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BY REGISTERED MAIL

Court of Justice of the European Union
Attn. President and the Members of The Court
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Amsterdam, 8 April 2014

Honorable President and Members of the Court,

Re: Opinion of Advocate-General Cruz Villalón regarding downloading from illegal sources

1. INTRODUCTION

1. The Consumentenbond is the Dutch consumers' association. The Consumentenbond was established in 1953. As of 2014, it has 490.987 members and represents one out of 14 Dutch households, which makes it the consumer organization with the highest level of penetration in any nation.[1]

2. The Consumentenbond wishes to put on record its views of the issues before the European Court of Justice (the "ECJ") in a case regarding private copying.[2] The case has been referred to the ECJ by the Dutch Supreme Court. The question to be answered is whether The Netherlands can maintain its longstanding interpretation of the private copying exception in copyright law to encompass downloading from the internet, without regard of the source of the download. According to Advocate General Cruz Villalón the ECJ should not allow The Netherlands' interpretation of the private copying exception. He is of the opinion that

[1] Consumentenbond, number of members at 28 February 2014. The Netherlands had over 7 million households in 2012 (CBS 2012).
[2] Case C-435/12, *ACI Adam e.a./Stichting de Thuiskopie*.

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pursuant to the European Copyright Directive (the "Directive") the private copying exception should not apply to the downloading of protected content from unlawful sources.[3]

3. Should the ECJ follow the Advocate General's Opinion, downloading from unlawful sources will be deemed a restricted act under copyright law in The Netherlands. Consequently, the right for artists and other creators of protected content to receive fair compensation for such copying will no longer apply. In addition, rightholders will be given the right to prohibit the copying of protected material in the privacy of the home of consumers.

4. We currently stand at a crossroad in applying copyright law in the digital environment. The ruling of the ECJ can either lead to the invasion of privacy of millions of consumers, to enforcement measures of no avail and to a further diminishing of the public's respect for copyright law. Alternatively, the ECJ can lead the way to an interpretation that respects the private sphere and allows for fair compensation to creators. Do creators and society as a whole benefit more from the right to prohibit or from the right to be compensated? That is the question.

5. The Consumentenbond strongly opposes an outright prohibition on private copying from unlawful sources for two fundamental reasons: 1. fair compensation from both the consumer and creator perspective and 2. its consequences in the online environment. The broad Dutch interpretation of the private copying exception has always made sure that rightholders are compensated for the use of their protected materials and has prevented the rise of privacy invasive enforcement of copyright against consumers.

6. In our discussion below, we will first address the benefits of a levy scheme. Secondly, we will discuss the privacy concerns of a ban on downloading from unlawful sources. Thirdly, we will shortly discus the difficulties in enforcing the exclusive rights of the rightholders in the private sphere. Finally, we will discuss the relevant international copyright law applicable to this case.

2. FAIR COMPENSATION

7. Under the Directive, Member States may only implement a private copying exception on condition that the rightholders receive "fair compensation". The Consumentenbond and its members fully accept the rationale of the right to fair compensation and agree that creators should be remunerated for the use of their work. Consumers are willing to pay this remuneration, for instance in the form of a small levy on data carriers and devices used for storing protected material if this safeguards them from exorbitant enforcement measures within their private sphere. Please be informed that 91% of the Consumentenbond's members prefer payment of a levy over a ban on downloading from unlawful sources.[4]

8. It is not surprising that so many consumers are willing to pay a levy for the right to download from the internet, disregarding the source of the download. The rationale behind the private copying regime – avoiding enforcement in the private sphere - applies equally to

[3] The Advocate General delivered his opinion on the case on 9 January 2014 (the "Opinion").
[4] 'Download verbod nee, vergoedingstelsel ja', survey by the Consumentenbond, November 2011: www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht-2011/downloadverbod-nee-vergoedingenstelsel-ja/.

copies from unlawful sources as it does to copies from lawful sources. Indeed, this scheme of fair compensation has created a fair balance between the rights of the rightholders and consumers for decades.

