard must, however, be had in so doing to the requirements of Article 3(4) and (5), in conjunction with Article 5, of the Rental and Lending Rights Directive. First, the presumption must be rebuttable. Next, there must be a contract. Furthermore, there must be equitable remuneration that cannot be waived. A national provision such as the second sentence of Paragraph 38(1) of the UrhG is therefore not compatible with the requirements of European Union law, because it does not take account of those conditions. First, there is no initial allocation of the whole entitlement to the principal director, only of half of it. The allocation of the other half to the film producer is not cast in terms of a presumption. Also, contrary to the requirements of European Union law, the existence of a contract is not laid down as a condition. Furthermore, the film author's entitlement can be modified. However, allocation of the half-share to the film producer may be regarded as justified because the film producer is the holder of related rights as the first producer of the film.

153. In the opinion of the *defendant in the main proceedings* and of the *Austrian Government*, a national provision such as the second sentence of Paragraph 38(1) of the UrhG is compatible with the provisions of European Union law.

154. In the opinion of the defendant in the main proceedings, the establishment and structuring of rules on remuneration fall within the discretion of the Member States. Member States may therefore also determine to whom those entitlements accrue. The provisions mentioned by the national court concern exclusive exploitation rights only, not the statutory rights to remuneration. In any event, it is permissible to provide for presumptions under which a transfer of the statutory rights to remuneration to the film producer is presumed. Otherwise, only the author of the film would be entitled to the statutory rights to remuneration, which would be inappropriate. Since Article 3(4) and (5) of the Rental and Lending Rights Directive is not applicable in a case such as this and there are thus no requirements of European Union law in respect of the transfer of the rights to which the author of the film is entitled, the Member States are entirely free in framing the rules applicable thereto. In any event, Article 2(5) and (6) of the Rental and Lending Rights Directive does not preclude a national provision under which the author of the film can freely dispose of those rights.

155. In the view of the Austrian Government, no entitlement of a principal director to remuneration can be founded on Article 5(2)(b) of the InfoSoc Directive, because a rule of presumption does not constitute an exception or limitation of the exploitation rights. In any event, even should that provision be applicable to a statutory presumption, regard must be had to the fact that the 'fair compensation' required under that provision for private reproduction does not need to be unwaivable.

B – *Legal appraisal*

1. Preliminary observation

156. The second part of the second question and the third and fourth questions concern the compatibility of a provision such as the second sentence of Paragraph 38(1) of the UrhG with requirements of European Union law. This national provision governs statutory rights. It provides that the author of the film and the film producer are each entitled to one half of the author's statutory rights to remuneration, provided that they are not unwaivable and the producer and the author have not agreed otherwise.

157. It is apparent from the order for reference that the statutory rights include, in particular, the 'blank cassette remuneration'. This is a right under Article 5(2)(b) of the InfoSoc Directive pursuant to which the author should be granted fair compensation for the fact that under national law private copying is to a certain extent permitted and his reproduction right is correspondingly restricted.

158. I shall first discuss whether a provision such as the second sentence of Paragraph 38(1) of the UrhG, in so far as it is applied to the 'blank cassette remuneration', is compatible with the provisions of European Union law. I shall start by setting out the requirements of European Union law which flow from Article 5(2)(b) of the InfoSoc Directive (1). I shall then examine whether a national provision such as the second sentence of Paragraph 38(1) of the UrhG is compatible with those requirements (2).

159. Beyond the 'blank cassette remuneration', the national court has referred its questions also in relation to other statutory rights within the meaning of the second sentence of Paragraph 38(1) of the UrhG. However, it does not state which specific rights are meant, so that it remains unclear which provisions of European Union law apply to those further rights. For this reason I shall not be going into these statutory rights that are not detailed more specifically.

2. Fair compensation under Article 5(2)(b) of the InfoSoc Directive

160. Under Article 5(2)(b) of the InfoSoc Directive, Member States may provide for a limitation on the reproduction right laid down in Article 2, in respect of reproductions made by a natural person for private use. If they do so they must, however, guarantee that the rightholders receive fair compensation in return. According to this provision, therefore, the Member States have the discretion to provide for a limitation on the reproduction right for private copying. However, if they provide for such a limitation, they must ensure that the rightholders affected receive fair compensation. To that extent the Member States have no discretion.

a) Who is entitled to the fair compensation?

161. The rightholders who under Article 5(2)(b) of the InfoSoc Directive are to receive fair compensation are all those persons whose exclusive reproduction right under Article 2 of the InfoSoc Directive is affected by the authorisation given without their consent to make private copies. They include in particular:

— the author of the cinematographic work, where his exclusive reproduction right in respect of his work under Article 2(a) of the InfoSoc Directive is affected, and

— the producer of the first fixations of films where his exclusive reproduction right in respect of the original and copies of his film under Article 2(d) of the InfoSoc Directive is affected.

162. In a case such as this one, the question arises whether the person concerned for the purposes of Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive is the principal director or the film producer. On the one hand, as has been explained above, the principal director is considered to be author of the cinematographic work.[27] On the other hand, the Member State has used its power under European Union law to allocate to the film producer the reproduction rights to which the principal director is in principle entitled as author of the film.[28]

163. In my view, Articles 5(2)(b) and 2(a) of the InfoSoc Directive are to be interpreted as meaning that in a case such as this one the principal director as author of the film is entitled to fair compensation. Fair compensation within the meaning of these provisions amounts to fair compensation under the second sentence of Article 17(1) of the Charter whereby the author is to be compensated for a restriction on his copyright. As explained above, the Member States' power under Article 14*bis*(2)(b) to (d) and (3) of the RBC to allocate to the film producer the reproduction right belonging in principle to the author of the film does not call in question the allocation of authorship to the principal director.[29] Therefore, in a case such as this one the focus must be on the principal director as the author of the film, even if the Member State has allocated the reproduction right to the film producer.

b) Further requirements

164. It must further be borne in mind that Article 5(2)(b) of the InfoSoc Directive contains no further requirements beyond the ensuring of fair compensation for the author. Since, under the third paragraph of Article 288 TFEU, a directive is binding on a Member State as to the result to be achieved, but not as to the manner in which it is achieved, the way in which the Member States secure fair compensation for the abovementioned persons is left to their discretion.

165. The only crucial matter for the purposes of Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive is therefore that the Member States secure fair compensation for the author or authors of the film. How they do this, however, is in their discretion. They may therefore, for example, decide to award authors a direct entitlement against purchasers of media which may be used to make private copies. They may also, for example, decide to award film producers an entitlement against purchasers of media which may be used to make private copies and then allow authors of films to claim against the film producers.

27 — See points 84 to 99 of this Opinion.

28 — See points 100 to 115 of this Opinion.

29 — See points 129 to 130 of this Opinion.

166. Finally, I would like to point out that, as regards the 'blank cassette remuneration', there are no requirements either under Article 14*bis*(2)(b) to (d) and (3) of the RBC or under Article 3(4) and (5) of the Rental and Lending Rights Directive. Article 14*bis*(2)(b) to (d) and (3) of the RBC, as is clear from its wording ('not … object'), only applies to exclusive exploitation rights. Nor can Article 3(4) and (5) of the Rental and Lending Rights Directive be applied by analogy since Article 5(2)(b) of the InfoSoc Directive governs fair compensation for copying for private use and there is thus no legislative lacuna.

167. The reply to the second part of the second question and the third question is therefore that Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive gives rise to no requirement of European Union law whereby an entitlement to fair compensation vis-à-vis the purchasers of media usable form private copying must mandatorily be granted to the principal director as the author of a cinematographic work. However, Member States must ensure that the principal director, as the author of the cinematographic work, receives fair compensation in recognition of the fact that his copyright is restricted by the authorisation without his consent of reproductions for private use.

3. Compatibility of a national provision such as the second sentence of Paragraph 38(1) of the UrhG with the requirements of European Union law

168. On the basis of the foregoing considerations I should now like to respond to the national court's question asking whether a national provision such as the second sentence of Paragraph 38(1) of the UrhG, in so far as it is applied to 'blank cassette remuneration', is compatible with the provisions of European Union law.

169. A provision such as Paragraph 42b(1) of the UrhG does provide for a right to equitable remuneration for the author of a film as compensation for the copying of his work for personal or private use. However, under a provision such as the second sentence of Paragraph 38(1) of the UrhG, that right is then divided up, the author of the film retaining only half of the entitlement while the film producer is allocated the other half.

170. Such a national provision does not seem to me to be in itself compatible with European Union law. As set out above, under Article 5(2)(b) of the InfoSoc Directive the author must receive fair compensation for the fact that reproduction of his cinematographic work for private use is allowed even without his consent. It is true that the provision in Paragraph 42b of the UrhG, under which the author of the film is granted a right to equitable remuneration, seems to meet this requirement. However, as a result of the division pursuant to the second sentence of Paragraph 38(1) of the UrhG, the author of the film ultimately retains only half of the remuneration that is equitable in light of the restriction of his reproduction right.

171. Regardless of how high the remuneration is in nominal terms, it seems to me that this division is not conceptually compatible with the requirements of European Union law.

172. It is true that a Member State cannot be criticised under European Union law for providing for entitlement to fair compensation within the meaning of Article 5(2)(b) of the InfoSoc Directive for both the author of the film and its producer. As set out above, that provision, in conjunction with Article 2 (a) and (d) of the InfoSoc Directive, provides for a right to fair compensation for both the author of the film and its producer. The author is to be compensated for the restriction of his copyright in the film and the film producer for the reproduction of the original or copies of his film.

173. However, it is conceptually incompatible with Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive to make provision for compensation that is fair in the light of the restriction of the copyright of the film's author to be divided between the author and the film's producer, in so far as the result is that the author is entitled to only half of the equitable remuneration that is appropriate having regard to the restriction on his copyright.

174. This approach, which is not conceptually compatible with the requirements of European Union law, seems to underpin a provision such as Paragraph 42b, in conjunction with the second sentence of Paragraph 38(1), of the UrhG.[30]

175. At the hearing, the Austrian Government justified this approach by stating that the Member States have discretion with regard to the allocation of entitlement to fair compensation. It argued that it has not been decided at European Union level to whom the right to fair compensation under Article 5(2)(b) of the InfoSoc Directive must be granted.

176. That premiss is incorrect. As shown above,[31] even when Member States have granted the reproduction right to the film producer in exercise of their power under Article 14*bis*(2)(b) to (d) and (3) of the RBC, they have to ensure that the author of the film receives fair compensation within the meaning of Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive.

177. By way of conclusion, therefore, it should be stated that a provision such as Paragraph 42b, in conjunction with the second sentence of Paragraph 38(1), of the UrhG is not compatible with Article 5(2)(b), in conjunction with Article 2(a), of the InfoSoc Directive, in so far as under such a provision the compensation that is fair in light of the restriction of the copyright of the film's author is divided between the author of the film and the film producer. However, it is compatible with Article 5(2)(b), in conjunction with Article 2(a) and (d), of the InfoSoc Directive for a national provision to provide for fair compensation for both the author of the film and the film producer whereby the author of the film is compensated for the reproduction of his cinematographic work and the film producer for the reproduction of the original or of copies of his film.

VII – Supplementary observation

178. For the sake of completeness only, I should like to refer to the Court's judgment in *Padawan*.[32] According to that judgment, Article 5(2)(b) of the InfoSoc Directive must be interpreted as meaning 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. The indiscriminate application of a private copying levy with respect to digital reproduction media is therefore incompatible with the InfoSoc Directive if it also applies to media not made available to private users and clearly reserved for uses other than private copying.

30 — The second sentence of Paragraph 38(1) of the UrhG provides for an exception for unwaivable entitlements, which are not shared between the author of the film and its producer but are retained in full by the author. Entitlements that are unwaivable comprise in particular entitlements of the author of the film for the purposes of Article 3(4) and (5), in conjunction with Article 5, of the Rental and Lending Rights Directive. In the case of other entitlements, on the other hand, one half of the entitlement of the film's author is allotted to the film producer.

31 — See points 160 to 167 of this Opinion.

32 — Case C-467/08 *Padawan* [2010] ECR I-10055.

VIII – Conclusion

179. In the light of the above considerations, I propose that the Court reply to the questions referred as follows:

1. Article 1(5), in conjunction with Article 2, of Directive 93/83/EEC of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission and Article 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), in conjunction with Articles 2 and 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, are to be interpreted as meaning that the principal director is the author of the film for the purposes of those provisions and is therefore entitled in principle to the exclusive exploitation rights in respect of reproduction, satellite broadcasting and other communication to the public through the making available to the public.

2. However, the Member States have the power, under Article 14*bis*(2)(b) to (d) and (3) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), to lay down a rule pursuant to which those exclusive exploitation rights originate with the film producer, provided that:

   — there is a contract between the principal director and the film producer under which the principal director is obliged to provide services as a director;

   — it is possible to conclude contrary stipulations, under which the principal director reserves the exclusive exploitation rights or the exercise of those rights;

   — Member States guarantee that in this case the author of the film receives fair compensation within the meaning of the second sentence of Article 17(1) of the Charter of Fundamental Rights of the European Union.

3. If the Member States make provision, under Article 5(2)(b) of Directive 2001/29, for the reproduction right of the author of a film under Article 2(a) of Directive 2001/29 to be restricted in respect of reproduction for private use, they must ensure that the authors of films are granted fair compensation. In so far as that is ensured, those provisions do not preclude a national rule under which entitlements in connection with reproduction for private use originate with the film producer.

4. Article 5(2)(b) and Article 2(a) of Directive 2001/29 are to be interpreted as precluding a national provision under which the entitlement of the author of the film to equitable remuneration is divided between him and the film producer as to half each, with the result that he receives only half of the remuneration that is appropriate for the restriction of his copyright.