Fair Compensation for Private Copying: Is There a Need to Amend Luxembourg's Copyright Law?

by **Martin Stierle** *

Abstract: Private copying exceptions are a core feature of many copyright laws around the world. EU Member States may provide for such an exception on the condition that the rightholders receive fair compensation. Although the European Court of Justice (ECJ) interprets the fair compensation requirement as an autonomous concept of EU law, it concedes Member States broad discretion when determining the design of their compensation scheme. Most of them have adopted a private copying exception, regularly in conjunction with a levy system operated by collecting societies. Luxembourg's Copyright Act enshrines a private copying exception on the condition that the rightholders receive fair compensation. The law refers to a Grand-Ducal regulation to lay down the conditions for determining and collecting it, but no corresponding act has ever been promulgated. This article interprets the existing legal framework in Luxembourg considering the ECJ's interpretation of Article 5(2)(b) DIR 2001/29/EC and assesses the need to amend Luxembourg's copyright law. It proposes establishing a fair compensation scheme funded through the general state budget and managed through an existing collective management organisation thereby taking into account the government's existing financial support of social and cultural establishments that already benefit reproduction rightholders.

Keywords: Private Copying; Fair Compensation; Luxembourg's Copyright Law; Article 5(2)(b) InfoSocDir

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A. Private Copying and Fair Compensation: Setting the Scene

1 An individual's ability to create a private copy of an otherwise copyright-protected work ("private copying") legally is a core feature of many copyright laws around the world.[1] Although its implementation varies considerably among national laws,[2] private copying is typically defined as an exception to

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1 For a global overview, see BIEM, CISAC and Stichting de Thuiskopie, *Private Copying, Global Study* (2020) <https://members.cisac.org/CisacPortal/cisacDownloadFileSearch.do?docId=39523&lang=en> accessed 18 September 2024. Originally, the ability to reproduce copyrighted materials for private use was intended to be enshrined as one of three express exceptions set out in art 9(2) of the Berne Convention; the UK, however, suggested a more general wording. See MRF Senftleben, *Copyright, Limitations and the Three-step Test. An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer International 2004) 50.

2 See eg MA Esteve Pardo & A Lucas-Schloetter, 'Compensation for Private Copying in Europe: Recent Developments in France, Germany and Spain' (2013) 35(8) EIPR 463 (regarding national legislation within the EU); BIEM/CISAC/Stichting de Thuiskopie (n 1) (overview of various national systems).

or limitation of the author's exclusive right to reproduce that author's work ("reproduction right").[3] The concept of private copying encompasses a variety of different reproduction activities, such as photocopying a magazine article, downloading a file for personal use, recording broadcasts to a storage medium to be viewed or listened to at a more convenient time, and making backup copies of lawfully purchased media recordings to ensure access if the original file becomes corrupted.[4]

2 The private copying exception largely developed when magnetic tape recorders were first introduced on the consumer market, with most national courts acknowledging that copyright protection covered private as well as commercial acts, resulting in a need to address private copying.[5] The concept of the exception is rooted in legal realism,[6] as it was designed to overcome two practical governance and enforcement challenges related to the reproduction of a work in the private sphere: Firstly, it was widely considered that unlimited private copying would result in market failure or, more precisely, the lack of a market, as such, for copied works.[7] From a practical perspective, most individual authors ("reproduction rightholders") lack the resources needed to manage individual requests for private copies from a potentially enormous number of private users in multiple locations and at various times.[8] Moreover, outsourcing the management of such requests to a commercial enterprise would not be financially feasible for many reproduction rightholders. Likewise, private users wishing to make a copy of a legitimately acquired work for private purposes may also lack the resources needed to seek authorisation from a potentially large number of unknown reproduction rightholders for their typical, private-copying activities. The job of identifying, locating, and communicating with all reproduction rightholders would likely be, in most situations, a burden beyond most private users' means and abilities due to the high transaction costs.[9] Secondly, in practice, with or without such an exception, most private users are able to copy works without ever seeking a licence to do so: it is practically impossible for reproduction rightholders to monitor such private copying[10] unless there is a legal regime that encroaches upon the private end-user's privacy rights.[11] When high transaction costs make bargaining between individual copyright owners and potential users of copyrighted material

3 Art 5(2) of the 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 [2001] OJ L 167/10 leaves it open as to whether private copying is implemented as an exception or limitation of the reproduction right (art 2 of the same Directive). The European Court of Justice also referred to allowing private copying as 'derogation' (Case C-426/21, *Ocilion IPTV Technologies*, ECLI:EU:C:2023:564, para 30). For a discussion on terminology, see S Karapapa, *Private Copying* (Routledge 2012) 9 f with further references. As the exception/limitation concept is most commonly described as a private copying "exception", we use "exception" throughout this article.

4 For examples, see JP Quintais, 'Private Copying and Downloading from Unlawful Sources' (2015) IIC 66, 70.

5 See PB Hugenholtz, 'The Story of the Tape Recorder and the History of Copyright Levies' in B Sherman & L Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer 2012) 179, 184 ff. See also Quintais (n 4) 75 f.

6 It is fair to say that, historically, legal realism was, and remains, the governing consideration of private copying exceptions. See A Lucas-Schloetter, 'La rémunération pour copie privée dans la tourmente (1re partie)' (2013) Légipresse 597, sec I.A (noting that the concept of private copying exceptions comes into play when it is difficult or even impossible to ensure respect for the rightholder's exclusive right); C Geiger, F Schönherr & S Karapapa, 'The Information Society Directive' in I Stamatoudi & P Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2021)para 11.119 (referring to 'reasons of practicability' as the justification for the private copying exception).

7 Karapapa (n 3) 25 ff. with further references.

8 J Reinbothe, 'Private Copy Levies' in IA Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer 2016) 299, 302; M Ficsor, *Collective Management of Copyright and Related Rights* (3rd edn WIPO Publication 2022) 14.

9 Ficsor (n 8) 14.

10 Case C-467/08 *Padawan*, ECLI:EU:C:2010:620, para 46; Case C-263/21, *Ametic*, ECLI:EU:C:2022:644, para 37 (both decisions referring to practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them).

11 Privacy concerns were addressed for the first time by the German Federal Court of Justice in its seminal decision, *Personalausweise* (BGH GRUR 1965, 104, 107) which became a corner stone of levy systems in Germany and other countries. See Hugenholtz (n 5) 187 f.

impossible or prohibitively costly, or when copyright owners are unable in practice to enforce their rights effectively against unauthorised uses, market failure is said to occur. In such circumstances, economic efficiency demands that alternate ways be found[12] and many countries opted for the private copying exception.

3 By enshrining a private copying exception in national law, copyright laws limit the reproduction rightholder's control over the use of their work. As a *quid pro quo* for this limitation, many countries have adopted statutory licensing systems.[13] When combining the private copying exception with financial compensation, the law strikes a balance between the interests of society and those of the reproduction rightholder.[14] One could refer to this combination as a liability rule or liability approach to private copying, as opposed to a property rule or property approach.[15] Such a liability rule does not protect the reproduction rightholder's interest in the work through exclusivity, but rather through obligatory financial compensation established, for example, by national legislation and/or national courts.

4 Many countries apply the liability rule using an indirect collectivisation mechanism comprised of a special levy paid into a collective pool.[16,17] The special levy, separate from a general sales tax, is imposed when purchasing reproduction media (e.g., hard drives, SD cards) or devices (e.g., copy machines, scanners, smartphones). Those levies, however, are not forwarded directly to individual reproduction rightholders; rather, they are paid into a collective copyright pool[18] representing all reproduction rightholders. The funds in the pool are then distributed to the rightholders on the basis of an abstract scheme. Such distribution is intended to reflect "fair compensation" for private copying.

5 The concept of fair compensation for private copying has triggered one of the most polarising discussions within the European copyright community. Various scholars have contested the ongoing justification for a private copying exception that includes a compensation requirement in today's digital environment.[19] In accordance with 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 ("InfoSocDir"), most EU Member States – but not all – have implemented a functional compensation scheme in conjunction with their own private copying exception. Although

12 L. Guibault, *Copyright Limitations and Contracts: An analysis of the overridability of limitations on copyright*, (Kluwer Law International 2002) 79.

13 Karapapa (n 3) p. 11 f (describing the private copying exception in EU law as a statutory licence, while distinguishing statutory licences and the mandatory collective administration of rights). The idea that payment of equitable remuneration can be understood to have a mitigating effect can be traced back to German copyright law of the 1950s and 1960s, which had an impact during the discussions of the 1967 Stockholm Conference. Senftleben (n 1) p. 56.

14 See eg Reinbothe (n 8) p. 302 (referring to the public interest in unhindered access and the interests of the economic interests of the rightholders).

15 For the difference between so-called property rules and liability rules, compare G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harv L Rev 1089 and C Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 Vand J Ent Tech L 515, 529 (arguing against use of the term 'liability rule' for private copying remuneration).

16 BIEM/CISAC/Stichting de Thuiskopie (n 1).

17 For an overview of the functioning of a system of collectivisation, see Ficsor (n 8) pp. 13 ff.

18 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance [2014] OJ L 84/72 ("Collective Management Directive").

19 See eg PB Hugenholtz, L Guibault and S van Geffen, 'The Future of Levies in a Digital Environment' [March 2003] <https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf> accessed 18 September 2024 (arguing that it has been possible to control private copying of protected since the advent of digital rights management) with further references.

