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## Cover Page Footnote

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.S., 2012, George Mason University. The author would like to thank her family for their constant love, encouragement, and support. The author would also like to thank everyone at the Alliance of Artists and Recording Companies for sparking her interest in copyright and international law, especially Executive Director, Linda Bocchi, for her invaluable guidance.

# THE POSITIVE AND NEGATIVE CONSEQUENCES OF THE EUROPEAN UNION COURT OF JUSTICE'S AMAZON DECISION ON INTERNATIONAL PRIVATE COPYING AND AMERICA

Jaclyn Kavendek<sup>+</sup>

“One good thing about music, when it hits you feel no pain.”<sup>1</sup> This quote by late musician Bob Marley may ring true for music consumers, but the same may not be said for the artists creating musical works. The authors<sup>2</sup> and rightsholders who create, produce, and own the rights to musical works often feel economic pain resulting from the private consumption of their protected works without fair compensation.<sup>3</sup>

As technology advances, so does the ease by which musical works can be reproduced.<sup>4</sup> Rightsholders of musical works frequently remain uncompensated for technological reproductions of their protected works.<sup>5</sup> The digital reproduction and sharing of musical works across borders requires international

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1. BOB MARLEY AND THE WAILERS, *Trenchtown Rock*, on AFRICAN HERBSMAN (Trojan Records 1973).

2. “An author is ‘the party who actually creates the work, which is the person translating an idea into a fixed tangible expression.’” *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989)).

3. *See, e.g., SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1224 (D.C. Cir. 2009) (citing 37 C.F.R. § 382.11 (2010)) (explaining that, when setting royalty rates, the Copyright Royalty Board does not include: “(1) subscription to and the sale of advertising on channels that make only incidental use of sound recordings; (2) the sale or license of equipment; and (3) miscellaneous other sources”).

4. Congress added several provisions to the United States Code in 1992 to address a void in the copyright regime that was left open by the 1976 Copyright Act with respect to new, digital copying technologies. *See* 17 U.S.C. §§ 114(b), 1001–1010 (2012); Richard P. Shafer, Annotation, *Constr. & Operation of Audio Home Recording Act of 1992*, 17 U.S.C.A. §§ 1001–1010, 178 A.L.R. Fed. 523, 528 (2002) (discussing Congress’s enactment of statutes in 1992 to prevent unauthorized digital reproductions of musical works); JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS, 354 (1994); Edward J. Damich, *Our Copyright Code: Continue Patching or Start Rewriting?*, 68 U. MIAMI L. REV. 361, 361–62 (2014) (elaborating on the newest technological advancements forcing the need to reform the United States Copyright Act).

5. *See* *Recording Indus. Of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1073–74 (9th Cir. 1999). There is also a need for a “progressive regulatory framework for copyright” in the European Union. *See EU Copyright Protection is Fundamental*, INSIDE SATELLITE TV, Apr. 1, 2014 (discussing the need for European Union copyright law to react to expanding technological advancements).

conformity and cooperation to protect and justly compensate rightsholders.<sup>6</sup> This cooperation is especially necessary for countries with thriving music industries, such as the United States and the countries in the European Union.<sup>7</sup>

Dating back to the 1800s, Governments have recognized the need to ensure that original<sup>8</sup> musical works are protected as an incentive for authors to continue to create more works.<sup>9</sup> International treaties, such as the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the World Intellectual Property Organization Performance and Phonograms Treaty (“WPPT”) have furthered governmental efforts to protect rightsholders by providing systems of equal treatment that internationalize copyright laws among the signatories of the treaties.<sup>10</sup> This international effort to protect musical works has created a system that confers some uniform rights to rightsholders, including the exclusive right to reproduce their works.<sup>11</sup> However, these international treaties also allow signatory countries to create some exceptions to the uniform rules.<sup>12</sup>

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6. See, e.g., Berne Convention for the Protection of Literary & Artistic Works art. 1, Sept. 9, 1886, 828 U.N.T.S. 221 (establishing “a union for the protection of the rights of authors in their literary and artistic works”); *EU Copyright Protection is Fundamental*, INSIDE SATELLITE TV (Apr. 1, 2014) (calling attention to the need for uniform copyright laws throughout the European Union).

7. See ORG. FOR ECON. CO-OPERATION & DEV., *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY* 13 (2007), available at <http://www.oecd.org/industry/ind/38707619.pdf>. In the European Union alone, “[t]here are more than 250 collective management organizations” which represent rightsholders’ interests of one or more designated rights. Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing—Frequently Asked Questions (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm).

8. See, e.g., U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (1976); Directive 2001/29, art. 12, 2001 O.J. (L167) 44 (EC). The United States Constitution requires a work to be original to merit copyright protection. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991); 1 SCOTT ON MULTIMEDIA LAW, § 4.11 (3d ed. 2013); BRABEC & BRABEC, *supra* note 4, at 350–51; DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS*, 208 (1994). Originality, as applied by United States courts, requires independent creation and a trivial degree of creativity—a low standard to satisfy. See, e.g., *Feist*, 499 U.S. at 345–47; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (establishing that judges, when determining if a work is original, and thus protectable, should not consider aesthetics in their determination); *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1268 (10th Cir. 2008) (explaining that originality should be assessed by examining the final product, not the process used to create the product).

9. See *Feist*, 499 U.S. at 349–50.

10. See Berne Convention, *supra* note 6, art. 1–2; World Intellectual Property Organization Performances and Phonograms Treaty preamble, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997) [hereinafter WPPT].

11. Berne Convention, *supra* note 6, art. 9; 17 U.S.C. § 106(1) (2012); Directive 2001/29, *supra* note 8, art. 2.

12. See Berne Convention, *supra* note 6, art. 9; WPPT, *supra* note 10, art. 16 (allowing signatory countries to create limited exceptions to copyright protections).

Many Berne Convention and WPPT signatory countries have enacted a private copying exception to the rightsholder's exclusive right of reproduction.<sup>13</sup> A private copying exception allows individuals to store reproductions of musical works on devices with recording capabilities.<sup>14</sup> Such reproductions do violate the rightsholders' exclusive right of reproduction, but the rightsholders are compensated for the reproduction through private copying levy royalties.<sup>15</sup> The private copying levy is placed on blank media devices and/or media that are used by consumers to make noncommercial copies for private use as a method of providing just compensation to rightsholders.<sup>16</sup> Commonly, collecting societies represent the rightsholder's interest in receiving royalties generated through the private copying levy.<sup>17</sup> Collectives worldwide negotiate bilateral agreements to collect international private copying royalties for their respective rightsholder members.<sup>18</sup> Bilateral agreements ensure that domestic rightsholders receive just compensation for the private copying of their protected works in other countries.<sup>19</sup> However, such tax systems are not without fault. The predominate problem the private copying levy system presents stems from the lack of congruency in the way private copying legislation is applied in different

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13. See Directive 2001/29, *supra* note 8, art. 5, MARTIN KRETSCHMER, INTELLECTUAL PROP. OFFICE, PRIVATE COPYING AND FAIR COMPENSATION 8–9 (2011), available at [http://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_ip\\_econ\\_ge\\_1\\_12/wipo\\_ip\\_econ\\_ge\\_1\\_12\\_ref\\_kretschmer.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_econ_ge_1_12/wipo_ip_econ_ge_1_12_ref_kretschmer.pdf).

14. See KRETSCHMER, *supra* note 13, at 9–10 (discussing the legal basis of the private copying exception in Europe and the activities that constitute as private copying).

15. PASSMAN, *supra* note 8, at 248 (explaining that the 1976 Copyright Act's legislative history clarified that recording works for private use in the home was not copyright infringement); see also KRETSCHMER, *supra* note 13, at 9–10.

16. See Case C-521/11, Amazon.com Int'l Sales, Inc. v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, CURIA, para. 5 (July 11, 2013); Case C-462/09, Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH, 2011, E.C.R. I-5331, para. 8; Case C-467/08, Padawan SL v. Sociedad Gen. de Autores y Editores de España, 2010, E.C.R. I-10098, para. 2; PASSMAN, *supra* note 8, at 248 (listing the parties who receive the royalty payments from the levy); Shafer, *supra* note 4, at 528–29 (elaborating on the royalty disbursement process).

17. Jörg Reinbothe, Private Copying, Levies and DRMs Against the Background of the EU Copyright Framework, DRM LEVIES CONFERENCE (Sept. 8, 2003), [http://ec.europa.eu/internal\\_market/copyright/documents/2003-speech-reinbothe\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm).

18. See, e.g., What Can AARC Do for Me?, ALLIANCE OF ARTISTS & RECORDING COMPANIES, <http://wp.aarcroyalties.com/what-can-aarc-do-for-you/> (last visited, Mar. 28, 2014); *About Croatian Performers' Rights Collecting Society*, HUZIP, <http://en.huzip.hr/about-huzip> (last visited, Mar. 28, 2014).

19. See KRETSCHMER, *supra* note 13, at 59–60 (explaining the costs involved in negotiating private copying royalty payments and the collective's role in managing costs).

countries.<sup>20</sup> Different laws complicate the remuneration, collection, and distribution processes.<sup>21</sup>

Beyond participating in international treaties, the European Union passed Directive 2001/29 as an attempt to harmonize private copying remuneration collection and distribution practices throughout the European Union Member States (“Member States”).<sup>22</sup> The European Union Court of Justice has clarified the vague, but mandatory guidelines of Directive 2001/29 and the ability for Member States to enact domestic private copying exception and levy.<sup>23</sup> As part of this harmonization effort, the Court of Justice has ruled on three private copying cases within a three-year period.<sup>24</sup> In these three cases, the Court of Justice supported and narrowed the existing European Union law allowing Member States to enact a private copying exception, but also requiring them to provide fair compensation to rightsholders for private copying and allowing them to charge a private copying levy to fund the compensation.<sup>25</sup>

In the earliest case, *Padawan SL v. Sociedad General de Autores y Editores de España*, the Court of Justice determined that all Member States that have adopted the private copying exception must follow the concept of fair compensation for rightsholders set forth in Directive 2001/29.<sup>26</sup> The *Padawan* decision also created a loophole that allowed companies to circumvent private copying levies on blank media.<sup>27</sup> The following year the Court of Justice built on its *Padawan* decision in *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*.<sup>28</sup> The Court held that each Member State, in accordance with the *Padawan* decision, may impose a private copying levy on importers and manufacturers where the private copying harm occurs.<sup>29</sup>

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20. See Lorraine Mallinder, Electronics Industry to Continue Subsidies of Artists, EUROPEAN VOICE (Feb. 21, 2008), <http://www.europeanvoice.com/article/imported/electronics-industry-to-continue-subsidies-of-artists/59286.aspx> (noting that the private copying levy is not uniformly applied throughout the EU, which “impede[s] the functioning of the internal market”).

21. *Id.*

22. Directive 2001/29, *supra* note 8, at (1)–(6).

23. See Case C-521/11, *Amazon.com Int’l Sales, Inc. v. Austro-Mechana*, CURIA, (July 11, 2013); Case C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*, 2011, E.C.R. I-5331; Case C-467/08, *Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10098. The Court of Justice examines European Union law, ensuring that it is consistently interpreted and applied by Member States. *Court of Justice of the European Union*, EUROPEAN UNION, [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm) (last visited Mar. 16, 2014).

24. See *Amazon.com Int’l Sales*, at para. 67(1); *Stichting de ThuisKopie*, 2011, E.C.R. I-5331, para. 42(1); *Padawan SL*, 2010, E.C.R. I-10098, para. 64(1).

25. See *Amazon.com Int’l Sales*, at para. 67(1); *Stichting de ThuisKopie*, 2011, E.C.R. I-5331, para. 42(1); *Padawan SL*, 2010, E.C.R. I-10098, para. 64(1).

26. *Padawan SL*, 2010, E.C.R. I-10098, para. 37.

27. *Id.* at para. 46.

28. *Stichting de ThuisKopie*, 2011, E.C.R. I-5331.

29. *Id.* at para. 29.

Most recently, in July 2013, the Court of Justice held in *Amazon.com International Sales v. Austro-Mechana* that a Member State may impose a private copying levy on all manufacturers and importers of blank media devices, even if a similar levy was charged in another territory, under the presumption that the devices will be used to reproduce protected works.<sup>30</sup> The reproduction presumption can result in some manufacturers and importers getting taxed twice.<sup>31</sup> However, double taxation is compatible with the fair compensation principle when joined with a reimbursement system.<sup>32</sup> The *Amazon* decision closed the loophole created by *Padawan* by applying the private copying levy indiscriminately to recording devices regardless of their intended use, but gave manufacturers an option for reimbursement for exported devices on which the private copying levy had been paid prior to export.<sup>33</sup> But the *Amazon* court also held that music collectives could allocate funds collected pursuant to the private copying levy to social and cultural projects.<sup>34</sup> Thus, although the *Amazon* decision improved private copying practices by requiring the imposition of the levy in multiple Member States but allowing for reimbursement, the Court hindered just compensation goals by allowing collectives to allocate private copying monies to social and cultural funds.<sup>35</sup> The collectives that allocate funds for social and cultural initiatives determine the percentage of money that gets distributed.<sup>36</sup> Money that goes into social and cultural funds is money that is not directly compensating the rightsholders for the violation of their exclusive right of reproduction.

This Note explores the potential negative implications the *Amazon* decision may have for rightsholders in the United States. Part I begins by examining the rights conferred on rightsholders by the Berne Convention and WPPT. It then explains the private copying practices in the United States and how they intersect with European practices and requirements. Part I then explores the European Union's recent efforts to harmonize private copying laws among the Member States. Part II discusses the European Union Court of Justice's *Amazon* decision. Part III analyzes the *Amazon* decision in light of the court's previous decisions. This Note concludes by exploring the inequalities in musical collectives' collection and distribution systems, confirmed by the *Amazon* decision, and its

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30. *Amazon.com Int'l Sales*, at paras. 45, 66 (holding that national private copying exceptions must satisfy "the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction by reason of the reproduction of protected works by final users who reside on the territory of that State").

31. *See id.* at paras. 33–36, 41.

32. *See id.* at 46–59.

33. *See Amazon.com Int'l Sales*, at para. 37.

34. *Id.* at para. 55.

35. *See id.* (holding "that compensation cannot be excluded by reason of the fact that half the fund received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled").

36. *The Collective Management of Rights in Europe the Quest for Efficiency*, KEA EUROPEAN AFFAIRS, 79–80 (July 2006).

effect on American musical rightsholders. Overall, this Note outlines the relevant history and legislation manipulating international private copying practices, and how the *Amazon* holding helps and hurts American rightsholders.

## I. FORMING PRIVATE COPYING LAWS AND INTERNATIONAL CONGRUENCE

### A. *The Berne Convention*

The Berne Convention was drafted in September 1886 to establish the minimum standards of intellectual property protection signing countries must apply to literary and artistic works.<sup>37</sup> The Berne Convention was necessary to protect authors and other producers of intellectual property.<sup>38</sup> The Berne Convention established a union of Member Countries committed to protecting the rights of authors against infringement with respect to their intellectual property and artistic works.<sup>39</sup>

Under Article 2, the Berne Convention extends protection to “every production in the literary, scientific and artistic domain, irrespective of expression or medium used to communicate such work.”<sup>40</sup> The Berne Convention also specified criteria individual authors must meet to qualify for protection when publishing a literary or artistic work.<sup>41</sup> Authorship protection under the Berne Convention depends on the author’s residence in a country that is a party to the treaty.<sup>42</sup> An author can be granted protection without being a citizen or resident of a Berne Convention signatory only if the author first published the work in a signing country, or published it concurrently in a signing and a non-signing country.<sup>43</sup> Perhaps most importantly, the Berne Convention

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37. See Berne Convention, *supra* note 6, preamble.

38. *Id.*

39. See *id.* at art. 1. As of January 15, 2014 there are 167 Berne Convention signing countries. *Contracting Parties: Berne Convention*, WIPO-Administered Treaties, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited Mar. 31, 2014). