Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 March 2013[1]

Case C-521/11

Amazon.com International Sales Inc.
Amazon EU Sàrl
Amazon.de GmbH
Amazon.com GmbH, in Liquidation
Amazon Logistik GmbH
v
Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Copyright and related rights — Directive 2001/29/EC — Reproduction right — Exceptions and limitations — Exception of copying for private use — Fair compensation — Possibility of reimbursing the private copying levy applied to digital reproduction equipment, devices and media — Financing of social and cultural institutions for rightholders — Payment of fair compensation in different Member States)

1. Copyright protection constitutes an extremely complex area of law in which the interests at stake are varied and the speed of technological development has changed, and continues to change, profoundly the very nature of protected works, the way in which they are used and the models applied to market them, thus constantly throwing up new challenges in terms of protecting copyrights and the rights of the authors of the works themselves and striking a fair balance between the interests concerned.

2. As part of a strategy to foster the development of the information society in Europe, the European Union legislature sought to harmonise certain aspects of copyright inter alia by adopting Directive 2001/29/EC ('Directive 2001/29'),[2] which forms the subject-matter of the present request for a preliminary ruling made by the Oberster Gerichtshof (Austria). Directive 2001/29 was adopted with the declared aim of providing a harmonised legal framework in the internal market by ensuring that competition is not distorted as a result of Member States' different legislation[3] and allowing adaptation to new forms of exploitation of rights, new forms of use and technological developments.[4]

1 — Original language: Italian.

2 — Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). See, in particular, recital 2 of the preamble thereto.

3 — See recital 1 of the preamble to Directive 2001/29 and Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraphs 26 and 31 to 34, and Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 35.

4 — See recitals 5, 6, 7, 39 and 47 of the preamble to Directive 2001/29, and point 29 of the Opinion of Advocate General Sharpston in Joined Cases C-457/11 to C-460/11 *VG Wort, Fujitsu Technology Solutions, Hewlett-Packard*, pending before the Court.

3. However, as a compromise between the differing legal traditions and views which exist in the Member States of the Union,[5] Directive 2001/29 ultimately left various aspects of copyright law unharmonised by providing for numerous exceptions and allowing the Member States considerable flexibility in the transposition of the directive, so that there has been uncertainty as to whether or not the Union legislature had in fact decided in practice not to harmonise copyright, in spite of its declared aims.[6]

4. In those circumstances, the directive gave rise to various implementation problems, a typical example of which is provided by the national proceedings in which the four questions referred to the Court for a preliminary ruling are raised in the present case. In fact, those proceedings concern a dispute between an international group active in the Internet marketing of recording media and a copyright collecting society in connection with the payment of 'fair compensation', as provided for in Directive 2001/29, for the use of copyright-protected works. The Member States' application in a specific case of the notion of fair compensation is one of the most complex issues raised by Directive 2001/29 and continues to pose problems over the relationship between it and the various national implementing laws. The Court has had the opportunity to examine this question and draw up certain principles to govern the matter[7] and in the near future will have to consider the question again on several occasions.[8]

5. However, before analysing the questions underlying this case, in which the Court is asked, on the one hand, to expand its case-law on the notion of fair compensation and, on the other, to reply to certain new and specific questions referred in that regard, I have to point out how the replies which the Court has given, and will give, to the various questions raised by the national courts necessarily fall within the legal context laid down by the existing provisions of European Union law. Although, within a defined legal context, the Court's replies provide points of guidance for identifying the forms, level and detailed arrangements of copyright protection and balancing the various interests at stake in a specific case, it is for the Union legislature to provide an appropriate legal framework which, on the basis of certain choices – also of a political nature – make it possible to establish unequivocally those forms, level and detailed arrangements of copyright protection and that balance. From that perspective, a positive welcome must be given to the recent initiative undertaken by the European Commission in approving an action plan to modernise copyright.[9]

6. In this regard I consider that it is important also to note that it will be clear from the analysis of some questions referred in the present case that a large number of problems relating to the application of Directive 2001/29 arise from the insufficient level of harmonisation of copyright law within the Union. In my view, this demonstrates that although it is important to respect the abovementioned legal traditions and views which exist in that regard in the Member States, for the purpose of developing a modern legal framework for copyright in Europe which, having regard to the various interests at stake, makes it possible to safeguard the existence of a genuine single market in that sector, by promoting creativity, innovation and the emergence of new business models, it is necessary to move towards pursuing a much greater level of harmonisation of national law than that attained by Directive 2001/29.

5 — For further considerations and references in this respect, see the Opinion of Advocate General Trstenjak in *Padawan* (cited in footnote 3), points 41 to 44.

6 — See, in this respect, the considerations put forward by Advocate General Sharpston at points 28 and 30 of his Opinion in *VG Wort and Others* (cited in footnote 4).

7 — See, in particular, *Padawan* (cited in footnote 3), Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-5331, and Case C-277/10 *Luksan* [2012] ECR.

8 — In addition to the present case and *VG Wort and Others* (cited in footnote 4), the Court will, in the near future, be asked to adopt a position on questions concerning the fair compensation provided for in Directive 2001/29 in Case C-435/12 *ACI Adam BV* and Case C-463/12 *Copydan Båndkopi*.

9 — See Commission press release of 5 December 2012 (Memo/12/950). In that regard, it should be noted that precisely the question of fair compensation, which forms the subject-matter of the present case, was rightly identified by the Commission as one of the most problematic issues of copyright law requiring immediate action.

I – Legal context

A – *European Union law*

7. Under Article 2 of Directive 2001/29, Member States are, in principle, to grant to authors the exclusive right to authorise or prohibit direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of their works.

8. However, under Article 5(2) and (3) of Directive 2001/29 Member States may provide for certain exceptions or limitations to that right. In particular, under Article 5(2)(b) thereof, Member States may provide for an exception to the author's exclusive reproduction right in relation to his work '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' (so-called 'private copying' exception').[10]

B – *National law*

9. Paragraph 42 of the Urheberrechtsgesetz[11] (Austrian Law on copyright; 'the UrhG') provides as follows:

'1. Any person may make single copies, on paper or a similar medium, of a work for personal use.

2. Any person may make single copies, on media other than those mentioned in paragraph 1, of a work for personal use or for research purposes in so far as it is justified by the non-commercial objective pursued.

3. Any person may make single copies of works which have been published in press reporting for personal use, provided that a similar use is involved.

4. Any natural person may make single copies of a work on media other than those mentioned in subparagraph 1 for private use and for purposes which are not directly or indirectly commercial.

5. Subject to subparagraphs 6 and 7, there is no reproduction for private or personal use where it takes place to make the work available to the public by making a copy. Copies made for private or personal use may not be used to make the work available to the public.

…'

10. Paragraph 42(6) of the UrhG lays down, subject to certain conditions, the so-called 'personal teaching exception' for schools and universities. Paragraph 42(7) lays down, subject to certain conditions, an exception for copies reproduced by publicly accessible institutions which collect works for purposes which are not directly or indirectly economic or commercial (so-called 'copy for personal collecting use').

10 — Furthermore, Article 5(5) of Directive 2001/29 makes the introduction of the private copying exception, like the other exceptions and limitations provided for in Article 5(1) and (4), subject to three conditions, that is, first, that that exception applies only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.

11 — Urheberrechtsgesetz of 9 April 1936 (BGBl. No 111/1936), as subsequently amended. The present versions of Articles 42 and 42b were amended in 2003 by the Urheberrechtsgesetz-Novelle 2003 (BGBl. I No 32/2003), which was adopted to transpose Directive 2001/29 into Austria law.

11. Paragraph 42b of the UrhG provides:

‘1. 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 (blank cassette levy) in respect of recording material placed on the domestic market on a commercial basis and for consideration; blank image or sound recording media suitable for such reproduction or other image or sound recording media intended for that purpose shall be deemed to constitute recording material.

…

3. The following persons shall be required to pay equitable remuneration:

(1) as regards remuneration for blank cassettes and equipment, persons who, acting on a commercial basis and for consideration, are first to place the recording material or equipment on the market in national territory;

…

5. Only copyright collecting societies can exercise the right to remuneration laid down in subparagraphs 1 and 2.

6. Copyright collecting societies shall be required to repay the equitable remuneration:

(1) to persons who export abroad recording media or equipment before it is sold to the final consumer;

(2) to persons who use recording media for a reproduction with the authorisation of the rightholder; indications to this effect are sufficient.’

12. Paragraph 13 of the Verwertungsgesellschaftengesetz (Austrian Law on collecting societies; ‘the VerwGesG’) [12] states:

‘1. Collecting societies may create institutions for social and cultural purposes for the beneficiaries which they represent and for their family members.

2. Collecting societies which exercise the right to remuneration for blank cassettes shall create institutions for social or cultural purposes and pay to them 50% of the funds generated by that remuneration, minus the relevant administration costs.’

II – Facts, the proceedings before the national court and the questions referred

13. The company in the main proceedings, Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H. (‘Austro-Mechana’) is a copyright collecting society which, as such and under contracts with other foreign and Austrian collecting societies, exercises rights of authors and holders of related rights. In particular, it is the person entitled to receive in Austria payment of remuneration for blank cassettes, as referred to in Paragraph 42b(1) of the UrhG.

12 — Law of 13 January 2006 (BGBl. I No 9/2006).

14. The defendant companies, Amazon.com International Sales Inc., Amazon EU Sàrl, Amazon.de GmbH, Amazon.com GmbH, in Liquidation, and Amazon Logistik GmbH (hereinafter also referred to jointly as: 'the Amazon group companies'), all belong to the international Amazon group, which is active inter alia in selling products via the Internet, including image or sound recording media within the meaning of the Austrian law.

15. Since at least 2003 the Amazon group companies have, acting together and in response to orders made via the Internet, placed on the market in Austria image or sound recording media, such as blank CDs and DVDs, memory cards and MP3 players.

16. Austro-Mechana brought an action against the Amazon group companies, claiming that they are jointly liable to pay equitable remuneration, as provided for in Paragraph 42b(1) of the UrhG, for recording material placed on the market in Austria between 2002 and 2004. With regard to the first half of 2004 Austro-Mechana made a pecuniary claim quantified at EUR 1 856 275. With regard to 2002 and 2003, and the period from June 2004, Austro-Mechana sought an order requiring the Amazon group companies to provide an account of the recording media placed on the market in Austria and reserved the right to quantify its claim in respect of that period.

17. By an interlocutory judgment, the first-instance court granted the application for an account and reserved its decision on the claim. The court hearing the appeal upheld the judgment at first instance.

18. Having heard the appeal brought against the judgment, the Oberster Gerichtshof, the referring court, stayed the main proceedings and referred the following questions to the Court for a preliminary ruling: [13]

'(1) Can a legislative scheme be regarded as establishing "fair compensation" for the purposes of Article 5(2)(b) of Directive 2001/29/EC, where

(a) the persons entitled under Article 2 of Directive 2001/29/EC have a right to equitable remuneration, exercisable only through a collecting society, against persons who, acting on a commercial basis and for remuneration, are first to place on the domestic market recording media capable of reproducing the works of the rightholders,

(b) this right applies irrespective of whether the media are marketed to intermediaries, to natural or legal persons for use other than for private purposes or to natural persons for use for private purposes, and

(c) the person who uses the media for reproduction with the authorisation of the rightholder or who prior to its sale to the final consumer re-exports the media has an enforceable right against the collecting society to obtain reimbursement of the remuneration?

(2) If Question 1 is answered in the negative:

2.1. Does a scheme establish "fair compensation" for the purposes of Article 5(2)(b) of Directive 2001/29/EC if the right specified in Question 1(a) applies only where recording media are marketed to natural persons who use the recording media to make reproductions for private purposes?

13 — The referring court observes that although the case before it concerns only the requirement to provide an account in order to quantify the claim, this matter is closely connected with the existence of a right to equitable remuneration under Austrian law.

2.2. If Question 2.1 is answered in the affirmative:

Where recording media are marketed to natural persons must it be assumed until the contrary is proven that they will use such media with a view to making reproductions for private purposes?

(3) If Question 1 or 2.1 is answered in the affirmative:

Does it follow from Article 5 of Directive 2001/29/EC or other provisions of EU law that the right to be exercised by a collecting society to payment of fair compensation does not apply if, in relation to half of the funds received, the collecting society is required by law not to pay these to the persons entitled to compensation but to distribute them to social and cultural institutions?

(4) If Question 1 or 2.1 is answered in the affirmative:

Does Article 5(2)(b) of Directive 2001/29/EC or other provision of EU law preclude the right to be exercised by a collecting society to payment of fair compensation if in another Member State – possibly on a basis not in conformity with EU law – equitable remuneration for putting the media on the market has already been paid?'

III – Procedure before the Court

19. The order for reference was received at the Court Registry on 12 October 2011. Written observations have been submitted by the Amazon group companies, Austro-Mechana, the Austrian, Finnish, French and Polish Governments, and the Commission. At the hearing on 6 December 2012, submissions were made by the Amazon group companies, Austro-Mechana, the Polish and Austrian Governments, and the Commission.

IV – Legal assessment

A – *Preliminary remarks*

20. The questions referred by the national court all concern the notion of fair compensation laid down in Directive 2001/29.[14]

21. As is apparent from Paragraph 42(4) of the UrhG, the Republic of Austria has introduced into its national law the private copying exception laid down in Article 5(2)(b) of Directive 2001/29. The related 'fair compensation' for authors is provided for in Paragraph 42b(1) of the UrhG in the form of 'equitable remuneration'.

22. However, it is clear from Paragraph 42b(1) of the UrhG that provision is made in Austria for equitable remuneration for the author not only in the case of reproduction of his work by a natural person for private purposes within the meaning of Paragraph 42(4) of the UrhG, but also in all cases of the reproduction of the work itself, as referred to Paragraph 42(2) and (7). Therefore, it follows that

14 — The notion of fair compensation is contained in various provisions of Directive 2001/29. In addition to Article 5(2)(b) thereof, to which the national court refers in its questions, fair compensation for rightholders is also provided for explicitly in relation to the exceptions laid down in Article 5(2)(a) and (e), and in various recitals in the preamble to the directive.

in Austrian law equitable remuneration does not correspond solely to the fair compensation due by the natural person in respect of the private copying exception but is also due in other cases considered by the UrhG to constitute 'personal use' which are covered by the other exceptions laid down in Paragraph 42 of the UrhG.[15]

23. This preliminary observation which, as we will see, will be relevant in the course of the assessment, prompts me to consider that apart from Question 2, which relates solely to the exception laid down in Article 5(2)(b) of the directive, the scope of the other questions is not limited to the private copying exception, but must be considered in relation to the notion of fair compensation in general within the meaning of Directive 2001/29.

24. In that regard, I shall merely point out, incidentally, that provided that the exceptions laid down in the national law are compatible with the directive, such a system, which provides for payment of fair compensation also in respect of exceptions other than the 'private copying exception', is not contrary per se to Directive 2001/29.[16] In any event, it will be for the national court, where necessary, to assess, on the basis of the criteria laid down in European Union law,[17] whether those exceptions are compatible with the directive.[18]

25. That being the case, in order to reply adequately to the questions referred by the national court for a preliminary ruling, I consider it appropriate to recapitulate certain principles laid down by the Court concerning the notion of fair compensation contained in Directive 2001/29.

B – *Court's case-law on the notion of fair compensation within the meaning of Directive 2001/29*

26. As I have already stated at point 4, the Court has had an opportunity to rule on several occasions on the notion of fair compensation contained in Directive 2001/29. It is clear in particular from the case-law that it is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception. This uniform interpretation is independent of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation.[19]

27. The notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by the author. It follows that it must necessarily be calculated on the basis of the criterion of the harm caused to authors of

15 — This concerns in particular cases of personal use for the purposes of research, press reporting, teaching in schools and universities, and public lending. See subparagraphs 2, 3, 6 and 7 of Paragraph 42 of the UrhG respectively.

16 — According to recital 36 of the preamble to Directive 2001/29, the Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

17 — As regards the assessment of the compatibility of a national law with Directive 2001/29, I refer to the considerations put forward by Advocate General Sharpston at points 37 and 38 of his Opinion in *VG Wort and Others* (cited in footnote 4).

18 — In the present case, it should be noted that the exceptions laid down in Paragraph 42(2), (3), (6) and (7) of the UrhG, whilst similar to some of those laid down in Directive 2001/29 (see in particular Article 5(2)(c) and (3)(a) and (c)), do not correspond to them exactly. However, in so far as they all lay down the requirement that the use made of the work for the purposes mentioned must be 'personal', those exceptions appear to have a more restrictive scope than the corresponding exceptions laid down in the directive.

19 — See *Padawan* (cited in footnote 3), paragraphs 33 and 37.

protected works by the introduction of the private copying exception.[20] However, as is apparent from recital 31 in the preamble to Directive 2001/29, a 'fair balance' must be maintained between the rights and interests of the authors, who are to receive the fair compensation, on one hand, and those of the users of protected works, on the other.[21]

28. Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned. Therefore, it is, in principle, for the person who has caused the harm to the holder of the exclusive reproduction right – the author – to make good the harm related to that copying by financing the compensation which will be paid to that rightholder.[22]

29. However, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment,[23] the Court has held that it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy.[24]

30. The Court has also pointed out that, since that system enables the persons responsible for payment to recover the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, who must be regarded in fact as the person indirectly liable to pay fair compensation. Such a system is consistent with a 'fair balance' between the interests of authors and those of the users of the protected subject-matter.[25]

31. The Court has held that there is therefore, having regard to those requirements, a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for private copying. Consequently, the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2) of Directive 2001/29.[26]

32. However, where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work. The Court has held that those natural persons are rightly presumed to benefit fully from the making available of that equipment, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying. It follows that the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.[27]

20 — *See Padawan* (cited in footnote 3), paragraphs 40 and 42, and *Stichting de Thuiskopie* (cited in footnote 7), paragraph 24. See in this regard recital 35 of the preamble to Directive 2001/29 from which it emerges that, having regard to the particular circumstances of each case, the criterion of the harm to the copyright holders resulting from the use of the protected works is a valuable criterion in cases of exceptions or limitations subject to fair compensation, and thus not only in the case of the private copying exception.

21 — *See Padawan* (cited in footnote 3), paragraph 43, and *Stichting de Thuiskopie* (cited in footnote 7), paragraph 25.

22 — *See Padawan* (cited in footnote 3), paragraphs 44 and 45, and *Stichting de Thuiskopie* (cited in footnote 7), paragraph 26.

23 — See recital 35 of the preamble to Directive 2001/29.

24 — See *Padawan* (cited in footnote 3), paragraph 46, and *Stichting de Thuiskopie* (cited in footnote 7), paragraph 27.

25 — See *Padawan* (cited in footnote 3), paragraphs 48 and 49, and *Stichting de Thuiskopie* (cited in footnote 7), paragraph 28.

26 — See *Padawan* (cited in footnote 3), paragraphs 52 and 53.

27 — See *Padawan* (cited in footnote 3), paragraphs 54 to 56.

C – *Question 1*

1. Preliminary remarks

33. By its first question, the national court seeks to know in essence whether a legislative scheme can be regarded as establishing fair compensation for the purposes of Article 5(2)(b) of Directive 2001/29, where a national law provides for a private copying levy in the form of equitable remuneration which can be charged, indiscriminately, only by collecting societies on persons who, acting on a commercial basis and for consideration, are first to place media suitable for recording works on the national market but where that national law also provides, on certain conditions, for a right to reimbursement of that equitable remuneration where payment thereof is not due.

34. The national court holds that in so far as the Austrian law provides for the indiscriminate application of the private copying levy it is 'clearly' contrary to the judgment in *Padawan*.[28] However, the referring court also observes that the national law at issue is fundamentally different from that at issue in *Padawan* in that it allows for the possibility of reimbursement of that levy.

35. The national court notes that that possibility is allowed for explicitly in Article 42b(6) of the UrhG only in two cases: re-exportation of the media and reproduction of the work with the authorisation of the author. Therefore, in Austrian law the obligation to pay fair remuneration exists also in the case of use of media which involves no breach of copyright.[29] The national court refers in particular to two situations: firstly, cases of reproduction of the work provided for in Paragraph 42 of the UrhG covered by another exception laid down in Article 5(2) or (3) of Directive 2001/29 in respect of which, however, the national law provides, in conformity with the directive, for payment of 'fair compensation' to the author[30] and, secondly, the case of use media to store data which a user himself has 'produced', which, in the view of the national court, must be equated with that of reproduction with the authorisation of the author and must, therefore, give rise by analogy to an obligation to reimburse the levy.[31]

36. According to the national court, uncertainty thus remains only as to the compatibility with European Union law of the reimbursement solution adopted by the national law at issue. A system based on the possibility of *a posteriori* reimbursement involves payment of fair compensation also where media are supplied to business users who clearly use them for purposes which in the system laid down in the directive and the national law does not have to give rise to payment of fair compensation, thereby placing the burden of the costs and risks attendant on the possibility of obtaining of such reimbursement on persons who should not be required to pay fair compensation. The national court does not rule out the possibility that such a law could be incompatible as a whole with European Union law.

37. Question 1 referred by the national court is broken down into three parts. I will analyse each of them in detail which will then allow me to provide an overall reply to the first question.

28 — See specifically paragraph 53 of that judgment and point 31 above.

29 — The national court also mentions the case of reproductions made unlawfully in breach of copyright in respect of which, in its view, there can clearly be no right to reimbursement of the fair compensation. According to the national court, it does not follow from Article 5(2) or (3) of the directive that that article precludes the payment of equitable compensation for such types of unlawful action. In my view, it is not necessary for the purpose of this case to rule on the relationship between unlawful copies and equitable compensation. This question will be the subject of the Court's considerations in *ACI Adam BV and Copydan Båndkopi* (cited in footnote 8 above). However, I can find no basis for the arguments put forward by the Amazon group companies to show that the national law at issue is unlawful in that it allows equitable compensation to be imposed for the harm caused to authors by unlawful copies of the work.

30 — See recital 36 of the preamble to the directive reproduced in footnote 16 above.

31 — The national court holds that a person who uses the medium to record data which he himself has produced cannot be treated less favourably than a person who uses it to reproduce data produced by third parties with their authorisation.

2. Question 1(a)

38. In first part of the first question, namely Question 1(a), the national court refers to three elements which characterise the national law in respect of which it asks whether the notion of fair compensation is compatible with Directive 2001/29.

39. First, the national court points out that the national law at issue has provided for fair compensation in the form of equitable remuneration. Equitable remuneration is a concept set out in Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. [32] It is clear from case-law that it too is an autonomous concept of European Union law. [33] In this regard, I consider that on account of the autonomy which the Member States enjoy within the limits imposed by European Union law, and in particular by Directive 2001/29, in determining the *form* of 'fair compensation', [34] there is nothing to prevent a Member State from establishing fair compensation in the form of 'equitable remuneration', provided that the system which it puts into place satisfies the requirements laid down by Directive 2001/29 and displays the characteristics of fair compensation within the meaning of that directive and the case-law of the Court. [35]

40. Secondly, Question 1(a) points out that under the law at issue the right to equitable remuneration is exercisable only through a copyright collecting society. Nor is such a provision, in my view, contrary per se to Directive 2001/29. It is clear from the case-law referred to at paragraph 26 above that the Member States enjoy autonomy in determining, within the limits imposed by European Union law and in particular by that directive, the detailed arrangements for collecting 'fair compensation'. [36] The use of collecting societies to gather funds from copyright is widespread throughout the Member States and is inspired principally by practical reasons. [37] Therefore, it follows that the exclusive collection of fair compensation by a copyright collection society provided for in national law, in so far as that society is in fact representative of various rightholders, does not render that law per se incompatible with European Union law.

41. Thirdly, Question 1(a) highlights that under the national law persons who, acting on a commercial basis and for remuneration, are first to place on the domestic market recording media capable of reproducing works must pay fair compensation. In that regard, it should be pointed out that it is clear from the case-law cited at points 26 to 32 above that, although the Court has held that the person who causes harm to the author by reproducing his work without authorisation is liable for the fair compensation and therefore, in principle, is required to pay him fair compensation for the harm that he has caused, the Member States are permitted to establish a system which places the obligation to pay fair compensation on other persons, and in particular persons who make media available to users who can then recover it in the price charged for doing so. Consequently, it can be inferred from that case-law that the fact that the obligation to pay fair compensation is placed on persons who are at a higher level in the media distribution chain than private individuals is not contrary per se to European Union law.

32 — OJ 2001 L 376, p. 28. That directive repealed 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 (OJ 1992 L 346, p. 61).

33 — Case C-245/00 *SENA* [2003] ECR I-1251, paragraphs 22 and 24.

34 — See *Padawan* (cited in footnote 3), paragraph 37 and point 26 above.

35 — This indeed appears to be provided for expressly in recital 38 of the preamble to Directive 2001/29 which provides that a 'remuneration' scheme for fair compensation may be introduced or maintained. Furthermore, it is clear from case-law that the concept of 'remuneration' has the same purpose as 'compensation', that is to establish recompense for authors to compensate for harm to them. See, to that effect, C-271/10 *VEWA* [2011] ECR I-5815, paragraph 29, and *Luksan* (cited in footnote 7), paragraph 34.

36 — See *Padawan* (cited in footnote 3), paragraph 37.

37 — This allows a system to function which simplifies the collection and distribution of those funds to the advantage, in principle, of both the rightholders and those liable for such funds.

3. Question 1(b)

42. As regards the second part of the first question, namely Question 1(b), it should be noted that it is common ground between the parties that, as is also pointed out by the national court, and subject to the possible justification discussed in the analysis of Question 1(c), in so far as the law at issue provides for the indiscriminate application of the levy corresponding to fair compensation for any use of the medium, thus including cases where a medium is used for purposes clearly unrelated to the reproduction on which the payment of fair compensation is due, it is contrary to the directive, as interpreted by the case-law of the Court. [38]

43. In its question the national court draws a distinction between three different categories of potential buyers of the medium from the person first required to pay equitable remuneration, that is to say the person who, acting on a commercial basis and for consideration, is first to place it on the market. There is no need to analyse in detail all the situations of the various persons who could acquire the medium from such a person, but two considerations appear to me to be relevant.

44. Firstly, as I pointed out at point 22 above, the national law at issue lays down an obligation to pay equitable remuneration not only on the basis of the private copying exception exercised by a natural person under Article 5(2)(b) of Directive 2001/29, but also in respect of other uses defined as 'personal' which are covered by other exceptions laid down in that Austrian law. In that context, it is conceivable that those other exceptions apply to persons other than natural persons, such as libraries or research institutes, for example. Therefore, it is possible for persons who are not natural persons to be required to pay equitable remuneration (which corresponds to fair compensation) as they use the medium for purposes for which such payment is due. Consequently, in the case of a law such as that at issue, the fact that the person who buys the medium is not a natural person, but a legal person, cannot exempt it *automatically* from paying fair compensation and that is not necessarily contrary to European Union law.

45. Secondly, and conversely, the fact that it is a natural person who buys the medium does not, in my view, *necessarily* mean that that person uses the medium for private purposes in such a way that the assumption laid down by the case-law mentioned in point 32 above, which gives rise to the obligation to pay fair compensation, must inevitably apply. The question will be analysed in detail in connection with Question 2, but I consider it important to emphasise now that it is quite possible for a natural person to purchase the medium not as a private person but, for example, as a trader or self-employed person. Where a natural person is able to show that he acquired the medium for a purpose which is *clearly* other than private copying (or use of the medium for other purposes on which fair compensation is payable), I consider that he should not be liable to pay it.

4. Question 1(c)

46. Moving on to the third part of the first question, namely Question 1(c), it is here precisely that the heart of the question referred by the national court lies. The question which that court asks is, in essence, as follows: can the establishment of a system for reimbursing fair compensation to people who are not required to pay it compensate for the unlawfulness deriving from the indiscriminate application of the levy corresponding to fair compensation?

38 — See points 31 and 34 above; see *Padawan* (cited in footnote 3), paragraph 53.

47. In that regard, it is important first of all to point out that, as is clear from point 35 above, the national court explained in the order for reference that the scope of the right to reimbursement laid down in Article 43b(6) of the UrhG is not limited to the two cases expressly provided for in law, but also extends to other cases. Extension of the scope of the provision which lays down the right to reimbursement to the other cases mentioned by the national court must be regarded as constituting a pre-existing situation. [39]

48. However, I consider that, subject to the considerations set out below on the possibility of a priori exemption from payment of fair compensation, for a national law which provides for a system for reimbursing fair compensation to be considered compatible with European Union law, it is necessary for that system to apply not to specific individual cases, but rather generally to all cases where payment of fair compensation is not due on the grounds that the use of the medium does not constitute an act likely to cause harm to the author of a work. [40]

49. Nevertheless, the doubts which the national court has and on which the Court is being questioned, are unconnected with the scope of the reimbursement system. The national court observes that a system based on indiscriminate payment of fair compensation and a subsequent, general, possibility of reimbursement, places the burden of the costs and risks associated with obtaining reimbursement on persons who are not required to pay fair compensation under Directive 2001/29. Although they use the media for uses on which fair compensation is not payable, those persons would have to pay it beforehand and only subsequently obtain reimbursement thereof with attendant risks and costs.

50. With regard to those doubts, the Commission, together with the Amazon group companies, considers that the power granted to the Member State to determine the form and detailed arrangements of levying fair compensation cannot go so far as to permit them to opt for a reimbursement system which imposes charges on persons who do not fall within the scope of the notion of fair compensation, as defined in Directive 2001/29, and does not fall within the competences of the Member States. From that perspective, the possibility of obtaining reimbursement does not remove the incompatibility with that directive of national legislation which provides for the payment of fair compensation even in the absence of the link, required by case-law, between it and the use of the media.

51. In that regard, it should be pointed out, however, that the case documents show that in Austria, where the person who, acting on a commercial basis and for remuneration, is first to place a medium on the domestic market, reliably guarantees that neither he nor his buyers will use the medium for purposes for which they would be required to pay fair compensation for private or personal use, he is able to benefit from a kind of a priori exemption from the obligation to pay such fair compensation.

52. Such a priori exemption can be obtained by Austro-Mechana by using a form made available for that purpose and is granted to undertakings in respect of which it may be assumed from the outset that they will most probably not make copies of copyright-protected works for uses on which fair compensation is payable. According to the statements made by Austro-Mechana at the hearing, the basis for that a priori exemption is to be found in the actual wording of Article 42b(1) of the UrhG, which provides that an author has the right to fair compensation only where 'it is to be anticipated' that the work will be reproduced on a medium. Therefore, conversely, where it can reasonably be anticipated that the medium will be used for purposes other than reproduction of a work, that right does not arise from the outset.

39 — It is settled case-law that, in the context of the judicial cooperation established by Article 267 TFEU, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice. See, for example, Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 19 and the case-law cited.

40 — See point 28 above.

53. However, according to case-law, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of European Union law necessary to enable that court to rule on the compatibility of national rules with European Union law.[41] Therefore, I consider that a national law which allows, on the one hand, for the possibility a priori exemption from payment of fair compensation for natural or legal persons who may reasonably be assumed on the basis of objective – and even merely indicative – factors to be acquiring the media for purposes which are clearly different from those on which fair compensation is payable[42] and, on the other, for the possibility of generally obtaining *a posteriori* reimbursement of such fair compensation in all cases where it is demonstrated that the use of the medium did not constitute an act likely to cause harm to the author of a work, would be compatible with Directive 2001/29.

54. Such a system, on the one hand, makes it possible to minimise a priori cases where the burden of possible risks and costs attendant on payment of fair compensation falls on persons not liable for it and, on the other, makes it possible to obtain reimbursement even where undue payment of the fair compensation has been made. In my view, such a system is capable of guaranteeing both effective and rigorous protection of copyright and a fair balance between the interests of the various categories of persons involved.[43]

55. However, it is for the national court to establish the actual impact and effectiveness of the functioning of the a priori exemption system in the circumstances of the main proceedings. In my view, to that end the court will have in particular to examine a number of circumstances including, firstly, whether the a priori exemption system is actually founded in Austrian law, as Austro-Mechana claims, and, secondly, whether the law at issue obliges Austro-Mechana to exercise that 'power of a priori exemption' objectively or allows it to have a certain margin of discretion in applying it. In the second case, questions will undoubtedly arise as to the impartiality of Austro-Mechana on account of its nature as a private company, albeit with certain aspects of public interest, which has an interest in the decision on whether or not to grant the exemption.

56. Finally, if the national court should consider that the a priori exemption system does not meet the above requirements, I again raise the question whether a law which allows for a general possibility of reimbursement cannot in any event be considered compatible with European Union law, even though it means that the costs and risk of the advance payment of fair compensation fall on persons who are not required to pay it.

57. I consider that in order to determine the compatibility or otherwise of such a law with European Union law it is necessary to strike a balance, with reference to the circumstances specific to a particular case, between the right of authors to obtain complete protection for the rights associated with their works, which finds its highest expression in Article 17(2) of the Charter of fundamental rights of the European Union, and the right of the businesses which market the media not to incur undue costs, which is attached to the freedom to conduct a business recognised by Article 16 of that charter.

41 — In the copious case-law in that regard, see Case C-25/11 *Varzim Sol* [2012] ECR, paragraph 27 and the case-law cited.

42 — As regards the argument put forward by the representatives of the Amazon companies that the possibility of a priori exemption is not clear from the order for reference, I consider that is clear from both the case documents and the discussion which took place at the hearing that the impact of the reimbursement system provided for in the law, to which the third part of Question 1 refers, is in practice reduced considerably by the existence of that possibility of a priori exemption. Therefore, in my view the existence of that possibility, which is clear from the case documents, is a circumstance of law and of fact which cannot be ignored in the assessment made by the Court.

43 — See recitals 9 and 31 of the preamble to Directive 2001/29.

58. In that regard, I would recall that the Court has stated precisely in relation to Directive 2001/29 that the Member States must, when transposing it, take care to rely on an interpretation of it which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing the directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with it but also make sure that they do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of Community law. [44]

59. In that regard, I also observe that the fact that the payment of fair compensation is 'temporarily' incurred by persons not required to pay it, provided that they can subsequently recover it, is inherent in the system in *Padawan*. In that judgment the Court acknowledged that it is possible to charge fair compensation to persons who are not actually liable for it but who can then recover it from subsequent buyers. [45]

D – *Question 2*

60. The national court refers Question 2 to the Court only if Question 1 is answered in the negative. That court holds that if the answer to Question 1 is in the negative, and therefore if that court has to declare the national law at issue incompatible with European Union law, it would nevertheless be required, in order to resolve the dispute in the main proceedings, to try to identify an interpretation of that law which was in conformity with Directive 2001/29. I concur with the approach taken by the national court. [46]

61. However, having held on the basis of the considerations contained in the preceding section of this opinion, that Question 1 may be answered in the affirmative, I consider that if the Court accepted that line it would not be necessary to reply to Question 2. It is only in the event of the Court answering Question 1 in the negative, by adopting a different approach from that which I propose, that I set out the following considerations.

62. Question 2 is divided into two parts. By the first part (point 2.1.), the national court asks the Court whether a scheme establishes 'fair compensation' for the purposes of Article 5(2)(b) of Directive 2001/29 if the right to fair compensation laid down in the national law at issue applies only where recording media are marketed to natural persons who use it to make reproductions for private purposes. As all the intervening parties who submitted observations on Question 2 observe, this question must be answered in the affirmative. In that regard, it is sufficient to note that the wording of Article 5(2)(b) of Directive 2001/29 shows that where recording media are marketed to natural persons who use them for private purposes, there is an obligation to pay fair compensation.

63. The second part of Question 2 (point 2.2), to which a reply is necessary only in the event that Question 1 is answered in the affirmative, is, however, of greater interest. By that question, the national court asks whether where recording media are marketed to natural persons it must be assumed until the contrary is proven that they will use them for private purposes.

44 — See Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 68, and more recently with regard to other directives, Case C-461/10 *Bonnier Audio and Others* [2012] ECR, paragraph 56.

45 — *Padawan* (cited in footnote 3), paragraph 46. Such a charge must essentially be considered as the 'price' to be paid for effective copyright protection.

46 — The Amazon group companies contest the national court's approach, contending that it conflicts with general legal principles, including, specifically, that of legal certainty. However, it should be noted that the Court has explicitly held that in the light of the obligation on the Member States to achieve the certain result of ensuring that the authors who have suffered harm actually receive payment of fair compensation for the prejudice which arose on its territory (see points 74 and 87 *in fine* below), 'it is for … the courts … to seek an interpretation of national law which is consistent with that obligation to achieve a certain result and guarantees the recovery of that compensation from the seller who contributed to the importation of those media by making them available to the final users' (see *Stichting de Thuiskopie*, cited in footnote 7, paragraph 39). Therefore, I consider that the national court's approach cannot be criticised in any way and, on the contrary, is entirely consistent with the case-law of the Court.

64. As is clear from point 32 above, in *Padawan* the Court held that where media are made available to natural persons for private purposes it may be assumed that they will use them to copy copyright-protected works for private purposes. The national court asks in essence whether that assumption can be extended on the grounds that where the media are made available to natural persons it may be assumed that they will use them for private purposes (and, thus, applying the assumption mentioned in point 32 above, it may be assumed that they will use them to reproduce protected works).

65. In that regard, it should be observed that the rationale of the assumption recognised by the Court at paragraphs 54 to 56 of the judgment in *Padawan* applies where, in a specific case, it is impossible in practice to determine whether or not natural persons use the acquired medium to reproduce copyright protected works for private purposes with the consequent obligation to pay fair compensation. It is because of that impossibility that the Court has established that where a natural person acquires a medium for private uses it may be assumed that he will use it to reproduce protected works. In that context, I consider that the operation of that assumption would be frustrated in practice if it were not possible to assume, until the contrary is proven, that where a natural person acquires the medium he will use it for private purposes. If that were not the case, whenever a natural person acquired a medium there would be uncertainty about the use he was making of it and thus about the existence or otherwise of the obligation to pay fair compensation. [47]

66. Therefore, I consider that, having regard to the above rationale, the second part of Question 2 must be answered in the affirmative. However, as pointed out at point 45 above, it is necessary in each case for the assumption that the medium is used for private purposes when it is acquired by a natural person to be regarded as a rebuttable assumption. Thus, the natural person himself or the person liable for fair compensation must be able to demonstrate, for the purposes of any a priori exemption from payment of fair compensation or any reimbursement thereof, that the natural person acquired the medium for purposes *clearly* unrelated to private copying or use of the medium for other purposes on which fair compensation is payable. In that case there is no doubt that payment of fair compensation will not be due.

E – *Question 3*

1. General observations and admissibility

67. By Question 3, to which the Court is asked to reply if Question 1 or 2.1 is answered in the affirmative, the national court asks whether it follows from Article 5 of Directive 2001/29 or other provisions of EU law that the right to be exercised by a collecting society to payment of fair compensation does not apply if, in relation to half of the funds received, the collecting society is required by law not to pay these to the persons entitled to compensation but to social and cultural institutions.

68. The national court is uncertain in particular whether the obligation laid down in Article 13 of the VerwGesG on copyright collecting societies to create institutions for social or cultural purposes for copyright holders and pay to them half of the funds generated by the 'blank cassette levy' may render the Austrian system of equitable remuneration incompatible with the notion of fair compensation laid down in Directive 2001/29. In that respect, the national court is uncertain on two counts. On the one

47 — Other than the case, which appears to me rather unlikely in practice, where a natural person systematically declares the use he will make of the medium before it is sold. De lege ferenda, it is conceivable that methods could be laid down to oblige a natural person to make such a declaration so as to render recourse to such an assumption unnecessary. Moreover, application of the assumption could in future also be marginalised by the development or expansion of technological methods of marketing the works. However, these considerations seem to me to go beyond the context of the present case which is within the existing factual and legal framework.

hand, authors have to make do with receiving in cash only half the compensation for the harm sustained from the use of their works. On the other, the national court refers to possible actual discrimination between Austrian and foreign authors with regard to the possibility of using those social or cultural institutions.

69. With regard to this question it is necessary, as a preliminary point, to adopt a position on certain issues relating to the admissibility thereof.

70. Firstly, I consider it necessary to reject the plea raised by the Austrian Government, alleging that this question is inadmissible in that, as that national court acknowledges, it has no relevance to the resolution of the main proceedings. In that respect, it is settled case-law that in the light of the presumption of relevance enjoyed by questions on the interpretation of European Union law referred by a national court, the Court may refuse to rule on them only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[48] It is expressly stated in the order for reference that the national court does not rule out the possibility that any incompatibility of the national law with Directive 2001/29, declared following the Court's reply to Question 3, could result in dismissal of the claim in the main proceedings. Therefore, it is clear that the national court considers that the question could be decisive in resolving this case. Consequently, that claim must, in my view, be regarded as admissible.

71. Secondly, I consider, on the other hand, that Question 3 should be declared inadmissible in so far as it refers without distinction to any 'other provisions of EU law'. In that regard, the Court has previously established that a question which is too general does not lend itself to a suitable reply.[49] Furthermore, it is settled case-law that in a preliminary ruling procedure it is essential for the national court, first, to set out the precise reasons why it was unsure as to the interpretation of certain provisions of EU law and why it considered it necessary to refer questions to the Court for a preliminary ruling on them, and, second, to provide at the very least some explanation of the reasons for the choice of the provisions of EU law which it requires to be interpreted and of the link it establishes between them and the national legislation applicable to the dispute.[50] It follows from those requirements that a general, unjustified reference to some 'other provisions of EU law', as contained in Question 3, cannot be regarded as admissible. Moreover, that interpretation is borne out by the wording of Article 94(c) inserted in the new version of the Rules of Procedure of the Court, according to which the request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

72. Consequently, in my view, the Court will have to rule only on the aspects of the question relating to Directive 2001/29, as set out in the order for reference. On the other hand, the Court will not, in my view, have to rule on the various arguments presented by the parties in so far as the national court has not submitted any question in that regard.[51]

48 — Of the abundant case-law to that effect, see, most recently, Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne* [2012] ECR, paragraph 35, and Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraph 15 and the case-law cited.

49 — Case 222/78 *Beneventi* [1979] ECR 1163, paragraph 20.

50 — Order of 3 May 2012 in Case C-185/12 *Ciampaglia*, paragraph 5 and the case-law cited, and Case C-370/12 *Pringle* [2012] ECR, paragraph 84.

51 — Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647, paragraph 23, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 29 and the case-law cited.

2. Substance of Question 3

73. As regards the substance of this question, it should be observed that what the referring court is asking the Court in essence is whether the possible non-conformity with the Directive 2001/29 of a national law, which provides for payment of half of the fair compensation not directly to the authors but to social and cultural institutions which carry out activities on their behalf, can relieve the person liable from payment of the fair compensation due.

74. In that regard, I observe, as a preliminary point, that it is clear from the principles expressed by the Court, referred to at points 27 and 28 above, that the notion of fair compensation is defined in terms of compensation to the author for the harm sustained as a result of the unauthorised reproduction of his work. The Court has likewise held that it is clear from the wording of Article 5(2)(b) of Directive 2001/29 that European Union law provides that the right to fair compensation for the author is to be unwaivable. Therefore, the author must *necessarily* receive payment thereof. [52] The Court has also held that the exception laid down in that provision must be interpreted strictly and thus cannot be extended beyond what is expressly imposed by the provision at issue and therefore cannot be applied to authors' remuneration rights. [53] In addition, according to case-law the Member States are under an obligation to achieve a certain result, namely to ensure that the fair compensation to compensate the rightholders harmed for the prejudice sustained in the territory of that Member State is recovered. [54]

75. I consider that a logical corollary of those principles of case-law is that the right to fair compensation, which is unwaivable and necessary, must be effective. A provision of national law which limits the exercise of that right by withholding even part of that compensation from the rightholders is not therefore, in my view, compatible with European Union law. [55]

76. However, that said, I can find nothing in either European Union law or case-law which leads me to think that Member States must be required to pay authors all the fair compensation in cash and or which precludes the Member States from providing that part of that compensation be provided in the form of indirect compensation. Provision in national law for a form of indirect compensation for authors does not seem to me in any way contrary per se to the notion of fair compensation. To that same effect, I consider that the possibility of providing that part of that compensation may be effected by a form of collective compensation for all authors is not contrary per se to the notion of fair compensation. [56]

77. A system which provided that the entire payment of the fair compensation be effected in the form of indirect or collective payment might not be compatible with the requirement relating to effectiveness which underlies the very notion of fair compensation. Therefore, the question arises as to the extent to which forms of indirect compensation are permitted to safeguard the effectiveness of fair compensation.

52 — See *Luksan* (cited in footnote 7), paragraphs 100, 105 and 108. Emphasis added.

53 — See *Luksan* (cited in footnote 7) paragraph 101.

54 — *Stichting de Thuiskopie* (cited in footnote 7) paragraphs 34 and 36, and *Luksan* (cited in footnote 7), paragraph 106. In that regard, see, more specifically, point 87 below.

55 — In that regard, see also the views of Advocate General Trstenjak at points 168 and 177 of her Opinion in *Luksan* (cited in footnote 7).

56 — As regards the possible objection that such a system does not take sufficient account of the individual link between the harm cause to an individual author and the compensation due to him, it may be stated in reply that, as the Commission pointed out, a remuneration system for private copying is necessarily imprecise in that, as mentioned at point 65 above, it is presently impossible in practice to determine which work was reproduced by which user and on which medium.

78. In that regard, I observe, however, that the forms and detailed arrangements of fair compensation distribution by the institutions who receive payment thereof are not specifically governed by European Union law and therefore the Member States have a certain margin of discretion in determining them within the limits of European law. Therefore, it is not for the Court to replace the Member States in determining those forms and detailed arrangements as Directive 2001/29 does not impose on them any particular criterion in that regard,[57] other than that relating to the effectiveness of fair compensation.

79. As regards specifically the activities carried out by the institutions created and financed pursuant to the national law at issue, I consider that social protection benefits for authors in general and their family members can, without any doubt, constitute types of indirect and collective compensation compatible with the notion of fair compensation and the aims specific to Directive 2001/29.[58] Similar considerations apply, in my view, also to cultural promotion activities which may be of benefit, not only to the safeguarding and development of culture in general in conformity with the objectives of both the TFEU[59] and copyright protection itself,[60] but also directly to the authors themselves in the form of more or less specific promotion of their works.

80. As regards possible discrimination between Austrian authors and foreign authors with regard to the benefit from those possible forms of indirect compensation, it is, in my view, for the national court to determine whether or not it exists in a particular case. However, I consider that where access to such social benefits is open without distinction to all authors, Austrian or foreign, and where the cultural benefits constitute an effective form of indirect compensation from which both national and foreign authors are capable of benefiting without distinction, albeit not necessarily to the same degree, there is no discrimination which could render the national law incompatible with European Union law.

81. Finally, to reply specifically to the question referred by the national court, I must also observe that, if it were accepted that a question concerning the distribution of fair compensation had the result of releasing the person liable from the obligation to pay it, the result would be that authors would not be compensated in any way for the harm sustained from the media sold in a specific case. Such a result would appear to me to be contrary per se to European Union law and thus unacceptable.[61]

82. Therefore, in the light of the foregoing considerations, I consider that where a national law provides that all funds received as payment of fair compensation are distributed to the authors, half in the form of direct compensation and the other half in the form of indirect compensation, the reply to the question whether a person is exempt from the obligation to pay fair compensation can only be in the negative. It will be for the national court to assess whether, and to what extent, the application of the national legislation at issue in the main proceedings actually involves forms of indirect compensation for authors.[62]

57 — See, by analogy, *VEWA* (cited in footnote 35) paragraph 35, regarding the criteria for determining the amount of the remuneration due to authors in the event of public lending within the meaning of Directive 92/100 (cited in footnote 32).

58 — In that regard, I find eloquent the reference made in recital 11 of the preamble to Directive 2001/29 to the fact that one of the aims of an effective and rigorous system for the protection of copyright is to safeguard the independence and dignity of artistic creators and performers.

59 — See Article 167(1) TFEU.

60 — See, for example, recitals 9 and 11 of the preamble to Directive 2001/29, and recital 3 of the preamble to Directive 2006/115, and Article 6 thereof.

61 — The need to guarantee recovery of the fair compensation in a specific case is clear from the case-law of the Court (see paragraph 39 of *Stichting de Thuiskopie*, cited in footnote 7).

62 — In the event that the national court rules that some of the funds received as of fair compensation are not used as indirect compensation for authors, I consider it conceivable that that court could also, where appropriate, reduce the applicant's claims as a result.

F – *Question 4*

83. By Question 4, the national court asks the Court to rule whether Article 5(2)(b) of Directive 2001/29/EC or any other provision of EU law preclude the right to fair compensation if in another Member State similar remuneration for putting the media on the market has already been paid.

84. It is clear from the order for reference that this question is based on the argument put forward by the Amazon group companies – the defendants in the main proceedings – that they had already paid in Germany an amount by way of fair compensation in respect of some of the media marketed in Austria. These companies therefore claim that since it is a second, unlawful, payment by way of fair compensation they are not required to make such payment in Austria. [63]

85. In that regard, it should be observed as a preliminary point that applying the considerations which I put forward at points 71 and 72 above, Question 4 too must, in my view, be declared partially inadmissible in so far as it makes a general reference to any 'other provision of EU law'. Therefore, in respect of that question too the Court will have to rule solely on the aspects set out in the order for reference without having to rule on the various arguments put forward by the parties but not raised by the national court.

86. As regards the substance, I consider in principle that double payment of fair compensation in respect of the same medium is not permitted. It is clear from the case-law recalled at points 27 and 28 above, which is repeatedly mentioned in this opinion, that fair compensation constitutes recompense for the harm suffered by the author as a result of the unauthorised reproduction of a work. It appears to me a logical consequence of this interpretation of the notion of fair compensation that in principle recompense should be effected only once in relation to the use of each reproduction medium on which fair compensation is payable. There is no reason to justify paying fair compensation twice. Therefore, in my view it is not possible to accept the argument put forward by the Polish Government that the margin of discretion left to the Member States in the absence of harmonisation of the law on fair compensation does not preclude receipt of a second payment by way of fair compensation in respect of the same medium. [64]

87. However, that said, it must be pointed out, as the referring court also observed, that the Court recognised the existence of an obligation to achieve a certain result on the Member State in which the harm was sustained, namely to recover the fair compensation for the harm suffered by the authors as a result of use of their work. The Court has found that if a Member State has introduced an exception for private copying into its national law and if the final users who, on a private basis, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the rightholders on the territory of that State. [65]

63 — However, in its order for reference the national court emphasises that it is disputed as to whether or not, in respect of some of the media subsequently marketed in Austria, payments by way of fair compensation were in fact made in Germany. The first-instance court was unable to verify those payments and the second-instance court left the question open as it considered it irrelevant to the resolution of the dispute.

64 — This argument appears to me to be an example of how, in the absence of harmonisation of law on fair compensation, profoundly different and incompatible approaches between them can be adopted at national level.

65 — *Stichting de Thuiskopie* (cited in footnote 7), paragraphs 34 and 36, and *Luksan* cited in footnote 7), paragraph 106. That statement of principle applies, in my view, regardless of whether or not in the case at issue fair compensation had already been paid. Therefore, the argument put forward by the Amazon group companies that this case-law is not applicable in the present case since in this case fair compensation has already been paid in another Member State is irrelevant.

88. The Court has also found, on the one hand, that it can be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which the final users, who reproduce the work and therefore cause the damage, reside,[66] and, on the other, the mere fact that the commercial seller of the media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation on the Member States to achieve a certain result.[67]

89. In the present case there is no dispute that since the media were acquired by final users in Austria the harm for which reparation is to be made by paying fair compensation took place in that country. Therefore, applying the abovementioned case-law there is an obligation on the Austrian authorities to ensure the effective recovery of the fair compensation for the harm suffered by the authors in Austria. Therefore, in that context, a person liable for fair compensation cannot claim that he can be released from the obligation to pay it in Austria on the grounds that he has already paid it in another Member State where the harm to the author justifying payment thereof did not take place. Where the payment of an amount on that basis was actually made in another Member State, it will be for the person liable to recover it in the Member State in question through the legal means available under its law.

90. The Amazon group companies contend that in Germany they are unable to assert any claim for recovery of fair compensation already paid in respect of certain media subsequently marketed in Austria. However, it is for the Member State in which undue payment was made to give persons not required to pay fair compensation an adequate opportunity to obtain reimbursement of undue payments by way of fair compensation, where applicable through actions before national bodies.

91. If double payment of fair compensation has actually been made in the present case, it would seem to me to be a reprehensible consequence of insufficient coordination between the laws of the Member States as a result of the absence of harmonisation of the rules on fair compensation. It will be for the Union legislature to intervene by enhancing the level of harmonisation of national law in order to prevent any such situations occurring again in future.[68]

V – Conclusion

92. On the basis of the foregoing considerations, I suggest that the Court should reply as follows to the questions referred by the Oberster Gerichtshof:

(1) A legislative scheme can be regarded as establishing fair compensation for the purposes of Directive 2001/29, where

(a) the persons entitled under Article 2 of Directive 2001/29 have a right to equitable remuneration, exercisable only through a collecting society representative of the various rightholders without distinction, against persons who, acting on a commercial basis and for remuneration, are first to place on the domestic market recording media capable of reproducing the works of the rightholders, and

(b) national law allows, on the one hand, for the possibility of a priori exemption from payment of fair compensation for natural or legal persons who may reasonably be presumed on the basis of objective – and even merely indicative – factors to be acquiring the media for purposes which are clearly different from those on which fair compensation is payable and,

66 — *Stichting de Thuiskopie* (cited in footnote 7), paragraph 35.

67 — *Stichting de Thuiskopie* (cited in footnote 7), paragraph 41.

68 — It is from that perspective, I believe, that the statements made by Advocate General Jääskinen at point 55 of his Opinion in *Stichting de Thuiskopie* (cited in footnote 7) should be viewed in the light of the subsequent judgment of the Court.

on the other, for the possibility of generally obtaining *a posteriori* reimbursement of such fair compensation in all cases where it is demonstrated that the use of the medium did not constitute an act likely to cause harm to the author of a work.

(2) In the light of the suggested reply to Question 1, I do not consider that it is necessary to reply to Question 2. Should the Court consider it necessary to reply to that question, I suggest that it should reply as follows:

2.1. a scheme establishes 'fair compensation' for the purposes of Directive 2001/29 if the right to fair compensation applies only where recording media are marketed to natural persons who use the recording media to make reproductions for private purposes, and

2.2. where recording media are marketed to natural persons it must be assumed until the contrary is proven that they will use such media with a view to making reproductions for private purposes. For the purposes of any a priori exemption from payment of fair compensation or any reimbursement thereof, it must be possible to demonstrate that a natural person has acquired the medium for a purpose clearly unrelated to private copying or use of the medium for other purposes on which fair compensation is payable.

(3) It does not follow from Directive 2001/29 that the right to payment of fair compensation does not apply where there is a national law which provides that all funds received from the payment thereof are distributed to the authors, half in the form of direct compensation and the other half in the form of indirect compensation. However, it is for the national court to assess whether, and to what extent, application of the national law constitutes, in a specific case, a form of indirect compensation which does not discriminate between the different categories of authors.

(4) Where the harm for which reparation is to be made arose in the territory of a Member State, Directive 2001/29 does not preclude the right to payment of fair compensation in that Member State if in another Member State similar remuneration for putting the media on the market has already been paid. However, it is for the Member State in which undue payment was made to give persons not required to pay fair compensation an adequate opportunity to obtain reimbursement of undue payments by way of fair compensation, where applicable through actions before national bodies.