9. It should be noted that the compensation awarded to rightholders is "fair", as it is equally divided between performers, authors and producers. This results from the fact that the remuneration is collected and divided by an independent non-governmental foundation. In the commercial sphere creators often don't receive fair compensation, as the remainder of the money is claimed by producers, distributors and other commercial entities. For instance, the remuneration from sources like iTunes or Spotify largely does not go to the actual creators.[5] As a consequence, a copying levy scheme is beneficial for the public support of copyright law in general.

3. PRIVACY ASPECTS OF COPYRIGHT ENFORCEMENT

10. The second issue the Consumentenbond would like to address is the consequence of a download ban for the privacy of consumers, also put forward in the proceedings before the ECJ by the Dutch Government. The Advocate General has set the privacy argument aside with one, unmotivated statement:

> "*There is no direct relation between the exclusion from the scope of the private copying exception of copies made from unlawful sources, and possible violations of the right to privacy of users*."[6]

11. This is a remarkable statement and one the Consumentenbond cannot begin to understand. Member States are obligated to safeguard that they do not rely on an interpretation of EU law that is in violation of fundamental human rights, such as the right to privacy.[7]

12. And there is evidently a direct link between the exclusion from the private copying exception of copies from unlawful sources and possible violations of privacy. If the private copying exception does not apply to copies from unlawful sources, a legal ban will apply. Rightholders will not receive a fair compensation from a copyright levy and their only choice will be to enforce their exclusive right.

13. To underline why enforcement of a download ban is problematic in terms of privacy considerations, we will first shortly explicate the origins of the private copying exception.

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[5] Joint Declaration of the Consumentenbond and the Dutch Artist Unions for modernization of copyright 2011: www.consumentenbond.nl/morello-bestanden/pdf-algemeen-2010/verklaring_cb_artiesten2.pdf and Joint Proposal of the Dutch and French Consumer Associations and Dutch and French Artist Unions 2013: www.3c-da.org/articles/card/id/5.
[6] Opinion § 78.
[7] ECJ 6 November 2003, C-101/01, nr. 87 *(Lindqvist),* ECJ 26 June 2007, C-305/05, nr. 28 (*Ordre des barreaux francophones et germanophone),* ECJ 29 January 2008 nr. 68 (*Promusicae/Telefonica)* and ECJ 27 maart 2014, C-314/12 *(Telekabel).*

3.1 Origins of the private copying exception

Germany

14. The origins of the private copying exception can be found in Germany in the 1960's where it was introduced to prevent copyright enforcement in the domestic sphere. The German levy system eventually became a model for legislators elsewhere in continental Europe, and was triggered by a decision by the German Supreme Court (the "Bundesgerichtshof").

15. The Bundesgerichtshof ruled in a decision of 29 May 1964, that German copyright collecting society GEMA could not force the vendors of home-taping equipment to oblige their customers to reveal their identity so as to enable GEMA to verify whether these customers engaged in unlawful activities.[8] In the opinion of the Bundesgerichtshof, although the recording by consumers constituted an infringement of copyright, such measures of control would have undeniably conflicted with each individual's right to the inviolability of his home. This eventually led to the introduction of a levy on tape recording equipment in lieu of an outright prohibition on private copying.[9]

Art. 16c Dutch Copyright Act

16. The consideration that monitoring of individual users' private copying behaviour would inevitably encroach upon their constitutionally protected private sphere, was already expressed in 1972 by the Dutch government:

> "*Moreover – as past experience shows in Germany – the effective monitoring of compliance with such a ban faces considerable practical difficulties. Proof of infringement can rarely be delivered, and then only through investigations concerning facts which usually take place within the domestic sphere, which in my view does not deserve encouragement.*"[10]

17. In 1990 the Dutch legislator adopted a private copying levy system in the Dutch Copyright Act, which was amended to its current form in 2004. In the explanatory memorandum, the Minister of Justice explains that in his view:

> "*collecting remunerations directly from the person who is copying, is, in addition to the privacy concerns, in practice impossible.*"[11]

18. In 2009, the Minister of Justice reported to Dutch Parliament that criminalization of downloading from unlawful sources would have the disadvantage of enforcement extending to the private sphere. This would inevitably lead to forms of control over the use of internet by individuals. The Minister of Justice underlined that this could result in a decline in public support for copyright in general.[12]

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[8] BGH 29 May 1964, *GRUR* 1965/2, p. 104. See also: Chr.A. Alberdingk Thijm, *Privacy vs. auteursrecht in een digitale omgeving*, Den Haag: Sdu 2001, p. 70 (Dutch).
[9] P.B. Hugenholtz e.a., *The Future of Levies in a Digital Environment*, Amsterdam: Instituut voor Informatierecht 2003, p. 11.
[10] Parliamentary History of the Copyright Act 1912 p. 1712.
[11] *Parliamentary Documents II*, 1987/88, 20 656, , nr. 3, p. 5.
[12] *Parliamentary Documents II*, 2009/10, 29 838, nr. 22, p. 13.

19. In 2012, Dutch Parliament adopted a motion to refrain from proposing amendments to the Dutch Copyright Act, which would effectuate a download prohibition. The majority of Parliament voted against measures to force internet service providers to block private users after a third detected copyright infringement, a method known as the "three strike system".[13]This reflects the majority view of the members of the Consumentenbond.[14]

3.2 Conflict with fundamental right to privacy

20. Private copying exceptions aim to strike a balance between the legitimate interest of rightholders in adequate protection of their creative works and the legitimate interest of users of these works, first and foremost the protection of their fundamental right to privacy. In the Explanatory Memorandum to the 1997 proposal for the Directive this is explicitly mentioned:

> "*The major reason for this exception has been the non-enforceability of the exclusive right in this area in practice as well as the thought that it was not even desirable to try to enforce an exclusive right in this area of private use for reasons of privacy.*"[15]

21. Privacy concerns are at the root of the private copying exception. As far as consumers' right to privacy tend not to be expressly considered in copyright law, this can be explained historically by the fact that private "analogue" use of copyrighted works, even the making of copies for private use, was generally not considered a commercial activity, and therefore not touched by copyright law at all. Copyright, with few exceptions, did not invade the private sphere of end-users.[16] It is not a coincidence that the sphere protected by the right to privacy is more or less the same as the sphere kept outside the reach of the right of communication *to the public*. The copyright legislation of many countries specifically states that an author may not object to the communication of his work within the "family" or "private" circle.

22. Therefore, the boundaries of copyright are not only the result of practical or economic considerations (the right of freedom of enterprise and consumer sovereignty) but also of a choice of fundamental principles: the right to privacy and the right of freedom of expression.[17]

23. The Consumentenbond can see how the digital age has increased difficulties for the commercial exploitation of copyrighted works. However, such commercial considerations should not, and may not be placed above individuals' fundamental right to privacy. The ECJ has decided in multiple instances that in the context of measures adopted to protect

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[13] *Parliamentary Documents II*, 2012/13, 29 838, nr. 56.
[14] 'Download verbod nee, vergoedingstelsel ja', survey by the Consumentenbond, November 2011: www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht-2011/downloadverbod-nee-vergoedingenstelsel-ja/.
[15] Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (1997) 628 final, Brussels, 10 December 1997.
[16] See for example: K. Koelman and L. Bygrave, *Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems*, Amsterdam: Instituut voor Informatierecht 1998, p. 38.
[17] D.J.G. Visser, *Auteursrecht op toegang: De exploitatierechten van de auteur in het tijdperk van digitale informatie en netwerkcommunicatie* (diss. Leiden), Den Haag: VUGA 1997, p. 133 (Dutch).

rightholders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.[18] Furthermore, when applying measures transposing directives such as the Copyright Directive, the authorities and courts of Member States must not only interpret their national law in a manner consistent with those directives, but must also make sure that they do not rely on an interpretation of those directives which would conflict with those fundamental rights or with other general principles of Community law, such as the principle of proportionality.[19]

24. On the internet, enforcement of copyright will mean the continuous monitoring and deep packet inspection of data traffic of consumers. Such measures should only be taken if necessary and proportionate in relation to their purpose. Since the commercial interests of rightholders in the private copying of their works can be met, at least partly, by means of a levy system, a viable and less invasive alternative for such draconic enforcement measures exists. Therefore, a limitation of the right to pivacy of the users cannot endure the proportionality test of both art. 7 of the Charter of Fundamental Rights of the European Union and art. 8 of the European Convention on Human Rights.

4. CRIMINALIZATION WILL UNDERMINE COPYRIGHT LAW

25. Thirdly, the Consumentenbond strongly opposes the criminalization of Dutch consumers by introducing a download prohibition. Private copying, also from unlawful sources, has long been an accepted standard and is firmly embedded in Dutch society. If copies from unlawful sources will no longer be compensated via a levy, rightholders and their organizations will have no other choice than to crack down on consumers, in order to restore the balance between the interests of the rightholders and users as required by the Directive. The argument put forth that a downloading ban would merely be in support of enforcement measures taken against big uploaders and professional intermediaries, is a false one. The exclusive right of communication to the public can already be fully enforced and is in no way dependent on the unlawfulness of the act of downloading.

26. Even if a download prohibition will not in first instance be primarily targeted at consumers, it will criminalize millions of individuals that are not acquainted with the fact that their conduct is unlawful. In fact, for consumers, it might not always be clear whether they are downloading from a lawful or an unlawful source.[20] This has also been an important consideration for the Dutch government:

> "*Given the nature of the infringement on the Internet, it is not obvious to primarily focus enforcement on the individual who is downloading from an illegal source for its own private use. This requires significant investment with limited results. Consumers would additionally be confronted with the not always easy to answer*

[18] See for example: ECJ 29 January 2008, case C-275/06 (*Promusicae*), para. 68, ECJ 19 February 2009, case C-557/07 (*LSG-Gesellschaft zur Wahrnemung von Leistungsschutzrechten*), para. 28, ECJ 24 November 2011, case C-70/10 (*Scarlet/Sabam*), para. 45.
[19] ECJ 29 January 2008, case C-275/06 (*Promusicae*), para. 70.
[20] T. Kreutzer, 'Limitations of the private copying exception: miracle cure of dead end?', *AMI* 2011/5, p. 160.

question whether the source is legitimate and whether the website that claims to offer legal files – whether or not for payment – is reliable."[21]

27. Because of the difficulties consumers might face in distinguishing between lawful and unlawful sources, a prohibition of copies from unlawful sources will have the effect that consumers will cease to download completely, which would pose a grave and serious threat to the right to receive information.[22] In addition, enforcement measures which are perceived by the public as excessive, can undermine the public support for copyright in general.[23]

28. The Consumentenbond stresses that consumers want to continue to download audiovisual and musical works, as a consumer friendly manner of gaining access to those materials, while at the same time paying rightholders a fair compensation. A levy system provides both.

5. PERMITTED UNDER COPYRIGHT LAW

29. Finally, we will show that the private copying exception in art. 5(2)(b) of the European Copyright Directive should be interpreted as to also encompass copies from unlawful sources.[24]

5.1 Text and purpose of the Directive

30. The text of art. 5(2)(b) Directive leaves room for interpreting it in line with the Dutch interpretation. It does not stipulate that the works copied should be legally made available, whereas other provisions in the Directive do. If it had been the intention of the EU legislator to limit the private copying exception to works legally made available, such a condition would have been included in the provision explicitly. That is the case, for example, for the quotation right.[25]

31. That the quotation exception only applies for works legally made available is quite logical. The quotation right serves the free flow of information and the right of the public to receive such information. In this context, it makes sense to distinguish between works from legal and illegal sources. The same cannot be said with regard to the private copying exception. The privacy implications relating to a download ban apply equally to both copies from lawful and unlawful sources.[26]

32. This line of reasoning[27] is too easily rejected by the Advocate General, merely stating "Notwithstanding, the scope of the private copying exception cannot be deducted from

[21] *Parliamentary Documents II*, 2007/08, 29 838, nr. 6 herdruk, p. 9.
[22] M.R.F. Senftleben, 'Tegengif of overdosis? Over rechtszekerheid bij privekopieren uit illegale bron', *AMI* 2011/5, p. 157.
[23] This concern has also been expressed by the Dutch Minister of Justice, *Parliamentary Documents II*, 2009/10, 29 838, nr. 22, p. 13.
[24] Directive 2001/29/EC (the "Directive").
[25] Art. 5(3)(d) of the Directive.
[26] This is underlined by art. 6(4) of the Directive, which requires Member States to safeguard that beneficiaries can actually benefit from the exceptions laid down in the Directive. With regard to certain provisions it is explicitly provided that the beneficiary should have *legal access* to the protected work or subject matter.[26] The private copying is mentioned separately and does not contain this condition.
[27] Also put forward by the Dutch government, see Opinion §§ 65-69.

provisions that are applied in a different context".[28] The rejection by the Advocate General lacks sufficient grounds, especially in the context of interpretation methods. Establishing the scope of the private copying exception should in fact take place taking into full consideration the structure and system of the Directive as a whole and by delineating it from the other exceptions.

33. Including copies from unlawful sources in the private copying exception is also fully in line with the purpose of the Directive. Recital 9 and 10 of the Directive state that a high level of protection for copyright must be ensured. The Recitals however directly relate this level of protection to the concept that creators will only create if they receive an appropriate reward for their work. Under the current circumstances, creators have no effective means to prevent the unauthorized dissemination of their works and the subsequent consumption by natural persons.[29] Therefore, the goal of ensuring the development and maintenance of creativity is better served by interpreting the private copying exception to include copies from unlawful sources.[30]

34. The rationale behind copyright exceptions is that a fair balance of rights and interests between rightholders and users of protected materials must be safeguarded.[31] Such a fair balance is evidently not struck if rightholders have no means of enforcing an exclusive right on the one hand, and are not granted a compensation for this deficiency on the other hand.

5.2 No conflict with the three-step test

35. Including copies from unlawful sources in the private copying exception does not conflict with the three-step test in art. 5 of the Directive.

36. As the Advocate General argues, the delineation of the exceptions in art. 5 of the Directive should be understood in itself to be the implementation of the three-step test.[32] The broadly worded three-step test was implemented in the Bern Convention at a time that most of the copyright exceptions were already common ground in many countries. Therefore, the exceptions were understood at that time not to conflict with the three step-test.[33] There is no reason why such would be different under the three-step test in the Directive.[34]

37. The Advocate General however concludes that copying form unlawful sources results in a conflict with the normal exploitation of the works by the rightholders, the second step of the three-step test.[35]

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[28] Opinion § 70.
[29] T. Kreutzer, 'Limitations of the private copying exception: miracle cure of dead end?', *AMI* 2011/5, p. 162.
[30] J. Poort & J.P. Quintals, *The Levy Runs Dry: a legal and economic analysis of EU private copying levies*, Jipitec, vol. 4, p. 214 argue that an interpretation not including unlawful sources would have detrimental economic effects.
[31] Recital 31 of the Preamble to the Directive.
[32] Opinion § 50.
[33] P.B. Hugenholtz e.a., *The Future of Levies in a Digital* Environment, IViR 2003, p. 33 and S. Ricketson en J. Ginsberg, *The Berne Convention for the* Protection *of Literary and Artistic Works,* Kluwer 2006, nr. 13.10, p. 763.
[34] Also see the Opinion of the Dutch Advocate General Huydecoper in the case referred to the ECJ, 11 May 2012, case nr. 11/01131 (*ACI Adam e.a./Stichting de Thuiskopie*), nr. 66.
[35] Opinion § 72.

38. The Consumentenbond is of the opinion that the Advocate General is interpreting the second step of the three-step test wrongly.

39. First of all, the Opinion does not show if there has been any evidence presented that the private copy from unlawful sources actually stands in the way of any "normal exploitation". An assessment of the second step of the three-step test requires an appreciation of the factual situation at a given moment in time and in the relevant Member State. The Consumentenbond is of the opinion that the ECJ cannot rule that copying from unlawful sources is in conflict with normal exploitation. This should be a matter for the national courts.

40. Secondly, the private, non-commercial copying by natural persons cannot by its nature conflict with any "normal exploitation" of the rightholders. Simply because there is no actual or potential major source of revenues to be generated by rightholders from private copying.[36]

41. Enforcement is practically impossible and, for privacy considerations, also unwanted. Contrary to what the Advocate General seems to imply, mass illegal file sharing is not only a Dutch, but a worldwide problem. The entertainment industry has not been able in any territory, including those where there is a prohibition of downloading from unlawful sources, to create a business model capable of subduing illegal file sharing and creating any significant revenues. Criticism on the entertainment industry that it is not offering enough legal alternatives to the downloading from unlawful source is abundant, ongoing and worldwide.

42. Given this situation, there can be no normal exploitation in a sense that rightholders can receive licensing fees for the copies made from unlawful sources. The argument by the Advocate General that the Dutch government's reasoning stems from the fact that it's legislation is actually indirectly causing the damages it is trying to mitigate via the fair compensation, is therefore a false one.[37]

43. The way the Advocate General has identified the act of copying by a natural person and the unauthorized dissemination of infringing material on the internet, is remarkable to say the least.[38] The Advocate General seems to take both acts together and to assess the impact of the copy acts by consumers mainly on the damages caused by the unauthorized communication to the public acts by others. The reference by the Dutch Supreme Court however clearly indicates that the right of communication to the public is fully acknowledged and respected. Under Dutch law, rightholders can enforce this exclusive right against any person violating it, whether it is a professional uploader or a natural person distributing copies to friends.

44. Finally, the Consumentenbond is of the opinion that an interpretation of the private copying exception in such a way as to exclude copies form unlawful sources, would actually be in conflict with the normal exploitation by the rightholder. There are no technological means to prevent private copying from unlawful sources, meaning that a levy is in fact the only way to

[36] M. Senftleben, *Copyright, Limitations and the Three-Step Test, An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer 2004, p. 193.
[37] Opinion § 75.
[38] Opinion § 74.

compensate the damages caused by these copies. Not including these copies would mean an unenforceable exclusive right,[39] without a fair compensation and would therefore contravene the third step of the three-step test.[40]

45. The Consumentenbond does not agree with the Advocate General that the three-step test can only be applied in such a way as to limit the applicability of the private copying exception and not to expand its scope.[41] The Advocate general has not substantiated this argument by any means. Such an interpretation would be completely contrary to the general purpose of the Directive of ensuring a high level of protection for rightholders whilst striking a fair balance with the legitimate interests of the users. The rationale of Recital 44 equally gives room for broadening the scope of the exceptions if circumstances so require.

46. The statement by the Advocate General that the fair compensation most likely does not provide adequate compensation for the income lost by the mass unauthorized *dissemination* of protected materials online,[42] is not substantiated by any facts. Even if it were true, receiving compensation for the *copy* is at least something. Also, the fair compensation is meant to compensate for damages caused by private copying. The extent of such damages can of course never be a reason to lower the fair compensation.

5.3 Member States are free to compensate outside of the scope of the exception

47. Even if the ECJ were to decide that copies from unlawful sources do not fall under the scope of the private copying exception in the Directive, the text of the exception certainly does not prohibit Member States to implement a levy nevertheless.

48. The Directive provides for minimum harmonization. As the title of the Directive shows, it merely harmonizes "certain aspects" of copyright. There is no rule of law prohibiting Member States of providing for a protection of rightholders that goes further than that of the Directive.[43]

49. The Directive leaves a wide margin of appreciation for Member States. This is the result of the fact that it was a (partly political) compromise. It is apparent from Recital 32 in the preamble, that the Directive takes into account the different legal traditions and beliefs in the Member States of the European Union. Member States have considerable discretion in implementing the Directive, which is partly due to the fact no agreement could be reached on some important issues.[44] This also, and especially, applies to the private copying exception. To this day, there are big differences in the way the exception has been implemented in the various Member States.[45]

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[39] See also, ECJ 21 October 2010, C-467/08 (*Padawan*), nr. 46.
[40] See also: ECJ 16 June 2011, C-462/09 *(Thuiskopie/Opus),* nr. 33.
[41] Opinion § 49.
[42] Opinion § 76.
[43] See the Opinion of Advocate General Trstenjak of 11 May 2010, C-467/08 (*Padawan/SGAE*), nr. 106.
[44] A. Buhrow, 'Richtline zum Urheberrecht for Information Gesellschaft ', *European Law Reporter* 2001, No. 10, p. 313.
[45] M. Kretschmer, *Private Copying and Fair Compensation; An empirical study of copyright Levies in Europe,* A report for the UK Intellectual Property Office, October 2011, p. 4.

50. The EU legislator has taken these differences into account: it has made implementation of the exception facultative, leaves it to the Member States to establish the form, modalities and level of the fair compensation according to the circumstances,[46] and Member States are free to require a fair compensation to be paid, even where the Directive does not.[47] Also, the Directive does not require that the exception only applies for copies from lawful sources. The legislator has intentionally left this issue open for the Member States, because they could not agree.[48]

6. CONCLUSION

51. Authors write to be read, performers perform to be watched. Indeed, creators are appalled by – and strongly object to - proposals that would criminalize consumption of their work or otherwise impeach the human rights and fundamental freedoms of consumers.

52. The only way a fair balance can be struck between the interests of both consumers and rightholders is by taking into account the realities of the digital environment. It cannot be expected that illegal activities on the internet will effectively be brought to a halt any time soon. Permitting Member States such as the Netherlands to compensate rightholders for private copies made in the privacy of the home will serve two goals: consumers are safe from exorbitant enforcement of copyright "behind the front door" and rightholders receive a fair compensation for all copies made outside of their effective reach.

Respectfully,

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Bart Combée
President
Consumentenbond

[46] ECJ 16 June 2011, C-462/09 (*Opus*), nr. 23, ECJ 27 June 2013, C-467/11 (VG Wort) and ECJ 11 July 2013, C-521/11 (*Amazon*), nr. 20, 22 en 40 and especialy the Opinion of Advocate General Sharpston of 24 May 2013, C-457/11 (VG Wort), punt 30 en 31.
[47] Recital 35 and 36. Also: Th. Dreier, 'Living with copyright from Luxembourg', *AMI* 2012/6, p. 243.
[48] G. Westkamp, *Study on the Implementation and Effects in Member States' laws of Directive 2001/29/EC, Part II,* Queen Mary Intellectual Property Research Institute 2007, p. 20 and N. van Eijk, *File Sharing*, European Parliament's Committee on Legal Affairs 2011, p. 10, see www.europarl.europa.eu/RegData/etudes/note/join/2011/432775/IPOL-JURI_NT(2011)432775_EN.pdf.