Luxembourg,[20] as well as Bulgaria[21] and Malta,[22] have incorporated a private copying exception into their copyright laws, they either have no compensation mechanism in place (Luxembourg),[23] or have adopted a compensation requirement that no longer works (Bulgaria),[24] or only works to a very limited extent (Malta).[25] This state of affairs is particularly surprising for Luxembourg, as it claims to offer an "exemplary level of protection" for ideas and creations through intellectual property rights.[26] Some even assert that Luxembourg's absence of a private copying levy makes the Grand Duchy a popular "copying levy haven" for blank media buyers from neighbouring countries.[27]

6 This article revisits Luxembourg's private copying exception considering EU law and the interpretation thereof by the European Court of Justice (ECJ). It looks at the existing legal framework in Luxembourg (section B) and the requirement for fair compensation set out in the InfoSocDir[28] (section C). Against this backdrop, it discusses the interpretation and application of Luxembourg's existing private copying exception *sans* compensation (section D) and addresses the need for an amendment to its existing national copyright framework (section E). The paper elaborates on the main considerations when setting up a fair compensation scheme (section F) before offering a conclusion that proposes a way forward (section G).

7 Although this article primarily addresses Luxembourg's specific situation, it also intends to inform similar discussions in other EU Member States, most notably Bulgaria and Malta, where compensating reproduction rightholders for private copying has been, or currently is, the subject of heated debate. In particular, the questions of whether the EU requires its Member States to adopt a fair compensation requirement, and how to implement and maintain such a mechanism without a heavy regulatory burden, are of similar concern to other small and medium-sized Member States that fear the introduction of a levy system due to the expected disproportionately high administrative costs.

B. The Legal Framework in Luxembourg

8 Luxembourg has a long history of copyright protection, dating back to the 19th century.[29] In 2001, just a month before the EU adopted the InfoSocDir,[30] the Grand Duchy consolidated its existing legislation on copyright and similar rights into its 2001 Copyright Act,[31] which remains the foundation of

20 JL Putz, *Le droit d'auteur* (2nd edn, Lacier 2013) para 338 ff; K Manhaeve and T Schiltz, 'Luxembourg' in B Lindner & T Shapiro (eds), *Copyright in the Information Society. A Guide to National Implementation of the European Directive* (2nd edn, Edward Elgar 2019), para 20.043 ff.

21 V Sokolov, 'Bulgaria' in Lindner/Shapiro (eds) (n 20) para 5.40.

22 PPM Grimaud & SL Azzopardi, 'Malta' in Lindner/Shapiro (eds) (n 20) para 21.32.

23 For the situation in Luxembourg as of this writing, see secs B and D.

24 After unprecedented lobbying by Bulgaria's consumer electronic industry, Bulgaria enacted amendments to its copyright law in 2011. At that point, Copy BG, the collective management organization appointed by reproduction rightholders, stopped collecting levies. A complaint with the European Commission was made, but the matter has yet to be solved as of this writing. Sokolov (n 21) para 5.41; BIEM/CISAC/Stichting de Thuiskopie (n 1) p. 260.

25 In Malta, a levy system for private copying was planned but never implemented. As a result, no remuneration is collected. Grimaud/Azzopardi (n 22) para 21.35; BIEM/CISAC/Stichting de Thuiskopie (n 1) p. 280.

26 Indeed, Luxembourg's national website states: 'Intellectual property. Your ideas and creations are entitled to exemplary protection' <https://luxembourg.public.lu/en/invest/innovation/intellectual-property.html> accessed 18 September 2024.

27 See eg Wikipedia <https://en.wikipedia.org/wiki/Private_copying_levy#Luxembourg> accessed 18 September 2024.

28 InfoSocDir (n 3) art 5(2)(a) and (b).

29 Putz (n 20) para 60.

30 InfoSocDir (n 3).

31 *Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données,* Mémorial A 50 (author translation: "Act of 18 April 2001 on authors' rights, related rights, and databases") (the "2001 Copyright Act"). Since its initial enactment, the 2001 Copyright Act has been amended and consolidated several times, most recently by *Loi du 1er avril 2022 portant modification de la loi modifiée du 18 avril 2001*

Luxembourg's copyright law to this day. Section 2 of the 2001 Copyright Act, entitled "Exceptions to Author's Rights",[32] included the original version of Article 10, which specifically noted in (4°):

> Where a work has been lawfully made available to the public, the author may not prohibit [...] the reproduction of the work made free of charge by the copier and for strictly private use, not intended for public use or communication, and provided that such reproduction does not prejudice the publication of the original work.[33]

9 A few years later, in 2004, Luxembourg amended the 2001 Copyright Law to align it with the InfoSocDir (the "2004 Amendment").[34] In that regard, it modified the original Article 10 to incorporate the *quid pro quo* contemplated by Article 5(2) of the InfoSocDir into Article 10 (1) (4°):

> Where a work [...] has been lawfully made available to the public, the author may not prohibit [...] the reproduction on any medium by a natural person for his or her private use and for ends that are neither directly nor indirectly commercial, on the condition that the rightholders receive fair compensation that takes into account the application of the technological measures referred to in articles 71[ter] to 71[quinquies] of this law to the works concerned. The conditions for fixing and collecting such compensation, as well as its level, are laid down by Grand-Ducal regulation.[35]

10 Article 10(1)(4°) has remained unchanged and intact for the last 20 years.

11 Although the 2004 Amendment made private copying conditional on fair compensation of rightholders and implied that a Grand-Ducal Regulation ("GDR") establishing a compensation scheme was to be set up, no such GDR has ever been promulgated.[36] The GDR of 16 March 2005, for example, defines the composition of Luxembourg's Copyright and Related Rights Commission, but does not mention any compensation scheme for private copying.[37] Therefore, Luxembourg's copyright law still does not specify who is responsible for paying fair compensation, how it should be calculated, or how reproduction rightholders are to receive their share.

12 The debate about how to calculate, collect, and distribute fair compensation was already in full swing before the 2001 Copyright Act was enacted. As part of that legislative discussion, the Minister for the Economy expressed doubts about the efficacy of the compensation mechanism being used in other EU Member States, specifically private copying levies.[38]

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sur les droits d'auteur, les droits voisins et les bases de données en vue de la transposition de la directive 2019/789 du Parlement européen et du Conseil du 17 avril 2019 établissant des règles sur l'exercice du droit d'auteur et des droits voisins applicables à certaines transmissions en ligne d'organismes de radiodiffusion et retransmissions de programmes de télévision et de radio, et modifiant la directive 93/83/CEE du Conseil, Mémorial A 159, (collectively, the 2001 Copyright Act, the 2004 Amendment (n 34), and all other amendments thereto, are referred to as "Luxembourg's Copyright Act" or the "amended Copyright Act").

32 Author translation of "*Des exceptions aux droits d'auteur*," the title of sec 2 of the 2001 Copyright Act.

33 Author translation of the original art 10(4°) of the 2001 Copyright Act, which reads, in the relevant part: *"Lorsque l'œuvre a été licitement rendue accessible au public, l'auteur ne peut interdire: [...] la reproduction d'une œuvre effectuée à titre gratuit par le copiste et pour son usage strictement privé, non destinée à une utilisation ou à une communication publiques [sic], et à condition que cette reproduction ne porte pas préjudice à l'édition de l'œuvre originale."*

34 *Loi du 18 avril 2004 modifiant 1. la loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, et 2. la loi modifiée du 20 juillet 1992 portant modification du régime des brevets d'invention.* (the "2004 Amendment").

35 (emphasis added). Author translation of the amended art 10(1)(4°) incorporated in the 2004 Amendment, which reads, in relevant part: *"Lorsque l'œuvre, autre qu'une base de données, a été licitement rendue accessible au public, l'auteur ne peut interdire [...] la reproduction sur tout support par une personne physique pour son usage privé et à des fins non directement ou indirectement commerciales, à condition que les titulaires de droits reçoivent une compensation équitable, qui prend en compte l'application des mesures techniques visées aux articles 71ter à 71quinquies de la présente loi aux œuvres concernées. Les conditions de fixation et de perception, ainsi que le niveau de cette compensation sont fixés [sic] par règlement grand-ducal."*

36 Putz (n 20) para 346; Manhaeve/Schiltz (n 20) para 20.076.

37 *Règlement grand-ducal du 16 mars 2005 portant organisation de la Commission des droits d'auteur et des droits voisins*, Mémorial A 52.

38 Doc. parl. 5128, 3 f.

He stated that he did not intend to introduce what he described as a "tax on computers, hard disks, printers, faxes, photocopying machines, blank cassettes or DVDs, unless there was an obligation at the European level to do so."[39] This reluctance was reiterated in 2003 when Luxembourg's Chambre des Députés discussed aligning the law with the InfoSocDir.[40] According to parliamentary documents, a lump-sum royalty was considered contrary to Luxembourg's vision of the information society and free access to information.[41] The Ministry of the Economy understood a flat-rate levy on equipment and recordables as a heavy regulatory and administrative burden, imposing significant administrative constraints on economic operators.[42]

13 Ultimately, the Chambre des Députés decided against introducing a levy system, opting instead to explore alternative, more balanced forms of compensation.[43] The government also began contemplating new forms of electronic rights management, such as digital rights management ("DRM").[44] In the early 2000s, it was widely assumed that technical advancements would eliminate the need for levy systems, allowing for greater control over the use of copyright-protected works and addressing the practical challenges of governing and enforcing reproduction rights in the private sphere.[45] This would work on a bilateral basis without any need to develop a regulatory framework. However, expectations surrounding DRM were only marginally realised, as it became unpopular with certain consumers and failed to address all dimensions of private copying.[46]

39 H Grethen, 36 session, 15 February 2001 (author translation). See also Manhaeve/Schiltz (n 20) para 20.072.

40 Doc. parl. 5128, 4.

41 Ibid 3.

42 Ibid.

43 Ibid 4.

44 Ibid 3.

45 Hugenholtz/Guibault/van Geffen (n 19).

46 See eg AA Quaedvlieg, 'The Netherlands' in Lindner/Shapiro (eds) (n 20) para 22.091 with further references, in particular the Gerkens Report.

47 COM (88) 172 final, p. 99 ff.

48 See Lucas-Schloetter (n 6) p. 597 (stating that private copying levies are not harmonized with the InfoSocDir only enshrining the principle of fair compensation); E Rosati, *Copyright and the Court of Justice of the European Union* (OUP 2023) 242 (describing InfoSocDir's ability to harmonize law on private copying as weak).

49 Emphasis added.

50 S Bechtold, 'Information Society Directive' in T Dreier & PB Hugenholtz (eds), *Concise European Copyright Law* (2nd edn, Kluwer 2016), art 5, n 3 (b).

51 Esteve Pardo/Lucas-Schloetter (n 2) p. 463; T Shapiro,

C. The Fair Compensation Requirement in EU Copyright Law

I. Fair Compensation as a Condition

14 Private copying and the private copying exception first appeared on the European Commission's harmonisation agenda in 1988.[47] Although a specific private copying directive was never adopted, the InfoSocDir of 2001 established parameters that Member States were (and still are) expected to implement (or continue to implement) in relation to the private copying exception.[48] Article 5(2)(b) of the InfoSocDir reads:

> Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: [...] 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 [...].[49]

15 The above wording embeds fair compensation as a condition for any private copying exception adopted or implemented by Member States.[50] Unsurprisingly, the consumer electronics and information technology sectors were hostile to what they perceived to be the imposition of a new "tax" on their products.[51]

Over time, innumerable disputes – particularly between industry and collective management organisations, which typically collect, allocate, and distribute such fair compensation to reproduction rightholders – triggered national litigation. This, in turn, led to numerous requests for preliminary rulings from the ECJ, seeking interpretation[52] of the fair compensation requirement set out in Article 5(2)(b) of the InfoSocDir. In its landmark ruling in *Padawan*,[53] the ECJ clarified that Member States opting to introduce or maintain a private copying exception in their national law are *required* to ensure the provision of fair compensation to rightholders.[54] The Court emphasised that the concept of fair compensation is an autonomous concept of EU law – one that must be interpreted uniformly across all Member States.[55] The Court further noted that "given the practical difficulties in identifying users and obliging them to compensate rightholders for the harm caused to them," Member States could opt to "establish a levy system" to finance such fair compensation.[56] Further, the ECJ held that Member States could impose such levies on "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."[57] Finally, the Court noted that "nothing prevents those liable to pay the compensation from passing on the private copying levy" to the private user in the form of a higher price.[58]

16 The original Commission's proposal for the InfoSocDir gave Member States more flexibility when adopting or maintaining a private copying exception, as it did not require financial compensation.[59] However, although negotiations in the European Parliament and European Council revealed that a higher degree of harmonisation was intended, no agreement was reached on the specifics. Most countries preferred levies as the majority of Member States either already had such a remuneration scheme for private copying in place or intended to introduce one.[60] The strongest opponent of requiring levies was the UK, which was not prepared to be obligated to introduce them through internal market legislation.[61]

17 A compromise was eventually reached, resulting in the term "fair compensation," originally formulated in Italian as "*equo compenso,*" the mother tongue of the European Parliament Rapporteur of the InfoSocDir's First Reading, Roberto Barzanti.[62] This notion was hoped to bridge the gap between the Member States that use levy systems and call for "equitable remuneration" and those that had resisted such levies altogether.[63] The concept of

'Directive 2001/29/EC on copyright in the information society' in Lindner/Shapiro (eds) (n 20) para 2.117.

52 See, however, A Metzger, 'Rechtsfortbildung im Richtlinienrecht: Zur judikativen Rechtsangleichung durch den EuGH im Urheberrecht' (2017) ZEuP 836, 860 (describing the ECJ's method in these decisions as lying somewhere between interpretation and development of law).

53 Case C-467/08 *Padawan* (n 10).

54 Ibid, para 30; see also, Case C-277/10 *Luksan*, ECLI:EU:C:2012:65, para 93; Case C-462/09 *Stichting de Thuiskopie*, ECLI:EU:C:2011:397, para 22; Case C-463/12 *Copydan Båndkopi*, ECLI:EU:C:2015:144, para 19; Case C-470/14 *EGEDA and Others*, ECLI:EU:C:2016:418, para 20.

55 Case C-467/08 *Padawan* (n 10) paras 32 and 37.

56 Ibid, para 46 ff; Case C-572/13 *Hewlett-Packard Belgium*, ECLI:EU:C:2015:750, para 70.

57 Case C-467/08 *Padawan* (n 10) para 46 ff; Case C-572/13 *Hewlett-Packard Belgium* (n 56) para 70.

58 Case C-467/08 *Padawan* (n 10) para 48.

59 Compare Article 5(2)(b) of COM(97) 628 final, which did not refer to compensation and Recital 26 of COM(97) 628 final, which reads, in the relevant part: "Member States should be allowed to provide for an exception [...] for private use; whereas this *may* include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders; [...] it appears justifiable to refrain from further harmonization" (emphasis added).

60 Reinbothe (n 8) 310.

61 Ibid.

62 Ibid.

63 J Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft' (2001) GRUR International 733, 738; Hugenholtz/Guibault/van Geffen (n 19) p. 36; S von Lewinski & MM Walter, 'Information Society Directive' in MM Walter and S von Lewinski (eds), European Copyright Law: A Commentary (OUP 2010) para 11.5.24; Bechtold (n 50) art 5, n 3 (b); L Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright

fair compensation was intended to compensate rightholders at a lower level than the amount of equitable remuneration provided by existing levies.[64] While equitable remuneration may amount to the remuneration a rightholder would have received by granting a typical licence, that is not necessarily the case for fair compensation.[65]

II. Fair Compensation as a Concept Based on Harm

18 The ECJ pointed out that the autonomous concept of fair compensation is based on an evaluation of harm[66] and, relying on Recitals 35 and 38 of the InfoSocDir, established "harm suffered" as the core criterion for calculating fair compensation.[67] In the ECJ's early decisions, it was unclear whether the Court understood "harm" as an abstract concept – referring to harm resulting from the introduction of a private copying exception – or as actual harm arising from the specific act of reproduction in question.[68] The very idea that abstract harm might be sufficient to trigger the need for compensation relates to the concept of private copying in German law. The German framework, established in the 1960s as the world's first levy system, served as a blueprint for many countries.[69] According to the Court in *Padawan*, fair compensation should be calculated based on the harm caused to authors of protected works by the introduction of the private copying exception.[70] In *Hewlett-Packard Belgium*, however, the ECJ held that fair compensation is, in principle, intended to compensate for the harm suffered resulting from the copies actually produced ("the criterion of actual harm suffered") and not for any abstract harm created by the mere implementation or continuation of a private copying exception in national laws.[71]

19 Notably, although nobody disputes the leeway of Member States to continue applying their existing levies based on "equitable remuneration",[72] such continuation appears problematic in light of the ECJ's conceptual understanding of fair compensation. If the concept of fair compensation is based on harm, it must be an *aliud* to the concept of equitable remuneration.[73] The ECJ's case law supports such a conceptual distinction: in the context of Article 8(2) of Directive 92/100/EEC,[74] the Court interpreted

under Directive 2001/29/EC' (2010) JIPITEC 55, 58; Geiger/Schönherr/Karapapa (n 6) para 11.114.

64 Reinbothe (n 8) p. 316; S Bechtold (n 50), art 5, n 3 (b) (mentioned in 1st edn but not in 2nd edn).

65 Bechtold (n 64) art 5, n 3 (b) (mentioned in 1st edn but not in 2nd edn). See also J Poort & JP Quintais, 'The Levy Runs Dry. A Legal and Economic Analysis of EU Private Copying Levies' (2013) JIPITEC 205, para 18.

66 Ibid, (n 10) para 37, 39 ff.

67 Ibid; see also Case C-462/09 *Stichting de Thuiskopie* (n 54) para 24. This approach has been criticized by Reinbothe (n 8) p. 318 (arguing that harm is mentioned as only one of the relevant aspects in the recitals).

68 Cf. Poort/Quintais (n 65) para 31; Shapiro (n 51) para 2.138 (understanding the earlier decisions of the ECJ as referring to the introduction of the exception).

69 J Reinbothe, 'Compensation for Private Taping Under Sec. 53 (5) of the German Copyright Act' (1981) IIC 36, 36 (describing, in 1981, the provision granting remuneration from the producers of sound and visual recording equipment as the only provision of its kind in the world). For the history of copyright levies, see Hugenholtz (n 5) p. 179 (asserting, eg, that the "German levy system [...] became a model for the world"); Quintais (n 4) p. 76 (describing the German system as a staple of most Member States' national copyright laws and the impact on the Stockholm revision of the Berne Convention).

70 Case C-467/08 *Padawan* (n 10) para 42.

71 Case C-572/13 *Hewlett-Packard Belgium* (n 56) para 69. See also Geiger/Schönherr/Karapapa (n 6) para 11.114 f. For a critique of the approach, see B Hazucha, 'Private copying and harm to authors–compensation versus remuneration' (2017) 133 LQR 269, 277 ff.

72 InfoSocDir (n 3) Recital 38 mirrors this understanding. See Reinbothe (n 8) 315 ff; von Lewinski/Walter (n 63) para 11.5.25. For a different view, see B Koch & J Druschel, 'Entspricht die Bestimmung der angemessenen Vergütung nach §§ 54, 54a UrhG dem unionsrechtlichen Konzept des gerechten Ausgleichs? (2015) GRUR 957, 967 f.

73 Bechtold (n 64) art 5, n 3 (b) (mentioned in the 1st but not 2nd edn); C Pflüger, *Gerechter Ausgleich und angemessene Vergütung. Dispositionsmöglichkeiten bei Vergütungsansprüchen aus gesetzlichen Lizenzen* (Nomos 2017), 63.

74 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 (1992) OJ L

equitable remuneration as a concept based on the value of the use in trade.[75] However, in later decisions, the ECJ appeared to suggest that the differences between the two are not significant.[76] The ECJ argued that the concept of "remuneration" is also intended to provide recompense for authors, arising from the need to compensate them for the harm caused.[77] Hence, the notion of equitable remuneration arguably encompasses fair compensation.[78]

III. Flexibilities and Guarantees

20 When the ECJ pointed out in *Padawan* that fair compensation is an autonomous concept of EU law, which must be interpreted uniformly in all Member States,[79] it also acknowledged a certain degree of flexibility for Member States in implementing a compensation scheme. The ECJ outlined that certain powers are vested upon Member States to determine, within the limits imposed by EU law and in particular by the InfoSocDir, the form and level of fair compensation as well as the detailed arrangements for its financing and collection.[80] The Court continued to develop this understanding in various other decisions, pointing out that Member States enjoy "broad discretion" when determining the design of a fair compensation scheme.[81]

21 However, the ECJ noted that the compensation requirement also imposed a duty on Member States. It obliges them to achieve a certain result.[82] In other words, a Member State implementing a private copying exception must ensure, within the framework of their competences, effective recovery of fair compensation intended to compensate authors.[83]

IV. Exceptions to Fair Compensation

22 As noted above, as of this writing, some Member States still do not have a compensation mechanism in place.[84] When attempting to justify this absence, arguments based on InfoSocDir's Recital 35 have been put forth.[85] Recital 35 reads as follows:[86]

> In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-

346//61 (repealed).

75 Case C-245/00 SENA, ECLI:EU:C:2003:68, para 37; Case C-192/04 *Lagardère Active Broadcast*, ECLI:EU:C:2005:475, para 50.

76 Bechtold (n 50) art 5, n 3 (b) (with a similar interpretation of the decisions); Hazucha (n 71) 293 ff. (arguing that the ECJ follows, *de facto*, a remuneration approach labelled as a compensation approach).

77 Case , *VEWA*, ECLI:EU:C:2011:442, para 29; Case C-277/10 Luksan (n 54) para 103.

78 For a suggested limit, see AG Opinion, Case C-260/22 *Seven.One Entertainment Group*, ECLI:EU:C:2023:583, para - 24 (AG Collins argued that a compensation that over- or underestimates the harm caused to rightholders is incompatible with the fair balance that must be maintained between the interests and fundamental rights of rightholders and users, together with the public interest); see also Lucas-Schloetter (n 6) sec I.A; A Lucas-Schloetter, 'Exceptions – Rémunération pour copie privée – Appareils reconditionnés – Double paiement (non)' (2024) (90) Propr Intell 50, 52 (referring to a similar discussion in France regarding refurbished devices).

79 Case C-467/08 *Padawan* (n 10) paras 32, 37.

80 Ibid, para 37.

81 Case C-462/09 *Stichting de Thuiskopie* (n 54) para 23; Case C-521/11 *Amazon.com International Sales and Others*, ECLI:EU:C:2013:515, para 20; Case C-463/12 *Copydan Båndkopi* (n 54) para 20; Case C-470/14 *EGEDA and others* (n 54) para 22; Case C-263/21 *Ametic* (n 10) para 36.

82 Case C-462/09 *Stichting de Thuiskopie* (n 54) para 34; Case C-470/14 *EGEDA and others* (n 54) para 21.

83 Case C-462/09 *Stichting de Thuiskopie* (n 54) para 34, Case C-470/14 *EGEDA and others* (n 54) para 21. See also Pflüger (n 73) pp. 86 ff.; P Homar, *System und Prinzipien der gesetzlichen Vergütungsansprüche des Urheberrechts* [Österreich 2021], para 863.

84 See sec A, above.

85 Shapiro (n 51) para 2.116, fn. 175; Hazucha (n 71) pp. 273 ff (explaining the UK's pre-Brexit position). Luxembourg's legislature did much the same (doc. parl. 5128, 4 (arguing, inter alia, that there might be no obligation to pay or to make an additional payment in certain cases, although it did not explicitly question the general obligation to compensate)); Metzger (n 52) p. 858 (arguing that Recital 35 is vague).

86 For purposes of our analysis, we have numbered each sentence comprising Recital 35. Emphasis added.

matter ("Sentence 1"). When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case ("Sentence 2"). When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question ("Sentence 3"). In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due ("Sentence 4"). The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive ("Sentence 5"). In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise ("Sentence 6").

23 By including Recital 35, both the European Parliament and the Council of the European Union acknowledged that not all exceptions to, or limitations on, reproduction rights require payment to the rightholder. The Sentence 4 clearly states that rightholders who have already been remunerated in some other way (e.g., through a licence) may not be entitled to a specific or separate payment for the consequences of such exceptions or limitations. Sentence 6 goes further, explicitly acknowledging that no payment at all needs to be made if the prejudice suffered is *de minimis*. Clearly, while Recital 35 provides evidence of the legislator's intent, the real substance of the fair compensation obligation – and whether an exception applies – derives from Article 5(2)(b) of the InfoSocDir, which contains no express exception to the compensation requirement; any such exception flows exclusively from Recital 35.[87] Despite this, one might interpret the adjective "fair" in Article 5(2)(b) of the InfoSocDir as implying situations where no compensation is expected, therewith incorporating the two scenarios mentioned in Sentence 4 and Sentence 6 of Recital 35.

24 Generally speaking, Recital 35 of the InfoSocDir had no intention of questioning the obligation of Member States to compensate rightholders for private copying. At least historically, the scope of the exceptions mentioned in Sentence 4 and Sentence 6 were limited to rather specific cases: Sentence 4 was designed to prevent so-called "double dipping" – that is, to prevent rightholders from being paid twice for copies of the same work via, for example, licence fees,[88] an understanding that was accepted by the ECJ in *Padawan*.[89] On the contrary, others contend that the ECJ has moved away from that particular interpretation, as per its decisions in *VG Wort*[90] and *Copydan Båndkopi*.[91] In these two cases, the ECJ suggested that the form of the rightholder's authorising act (e.g., licence) could have no bearing on the fair compensation owed.[92] Such reasoning, however, appears to conflict with Sentence 4, raising questions about whether it has *any* applicable scope. Should the ECJ interpret Sentence 4 in this latter manner, it would diminish the intended impact of the provision, which appears contrary to the original legislative intent. Furthermore, this interpretation could place consumers at a disadvantage by making it even more difficult for Member States to justify the absence of compensation in cases where double dipping might occur.

25 Sentence 6 expresses the legislators' desire to obviate the need for compensation when there is minimal prejudice to the rightholder's reproduction right. This was included in Recital 35 to accommodate the concerns of a few Member States –particularly the pre-Brexit UK. During the directive's negotiations, the UK insisted that exceptions to the reproduction right should be allowed without remuneration for time-shifting.[93] It should be pointed out that, at the

87 *British Academy of Songwriters, Composers and Authors and others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin), para 199.

88 Reinbothe (n 8) 317.

89 Case C-467/08 *Padawan* (n 10) para 39.

90 Joined Cases C-457/11 to C-460/11, *VG Wort and others*, ECLI:EU:C:2013:426, para 37 ff.

91 Poort/Quintais (n 65) para 32 ff; Hazucha (n 71) 278; Shapiro (n 51) para 2.153.

92 Case C-463/12 *Copydan Båndkopi* (n 54) para 65. Shapiro (n 51) para 2.153.

93 A Lauber-Rönsberg, *Urheberrecht und Privatgebrauch. Eine rechtsvergleichende Untersuchung des deutschen und britischen Rechts* (Nomos 2011) 65; Reinbothe (n 8) p. 317 (both referring to a Commission statement).

time, the UK already had a corresponding provision in Section 70 of its Copyright, Designs and Patents Act 1988. In *Copydan Båndkopi*, while the ECJ ruled that setting such a threshold falls within the discretion of Member States,[94] they are still expected to apply the principle of equal treatment when setting it.[95] Some scholars suggest that, in addition to reproduction for time shifting purposes, the scope of *de minimis* prejudice should include, for example, format shifting (e.g., converting media files into different file formats and data compression) and making backup copies, so long as the private copy does not lead to a proliferation of the content.[96]

V. The Experience of Pre-Brexit UK

26 Sentences 4 and 6 arguably allow Member States to establish a private copying exception without implementing a compensation mechanism.[97] In 2014, the UK did just that – adopting a regulation implementing such an exception without compensation pursuant to Section 28B of its Copyright, Designs and Patents Act 1988.[98] Accordingly, any person who legitimately acquired content, other than a computer program, was entitled to copy that work for his or her own private use, and make any such copies in other formats and store them in the cloud, provided that such copies were made for private, non-commercial use. The exception, however, did not allow that person to copy such content to give to a family member, friend, or colleague.

27 Various studies had suggested that adopting or maintaining a private copying exception without implementing a commensurate compensation mechanism is consistent with Sentences 4 and 6, provided that no significant harm resulted.[99] Other scholars and governments have argued that reproduction rightholders are already well aware that consumers make private copies of content for legitimate, private-use purposes, such that the benefit of being able to do so is already priced into the purchase ("pricing in principle"), making any additional compensation either double dipping, a *de minimis* prejudice, or both.[100] Hence, a government's decision to forego a compensation scheme can be based on the understanding that the private copying exception will not entail a loss for rightholders – rather, it merely legitimises an already well-known and anticipated consumer practice.[101]

28 The UK courts rejected such arguments, confirming that the private copying exception implemented by the UK government did not comply with the UK's obligations under EU law.[102] On 19 June 2015, the High Court quashed the amendment.[103] Judge Green accepted the application of the pricing in principle[104]

94 Case C-463/12 *Copydan Båndkopi* (n 54) para 62.

95 Ibid.

96 Poort/Quintais (n 65) para 91 (arguing that there may not even be any harm in these cases).

97 *British Academy of Songwriters, Composers and Authors and others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin), para 184 f. See E Rosati, 'ECJ links fair compensation in Arts. 5(2)(a) and (b) of the InfoSoc Directive to actual harm requirement' (2016) GRUR International 399, 401.

98 Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361). See on this amendment Hazucha (n 71) pp. 271 ff.; Rosati (n 48) pp. 243 ff.

99 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* [UK Intellectual Property Office 2011] para 5.28 ff <https://assets.publishing.service.gov.uk/media/5a796832ed915d07d35b53cd/ipreview-finalreport.pdf> accessed 18 September 2024; M Kretschmer, 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' [UK Intellectual Property Office 2011] 19 ff <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710611> accessed 18 September 2024. See also, S Karapapa, 'A Copyright Exception for Private Copying in the United Kingdom' [2013] 35(3) E.I.P.R. 129. Compare K Grisse & S Koroch, 'The British Private Copying Exception and Its Compatibility with the Information Society Directive' [2015] 10(7) JIPLP 562 (doubting the compatibility of 28B of the CDPA with the InfoSocDir).

100 Hargreaves (n 99) para 5.30 f.

101 Ibid.

102 *British Academy of Songwriters, Composers and Authors and others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin), para 208 ff.

103 *British Academy of Songwriters, Composers and Authors and others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin).

104 Ibid, para 208 ff.

but held that the discretion of EU Member States not to implement a compensation mechanism could only be exercised if they could demonstrate that the harm to the reproduction rightholder caused by the introduction of a copyright exception is *de minimis* or zero.[105] According to the court, this means that the evidence which the Member State must collect and the inferences it may draw upon must be sufficient to provide an answer to the following question: "Is the harm minimal or zero?"[106] The government's decision to introduce the amendment was based on multiple studies.[107] The High Court accepted that there was sufficient evidence and literature upon which "to draw certain common sense economic intuitions about pricing-in", but also found that "these common sense intuitions were not capable of answering the very much more specific legal question which was whether pricing-in was so extensive as to render residual harm minimal or non-existent".[108] According to the Court, it is "one thing to say that '*to some extent*' harm is avoided by pricing-in; it is altogether another thing to say that it is avoided so completely as to pass a *de minimis* threshold."[109]

29 The decision of the High Court was not motivated on the grounds that the absence of a fair compensation requirement is inadmissible per se – which is in line with academic literature suggesting that Member States are not prevented by EU law from drafting a tight copyright exception.[110] Rather, according to the Court, the UK government had failed to provide adequate evidence proving that harm was minimal or zero. In doing so, Judge Green set an extremely high threshold for the introduction of a private copying exception without a compensation requirement, making it almost impossible to adopt such an exception.

30 At present, the ECJ has not yet specifically decided on the level of evidence required to prove that harm is minimal or zero. Regularly, the Court emphasises the discretion of Member States.[111] Nevertheless, it would not be surprising if the ECJ were also to set high standards to demonstrate that an exception falls within the scope of Sentences 4 and Sentence 6 of InfoSocDir's Recital 35 if a Member State chooses to adopt or maintain a private copying exception while not providing *any* compensation for the rightholder. Despite his criticism of the High Court's decision, Hazucha points out that "the ECJ has clearly rejected the 'no harm' and 'indirect appropriation' arguments that could be used to justify a private copying exception without the payment of any compensation" and noted that the Court has an "attitude towards the '*de minimis* harm' argument [that] is rather restrictive."[112] Against this backdrop, the threshold to verify that no compensation is required as a *quid pro quo* for private copying is high.

D. Interpreting the Private Copying Exception Embedded in Luxembourg's Copyright Act – De Lege Lata

31 The foregoing analysis leads to questions about how one can interpret the existing private copying exception in Luxembourg's Copyright Act. To our knowledge, there have been no court decisions to date applying its Article 10(1)(4°).[113] As a principle, Article 5(2)(b) of the InfoSocDir stipulates that fair compensation for rightholders is a condition for such an exception. Article 10(1)(4°) of the amended Copyright Act provides for such compensation

105 Ibid, para 249.

106 Ibid.

107 Ibid, para 49 (referring to the reports by Hargreaves and Kretschmer).

108 Ibid, para 271 (emphasis in the original).

109 Ibid, para 271 (emphasis in the original).

110 See E Rosati, 'ECJ links fair compensation in Arts. 5(2)(a) and (b) of the InfoSoc Directive to actual harm requirement' (2016) GRUR International 399, 401 (arguing that Member States are not prevented from drafting a tight private copying exception).

111 See references in n 81.

112 Hazucha (n 71) p. 281.

113 JL Putz, *Recueil de Propriété intellectuelle* (Larcier 2022) 113. The only Luxembourg court decisions dealing with a private copying exception appear to be TA Lux., com. 8 December 2010, no 113017 and CSJ, 13 June 2012, no 37207 (affirming the court of first instance decision), which addressed the German Copyright Act, not Luxembourg's Copyright Act.

on paper but the intended GDR for setting up the conditions for the fixing and collecting of this compensation was never introduced, as pointed out above. There are three potential approaches to Article 10(1)(4°) of Luxembourg's Copyright Act: (I) apply the private copying exception without a compensation requirement, (II) do not apply the provision at all, or (III) apply it using direct compensation.

I. Apply Article 10(1)(4°) Without a Compensation Requirement

32 Article 10(1)(4°) of Luxembourg's Copyright Act may be applied without compensating the rightholder, since a compensation scheme has not yet been established. This would correspond to the legal situation prior to the amendment of 18 April 2004. Two guides on copyright law, one produced by the Luxembourg Ministry of the Economy[114] and the other by the Luxembourg Ministry of Culture[115] appear to follow this interpretation of the law. The guides refer to private copying as one of the exceptions to the reproduction right without addressing the need for compensation. For other copyright exceptions, the guides mention requirements.[116]

33 Nonetheless, such an understanding does not mirror the wording of Article 10(1)(4°) of the amended Copyright Act, which unambiguously requires fair compensation for private copying even if the details have never been set. It also is not in line with the condition of fair compensation in EU law. Reproduction acts permitted by Luxembourg's private copying exception are not so insignificant as to fall within the scope of Sentences 4 and Sentence 6 of Recital 35, such that no compensation is a "fair compensation". Firstly, qualitatively, Luxembourg's private copying exception is an extensive adaptation of the corresponding EU-level concept found in the InfoSocDir. It applies to more situations than just those in which there is minimal or no harm[117] as it replicates, almost verbatim, the wording of Article 5(2)(b) of the InfoSocDir, thereby implementing one of that provision's broadest possible scopes.[118] Indeed, in several ways, that scope is even broader than the UK's legislative exception, which was quashed by the High Court.[119] Moreover, unlike the UK government, Luxembourg has not produced any substantive assessment as to why such private copying falls within either Sentence 4 or Sentence 6 of Recital 35 of the InfoSocDir or both. At least, no such assessment has been reported.

34 Secondly, one cannot credibly suggest that the population of the Grand Duchy is quantitatively so small that reproductions in Luxembourg cause a prejudice to the rightholder which is minimal when viewed in relation to the EU's overall population. As copyrights are national IPRs and not EU IPRs, Recital 35 can only refer to the insignificance of the prejudice for the copyright conferred by a specific Member State. The case law of the ECJ supports this perspective when describing that the obligation of a Member State to ensure fair compensation is based on the harm suffered by the authors on the territory

114 Ministère de l'Économie et du Commerce Extérieur, *Les droits d'auteur : le guide* (2010) 10 <https://meco.gouvernement.lu/dam-assets/publications/guide-manuel/minist-economie/guide-droits-auteur/2010-guide-droits-auteur-fr.pdf> accessed 18 September 2024.

115 Ministère de la Culture, *Guide pratique : Droits d'auteur, droits voisins et autres droits dans le secteur du patrimoine culturel numérique*. (Version 1.0, 5 July 2021) 08 <https://mcult.gouvernement.lu/dam-assets/publications/guide-manuel/minist-culture/guide-droit-auteur/droits-auteur-droits-voisins-et-autres-droits-numerique.pdf> accessed 18 September 2024.

116 Ibid.

117 Putz (n 20) para 340.

118 It is more restrictive than the EU framework in one aspect: it allows a natural person to copy only for his or her own private use, whereas the InfoSocDir also permits copying for the private use of another natural person. The literature on Luxembourg's copyright law, however, advocates for an extended interpretation that would include copies for friends and family members (see eg Putz (n 20) para 343; Manhaeve/Schiltz (n 20) para 20.046 (adhering to the French concept of 'family circle')), which would be in line with EU law (von Lewinski/Walter (n 63) para 11.5.31; Quintais (n 4) 69; Shapiro (n 51) para 2.123) and eliminate this difference.

119 For example, Section 28B CDPA required the template to be either the individual's own copy of the work, or a personal copy of the work made by the individual while Luxembourg's law does not specify similar aspects. See also Hazucha (n 71) pp. 276 f. (explaining that the scope and applicability of the UK amendment was quite narrow in contrast to InfoSocDir's Article 5(2)(b)).

of that State.[120] The ECJ looks at the requirement of fair compensation through the prism of the specific Member State but not the entire EU.

II. Do Not Apply Article 10(1)(4°) at All

35 Several scholarly works on Luxembourg's copyright law adopt a different approach to the country's private copying exception. They argue that because fair compensation is obligatory, the private copying exception should not,[121] legally cannot,[122] or even *de facto* cannot[123] be applied at the moment, due to the lack of the requisite GDR. Luxembourg's private copying exception mentions compensation as a prerequisite for private copying, yet no GDR on compensation has yet been adopted. This position contradicts the government's own interpretation of its law – their guides on copyright law unequivocally indicate that Luxembourg has a private copying exception, despite the lack of a GDR on the details of collecting and paying fair compensation.[124]

36 If Luxembourg's Chambre des Députés had intended to pause its private copying exception until it could comply with its obligation to pay rightholders fair compensation therefor, it was equipped to do so. For example, it could have made Article 10(1)(4°) of Luxembourg's Copyright Act effective only after the required GDR introducing a compensation scheme had been promulgated. However, it chose not to implement such an express condition.

37 Moreover, it is unconvincing to interpret Article 10(1)(4°) of Luxembourg's Copyright Act as making the adoption of the GDR an implicit condition for the effectiveness of the provision. The legislative history of the amendment does not suggest that the legislature intended to suspend the pre-existing right of private parties to copy. Indeed, such an approach would have been contrary to Luxembourg's vision of the information society, as articulated in the parliamentary documents.[125]

III. Apply Article 10(1)(4°) Using Direct Compensation

38 A third potential application of Article 10(1)(4°) refuses to question the applicability of the current private copying exception. It rather sets out the requirement of each individual copying a protected work to locate and pay the individual rightholder fair compensation as a *quid pro quo* for the copy.[126] Such a compensation system would represent a significant departure from the indirect systems of collectivisation and payment implemented in most EU Member States, establishing a direct bilateral obligation for the private copier to compensate the rightholder.

39 Article 10(1)(4°) of Luxembourg's Copyright Act, as amended in 2004, clearly reflects the Member State's attempt to align its national law with the InfoSocDir, but there are no indications that the Chambre des Députés ever intended to put Luxembourg's existing private copying exception on hold until the necessary GDR was put in place. In the absence thereof, the compensation requirement can be interpreted as an obligation to be fulfilled between the parties, just like any other legal obligation must be interpreted in private law settings when no further details are provided by law. At present, there is nothing in Luxembourg's Copyright Act preventing such an interpretation. In particular, the law does not expressly prohibit individual compensation claims by stipulating that rightholders can only claim compensation via a collective society, which is the case in some Member States.[127]

120 Case C-462/09 *Stichting de Thuiskopie* (n 54) para 36.

121 Putz (n 20) para 338.

122 Oral Comments by B Krieps, quoted in M Carey, 'Right to private copy' [13 April 2007] <https://paperjam.lu/article/news-right-private-copy> accessed on 18 September 2024.

123 Manhaeve/Schiltz (n 20) para 20.076.

124 See references in n 115.

125 Doc. parl. 5128, 3.

126 As the law refers to fair compensation as a condition for an exception to the exclusive reproduction right, the copier needs to compensate (or at least offer to compensate) the rightholder in order to avoid an infringement of the reproduction right. Hence, a private party cannot copy and compensate only upon a claim of the rightholder.

127 See eg art 16d of the Dutch Copyright Act and § 54h(1) of the German Copyright Act which requires the debtor to pay to a collecting society or the rightholder

40 This approach indeed has the potential to create onerous burdens on both the copier and the rightholder. For every work acquired and copied, the private copier would have to determine who the actual rightholders are, how to get in contact with all of them, and arrange to send payment to them once the rightholders agree to whatever is considered fair compensation. Rightholders, in turn, could receive tens, hundreds, thousands, or even millions of communications from private copiers, and would need to coordinate the receipt of such fair compensation.

41 The third interpretation is, perhaps surprisingly, in line with EU law. To be clear, the InfoSocDir does not prohibit the payment of the obligatory fair compensation directly to the rightholder. In *Padawan*, the ECJ indicated that the word "compensate" in InfoSocDir's Recitals 35 and 38 expressed the EU legislature's intent to establish a specific compensation scheme.[128] However, the ECJ only noted the practical difficulties in obtaining direct compensation, therefore focusing more on the possibility of Member States to establish indirect mechanisms.[129] Additionally, Recital 38 permits such remuneration schemes, but does not prohibit direct compensation.[130]

42 If a Member State chooses to rely on a direct compensation scheme, it would still be obligated to ensure that it resulted in the effective recovery of the fair compensation intended to compensate the rightholders. It is not clear that Luxembourg could meet that obligation with such a direct compensation mechanism. As already mentioned above, the ECJ pointed out in *Stichting de Thuiskopie* that a Member State that has introduced a private copying exception into its national law is under an obligation to ensure fair compensation as a result.[131] In practice, a mechanism requiring individuals who make copies to directly compensate reproduction rightholders would likely differ significantly from situations that arise when there is no private copying exception.[132] Such an arrangement would regularly be one "honoured in the breach", as most individuals would unlikely follow through with such an individual obligation every time they wanted to record a broadcast programme or film to watch at a later time. In other words, it would be significantly challenging to enforce individual compensation, with private parties regularly reproducing works without providing any compensation to the rightholders.

E. The Need to Change the Law

43 For the reasons mentioned in Section D, none of the potential interpretations or approaches to applying Luxembourg's existing Article 10(1)(4°) is particularly compelling – or even appealing. Applying the existing private copying exception without providing fair compensation violates the compensation requirement in InfoSocDir's Article 5(2)(b) (see section D.I), yet refraining from applying any private copying exception conflicts with Luxembourg's express desire to permit private copying (see section D.II). Finally, interpreting the compensation requirement as a bilateral obligation between the copier and the rightholder risks failing to fulfil the obligation as emphasised by the ECJ's case law, namely, to ensure the effective recovery of fair compensation (section D.III). Nevertheless, without the GDR envisaged by Article 10(1)(4°) of Luxembourg's Copyright Act, Luxembourg must attempt to align itself with one of these approaches.

44 Luxembourg should change its existing legislation to ensure, on the one hand, the existence of an effective private copying exception and, on the other, compatibility with EU law. Repealing Luxembourg's private copying exception is not a feasible option. Without a private copying exception, the reproduction right would have full effect

to claim remuneration thereby via such (so-called 'Verwertungsgesellschaftenpflichtigkeit'), see T Dreier, '§ 54h Verwertungsgesellschaften; Handhabung der Mitteilungen' in T Dreier and G Schulze (eds), *Urheberrechtsgesetz Kommentar* (7th edn, CH Beck 2022) para 1.

128 Case C-467/08 *Padawan* (n 10) para 19; Case C-470/14 *EGEDA and others* (n 54) para 19.

129 Cf Shapiro (n 51) para 2.131.

130 It reads: "This may *include* the introduction or continuation of remuneration schemes [...]." (emphasis added).

131 Case C-462/09 *Stichting de Thuiskopie* (n 54) para 34.

132 See sec A above.

in the private sphere – a result that contradicts Luxembourg's express intent to follow a liberal approach with respect to private copying.[133] A clear solution in line with this approach is to uphold the broad exception in Luxembourg's copyright law while introducing an indirect mechanism to provide fair compensation to rightholders by a GDR as promised in the second sentence of Article 10(1) (4°) of Luxembourg's Copyright Act. The practical implications of this option will be explored below.

F. Fair Compensation in Luxembourg – De Lege Ferenda

45 If Luxembourg were to adopt the long-envisaged GDR setting up an indirect compensation scheme for private copying, it would need to address three particularly significant points: how to assess fair compensation for private copies made pursuant to the private copying exception (section F.I); how to collect it (section F.II); and how to allocate it (section F.III).

I. Assessing Fair Compensation

46 Applicable EU law gives those Member State choosing to grant a private copying exception broad discretion to design and implement a national compensation mechanism as well as to establish an appropriately "fair" level of compensation within its borders.[134] The starting point in exercising that discretion necessarily involves determining who decides the Member State's precise level of compensation and under what circumstances.[135] Germany, for example, originally set out its compensation levels in the applicable law;[136] however, it abandoned that approach in 2008, opting instead for compensation levels negotiated by collective management organisations with the reproduction media and device manufacturers.[137] France, on the other hand, appointed a special commission to perform the function.[138] Selecting the appropriate decision-maker is likely to exert a disproportionate impact not only on the level of compensation but also on the perceived fairness of the compensation system as a whole – therefore, it is imperative to make this choice judiciously.

47 For Luxembourg – with a very small population and an even smaller subset of individuals making private copies of protected content for their own purposes, as well as lacking relative legislative or regulatory experience in the domain – it may appear that an elegant compromise would be to establish, through legislation or the long-anticipated GDR, a commission. This would comprise of representatives of the different stakeholders involved (e.g., collective management organisations, reproduction rightholders, reproduction media and device manufacturers and vendors, private copiers/consumers, and the relevant ministries), whose purpose would be to reach a negotiated compromise on the level of fair compensation. This particular solution appears feasible, as Articles 92 and 93 of Luxembourg's amended Copyright Act already contemplate a Commission for Copyright and Related Rights. Moreover, the GDR of 16 March 2005, as mentioned above,[139] which sets out the composition and the internal procedures of this Commission, could easily be amended to adjust its composition and to grant it the competence to propose an appropriate level of compensation.

48 Regardless of which method Luxembourg uses to set the level of fair compensation for private copying within its own territory – whether by regulation or appointed commission –, the Grand Duchy still needs to conform to various standards already embedded in EU law via a plethora of preliminary

133 Doc. parl. 5128, 3.

134 See references in n 81.

135 Although partially outdated, for concepts implemented in France, Germany, and Spain, see Esteve Pardo/Lucas-Schloetter (n 2) pp. 469 f.

136 § 54d of the German Copyright Act (with its attachment) before its reform of 2008.

137 Germany's post-2008 reform system of extended self-regulation.

138 France's *Commission pour la Rémunération Copie Privée*.

139 *Règlement grand-ducal du 16 mars 2005 portant organisation de la Commission des droits d'auteur et des droits voisins*, Mémorial A 52.

rulings by the ECJ.[140] The ECJ has, for example, ruled that reproductions based on illegal copies do not fall under the private copying exception found in Article 5(b)(2) of the InfoSocDir, thereby eliminating the need for the fair compensation therefor.[141] However, it did hold that fair compensation may be due for reproductions made via a single process that uses a chain of devices,[142] for reproductions made on multifunctional media,[143] or for reproductions stored in the cloud.[144] Luxembourg must also consider other on-going debates regarding fair compensation in other Member States, e.g., on tethered downloads (a digital file electronically delivered to a device intended to reside there on a limited basis).[145] Moreover, Luxembourg must determine whether to adopt a *de minimis* rule for reproductions that do not result in any significant harm to the rightholder – that is, when the private copy does not lead to any proliferation of content – thereby ensuring that no compensation is due.[146] The decision to exclude certain acts of reproduction requires a prior evaluation of the involved harm of the rightholder, as pointed out above.

49 Looking at the choices made by Luxembourg's nearest neighbours, taking a *quid pro quo* approach to fair compensation for private copying often leads to levies that give substantial compensation to rightholders accompanied by a substantial financial burden borne by consumers. Moreover, such levies are imposed on a wide variety of consumer products, including, but not limited to PCs, servers, laptops, tablets, smartphones, hard drives, USB sticks, and copying machines. The ECJ has confirmed that Member States have discretion as to what level of compensation is considered "fair" within their own borders,[147] the size of which varies significantly among them.[148] For example, a USB stick with 64 GBs of storage results in a levy of EUR 0.30 in Germany,[149] EUR 0.40 in the Netherlands,[150] and EUR 2.80 in France.[151] Another example concerns so-called smartphones. Depending on the particular device's specific features, it can carry a levy of EUR 5.30 in the

140 For a detailed overview, see Rosati (n 48) pp. 245 ff.

141 Case C-435/12 *ACI Adam and Others*, ECLI:EU:C:2014:254, para 31 (if the initial source of the copy was not lawful, no fair compensation is due for copying it).

142 Joined Cases C-457/11 to C-460/11 *VG Wort and others* (n 92) para 78 (reproductions made through a single process using a chain of devices, a levy may be imposed on each device, provided that the overall compensation owed is not substantially different from the amount fixed for a reproduction obtained through a single device).

143 Case C-463/12 *Copydan Båndkopi* (n 54) para 29 (fair compensation is due for multimedia (eg mobile phone memory cards) if at least one of the medium's function permits private copying; however, the amount thereof should take into account whether private copying is the medium's main or ancillary purpose as well as the relative importance of the medium's capacity to make such copies, such that no consideration need be collected, if the rightholder's prejudice if determined to be minimal).

144 Case C433/20 *Austro-Mechana,* ECLI:EU:C:2022:217, para 54 (InfoSocDir's Art 5(b)(2) precondition for a private copying exception extend to cloud storage).

145 The copyright community in the Netherlands is hotly debating whether tethered downloads must be taken into account when calculating the required compensation. See eg The Hague Court of Appeal, *HP c.s. / SONT and Thuiskopie*, 22 March 2022; O Jani & M Vonthien, 'Zur Einordnung von Tethered Downloads als Privatkopien gemäß § 53 Abs. 1 UrhG' (2023) ZUM 73.

146 Poort/Quintais (n 65) para 91 (stating that there may be even not harm at all in these cases).

147 See references in n 81.

148 Geiger/Schönherr/Karapapa (n 6) para 11.119. Unlike other countries, France, for example, charges levies even for second-hand products: Copie France, 'Private Copying Remuneration Tariffs in France as from February 1st 2023 (VAT not applicable)' (January 2023) <https://www.copiefrance.fr/images/documents/tarifs-EN-2023-02-D23.pdf> accessed 18 September 2024. For private copying levies on refurbished devices see also, A Lucas-Schloetter, 'Exceptions – Rémunération pour copie privée – Appareils reconditionnés – Double paiement (non)' (2023) (87) Propr Intell 32; Lucas-Schloetter (n 78) p. 50.

149 ZPÜ, VG Wort and VG Bild-Kunst, 'Gemeinsamer Tarif. USB-Sticks und Speicherkarten' (24 June 2019) <https://www.zpue.de/download-center/61-gesamtvertrag-usb-sticks-und-speicherkarten-ab-2019-vere/file.html> accessed 18 September 2024.

150 SONT, 'Decree on Private Copying Levies 2023 – 2024' <https://www.onderhandelingthuiskopie.nl/About-the-SONT> accessed 18 September 2024.

151 See Copie France (n 151) p. 151.

Netherlands,[152] EUR 6.25 in Germany,[153] and EUR 14.00 in France.[154] Looking only at the above-mentioned devices, and noting that STATEC[155] reports that more than 125,000 memory storage devices[156] and more than 250,000 smartphones[157] were imported into Luxembourg in 2023 alone, implementing a similar levy system in Luxembourg could amount to a financial transfer of several million euros per year.

50 Notably, France,[158] Germany,[159] and the Netherlands[160] traditionally work with a system that calls for equitable remuneration, rather than fair compensation. As previously mentioned, the level needed to achieve fair compensation is typically considered to be lower than that to achieve equitable remuneration, as the latter is frequently equated to the remuneration a rightholder would receive as a result of a licence.[161] Therefore, if the Grand Duchy were to introduce a compensation system solely based on pure harm to the rightholder, which gives rise to an obligation to provide fair compensation rather than equitable remuneration, Luxembourg could substantially reduce the financial burden placed on consumers making copies for their private use in comparison to its neighbours.

II. Compensation through Luxembourg's State Budget

51 According to the legislative history of the 2004 Amendment that introduced the current Article 10(1)(4°) of Luxembourg's Copyright Act, Luxembourg's Chambre de Députés feared that introducing a compensation scheme would result in a complex regulatory structure as well as significant administrative costs for economic operators.[162] Although the effort needed is likely to be less than it was feared 20 years ago (due, in large part, to advances in electronic cashier and booking systems), it is still likely to be costly and time-consuming for sellers to collect such levies and then channel the collected funds to a collective management organisation for allocation and distribution. Additionally, some of the sentiments expressed back then remain: the levies may still feel like an extra tax only imposed on certain products and the collection thereof may still not align with Luxembourg's societal spirit or political will. Moreover, many entitled rightholders will be non-residents. Hence, levies paid within Luxembourg will be paid out primarily to beneficiaries outside the country.

52 To alleviate such political, economic and legislative concerns, Luxembourg could opt for an alternative system, whereby fair compensation for private copies is funded not by levies, but as a state-level line-item expense taken from the state budget. Indeed, a few EU/EEA countries, including Spain[163]

152 See n 153.

153 ZPÜ, VG Wort and VG Bild-Kunst, 'Gemeinsamer Tarif. Mobiltelefone' [4 January 2016] <https://www.zpue.de/download-center/83-tarif-mobiltelefone-ab-2008/file.html> accessed 18 September 2024.

154 See Copie France (n 151) p. 151.

155 At the author's request, Luxembourg's National Institute of Statistics and Economic Studies (STATEC) provided the author with unpublished, unofficial import statistics for the years 2022 and 2023, which information the author retains on file.

156 STATEC Code No. 85235110

157 STATEC Code No. 85171300

158 Lucas-Schloetter (n 6) under sec I.A (describing private copying levies as a legal right to remuneration in France). See also, Geiger (n 15) p. 530.

159 Lauber-Rönsberg (n 93) p. 231 (describing the remuneration as compensation at the level of a licensing fee based on an individual contract); Lucas-Schloetter (n 6) under I.A (describing private copying levies as a legal right to remuneration in Germany); Esteve Pardo/Lucas-Schloetter (n 2) 466; Koch/Druschel (n 72) pp. 959 ff. (describing the German remuneration principle and its relation to fundamental rights); H Schack, *Urheber- und Urhebervertragsrecht* [10th edn., Mohr Siebeck 2021) no 507 (describing remuneration for private copying as the functional equivalent to the exploitation right).

160 For the discussion on the term *vergoeding* (art 16c Dutch Copyright Act) as opposed to r*edelijke tegemoetkoming*, see Quaedvlieg (n 46) para 22.088 with further references.

161 See sec C.I above.

162 Doc. parl. 5128, 3 f.

163 A levy system was reinstated in 2017 in the course of the proceedings relating to Case C-470/14 *EGEDA and others* (n 54). See M García Léon, 'Spain' in Lindner/Shapiro (eds) (n 20) para 28.055 ff; Rosati (n 48) p. 254.

Finland,[164] and Norway,[165] have experimented with such mechanisms in connection with their private copying exceptions. Unsurprisingly, the ECJ was called upon to give a preliminary ruling on the appropriateness thereof. In *EGEDA and Others*,[166] the Court held that, in principle, Member States can choose to establish such a compensation scheme,[167] based on the discretion reserved to them in Recitals 35 and 38 of the InfoSocDir.

53 However, the ECJ made clear that any such scheme financed by the general state budget must guarantee that the cost of fair compensation is borne solely by those individuals who generate private copies falling under the Member State's private copying exception.[168] That clarification aligns with the concept of cost allocation adopted by the ECJ in its decisions on levy schemes, where it held that levies imposed on reproduction equipment, devices, and media acquired by legal persons – as opposed to natural persons – do not fall within Article 5(2)(b) of the InfoSocDir, as the harm to rightholders is not, and cannot be, based on the Member State's private copying exception.[169] Hence, if a levy is imposed on all blank media, the Member State is required to provide persons not covered by the private copying exception with an effective right to reimbursement.[170] According to the ECJ, the right to reimbursement must be available "for persons other than natural persons who purchase reproduction equipment for purposes clearly unrelated to the making of copies for private use."[171] Spain's scheme for financing fair compensation by its general state budget failed to incorporate an exemption or a right to reimbursement for legal persons which do not in any event fall within Article 5(2)(b) of the InfoSocDir or the Member State's private copying exception.[172] As a result, it obliged legal persons to finance at least a portion of the compensation. Therefore, in *EGEDA and Others*, the ECJ found that such a mechanism is incompatible with Article 5(2)(b) InfoSocDir.[173]

54 Notwithstanding those limitations imposed by EU law, funding Luxembourg's fair compensation through its state budget is still a viable policy option worth considering, as it would keep administrative costs lower than those of a levy system. Allocating a dedicated line within an existing budget imposes a lower administrative burden than collecting levies. Keeping costs down is a particularly important goal in smaller countries where it is highly unlikely that the overheads resulting from running a complex compensation scheme would be offset by the relatively small number of individual compensation processes. Additionally, this is especially important when considering that in Luxembourg much of the

164 Kopiosto, 'Compensation for Private Copying' <https://kopiosto.fi/en/kopiosto/about-copyright/compensation-for-private-copying/> accessed 18 September 2024. See also, K Harenko, 'Finland' in Lindner/Shapiro (eds) (n 20) para 11.18. Most recently, Finland's private copying compensation experienced a drastic cut which caused a heavy debate including the call to reverse the decision of Finland's government. See CISAC, 'Creators' rights organisations call for drastic cut in Finland's private copying compensation to be reversed' <https://www.cisac.org/Newsroom/articles/creators-rights-organisations-call-drastic-cut-finlands-private-copying> accessed 18 September 2024.

165 Norwaco, 'Copying for Private Use' <https://www.norwaco.no/en/private-copying> accessed 18 September 2024.

166 Case C-470/14 *EGEDA and Others* (n 54).

167 Case C-470/14 *EGEDA and others* (n 54) para 24. Compare Metzger (n 52) 860 (apparently suggesting that the decision rejects any compensation mechanism funded by the general state budget).

168 Case C-470/14 *EGEDA and others* (n 54) para 41. The ECJ pointed out that under levy systems, persons who have reproduction equipment, devices, and media and then make them available to natural persons must pay the levy, but they are not prevented from passing the amount of the private copying levy to such persons by including it in the price charged (para 33). Thus, the burden of the levy may ultimately be borne by the private user who pays the price for the use of such media (para 34).

169 Case C-467/08 *Padawan* (n 10) para 53.

170 Case C-521/11 *Amazon.com International Sales and Others* (n 81) para 28 ff; Case C-463/12 *Copydan Båndkopi* (n 54) para 44 ff. For the details of such exceptions, see Case C-110/15 *Nokia Italia and Others*, ECLI:EU:C:2016:717, para 24 ff; Case C-263/21 *Ametic* (n 10) para 33 ff (holding that the exception can be administered by a legal person established and controlled by intellectual property management organisations).

171 Case C-467/08 *Padawan* (n 10) para 53; Case C-463/12 *Copydan Båndkopi* (n 54) para 47; Case C-263/21 *Ametic* (n 10) para 45.

172 Case C-470/14 E*GEDA and Others* (n 54) para 39 f.

173 Case C-470/14 *EGEDA and Others* (n 54) para 41.

compensation will be granted to non-residents.

55 Compensation in Luxembourg could be financed, for example, from the income tax of private persons or from the VAT collected from the purchase of reproduction equipment and media paid by private persons. This would ensure that the requirements set in the ECJ's decision in *EGEDA* are met as only natural persons eligible for private copying in the sense of Article 10(1)(4°) of Luxembourg's Copyright Act are affected. This is also a feasible approach for other countries that are hesitating to implement a levy system.

III. Allocating and Distributing Fair Compensation

56 Irrespective of whether Luxembourg chooses to compensate rightholders through levies or its state budget, the country will ultimately have to first allocate and then distribute the funds collected to the appropriate rightholders.[174] The term "rightholders" in InfoSocDir's Article 5(2)(b) refers to the list of natural and legal persons granted the exclusive right to reproduce their content, which is set out in Article 2(a) through (e).[175] Interestingly, that list appears to be exclusive. For example, the ECJ held that publishers, not being mentioned therein, are not considered rightholders entitled to compensation pursuant to InfoSocDir's Article 5(2)(b).[176]

57 Inevitably, Luxembourg will have to work with or through a collective management organisation to allocate and distribute the collected funds; it could choose to establish a new one or commission an existing one. France, for example, established Copie France, a private enterprise founded to administer compensation for private copying.[177] However, for smaller countries, such as Luxembourg, it may be preferable to administer the rightholders' compensation through one of its existing collective management organisations (e.g., ALGOA[178], Luxorr,[179] SACEM Luxembourg[180]) to avoid excessive administration costs. This is particularly true if the funds to be distributed are transferred from the state budget and the collective management organisation is not obliged to collect levies.

58 Interestingly, EU law does not demand that all the funds collected as compensation need to be paid directly to individual rightholders. The ECJ found that allocating part of the funds intended for fair compensation to social and cultural establishments set up for the benefit of those entitled to such compensation is not contrary to the objective of such compensation, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.[181]

59 Finland takes this approach to the allocation of compensation, supporting certain cultural activities from a share of the national budget established to compensate rightholders.[182] Other countries, such as France, that operate a private copying levy system also use part of the sums collected for cultural

174 It is unclear whether the right to fair compensation is waivable. The ECJ held in Case C-277/10 *Luksan* (n 54) that the reproduction rightholder's right to fair compensation might not be waivable. It decided this explicitly for authors of films.

175 It was disputed whether broadcasting organisations receive compensation: See von Lewinski/Walter (n 63) para 11.5.35; Shapiro (n 51) para 2.141. The ECJ confirmed their eligibility in C-260/22 *Seven.One Entertainment Group*, ECLI:EU:C:2023:900, para 21 ff.

176 Case C-572/13 *Hewlett-Packard Belgium* (n 56) para 47 ff.

177 See art L311-6 of the French Copyright Act.

178 Association of Collective Management of Audiovisual Works in Luxembourg ASBL ("ALGOA"), a Luxembourg non-profit association, represents the Association of International Collective Management of Audiovisual Work ("AGICOA") <https://www.algoa.lu/english/about/about.html> accessed 18 September 2024.

179 Luxembourg Organization for Reproduction Rights ASBL ("Luxorr"), a Luxembourg non-profit association <https://www.luxorr.lu/en/> accessed 18 September 2024.

180 Society of Music Authors, Composers and Editors Luxembourg SC ("SACEM Luxembourg"), a Luxembourg civil company <https://www.sacem.lu/en> accessed 18 September 2024.

181 Case C-521/11 *Amazon.com International Sales and Others* (n 81) para 53. See also Article 12(4) of the Collective Management Directive.

182 Kopiosto (n 167).

purposes.[183] This approach is also highly attractive for a small country like Luxembourg – as it would mean keeping the funds within the country and avoiding their transfer abroad, where many of the registered rightholders might be based. Moreover, because Luxembourg already offers strong financial support to its cultural establishments, it might even be possible to consider at least a portion of that existing financial support as compensation for private copies made pursuant to Luxembourg's private copying exception. As long as the amount thereof supports the rightholders mentioned in Article 2 of the InfoSocDir – which it already does – this could reduce the additional administrative expenditures that would result from implementing a compensation mechanism funded by the state budget.

G. Conclusion

60 Historically, many countries have implemented a private copying exception to overcome the practical difficulties encountered when applying and enforcing copyright law in the private sphere. In recognition thereof, the EU adopted Article 5(2)(b) of the InfoSocDir, which allows Member States to provide or maintain that exception as long as they guarantee that reproduction rightholders receive fair compensation. Although fair compensation is an autonomous concept of EU law, the InfoSocDir gives a Member State broad discretion when determining the design of a fair compensation scheme. Indeed, many Member States have exercised this discretion. Most use varying forms of levy systems that ultimately charge private parties a certain amount when purchasing reproduction media or devices, with the collected amounts being allocated and distributed to compensate reproduction rightholders through collective management organisations. EU law enshrines two exceptions under which Member States are not required to offer compensation for private copying, each of which has a very narrow scope: Recital 35 of the InfoSocDir indicates that the reproduction has to inflict either zero or minimal harm on the rightholders if a Member State does not want to provide compensation.

61 In 2014, prior to Brexit, the UK introduced a private copying exception without any compensation requirement. Despite multiple reports indicating that the new provision did not inflict any significant harm on the rightholders, the High Court quashed the amendment ruling that the UK government had failed to demonstrate that the introduced exception fell within the scope of Recital 35. Therewith, the High Court set high standards, but it would not be surprising if the ECJ were to adopt a similar approach in case a Member State adopts or maintains a broad private copying exception without *any* compensation for rightholders.

62 Although Luxembourg's Copyright Act includes a private copying exception in Article 10(1)(4°) that enshrines an obligation to fairly compensate, it does not currently operate a levy system or any other form of collective programme that actually compensates reproduction rightholders. Luxembourg's exception replicates almost verbatim the wording of Article 5(2)(b) of the InfoSocDir, thereby implementing one of that provision's broadest possible scopes. Therefore, it is unlikely that Article 10(1)(4°) of Luxembourg's Copyright Act inflicts, in the sense of Recital 35 of the InfoSocDir, only zero or minimal harm on the rightholders. Against this backdrop, it is unclear whether and, if so, how Luxembourg's private copying exception is to be applied in conformity with the Member State's obligations under EU law. One can think of three potential approaches *de lege lata* whereof none is particularly compelling.

63 This paper proposes that the Grand Duchy should consider setting up an express compensation scheme. Given the discretion afforded to Member States under EU law, Luxembourg may implement a level of compensation lower than that of many other European countries – as Member States are only obliged to provide fair compensation, whereas Luxembourg's neighbours have adopted higher levels of equitable remuneration. Instead of setting up a cumbersome levy system, the Grand Duchy should consider funding such fair compensation through its state budget. This is also recommended for other Member States concerned about the regulatory and administrative burdens associated

183 A Lucas-Schloetter, 'La rémunération pour copie privée dans la tourmente (2e partie)' (2013) Légipresse 661, sec C.III

with implementing a levy system. In principle, the ECJ permits such an approach provided that the Member State ensures that the cost of the compensation is borne by the users of private copies. Countries like Finland, Norway, and Spain already have experience in running such a scheme, and their experiences can inform Luxembourg's own implementation. Luxembourg could manage and distribute such funds through an existing collective management organisation. A Member State's support of social and cultural establishments that benefit reproduction rightholders can count towards the required fair compensation – and Luxembourg is already highly active in supporting its unique and vibrant cultural scene. Taking such funding into account would limit the need for additional spending if the Grand Duchy were to implement an indirect fair compensation scheme for private copying via its state budget, effectively killing two birds with one stone.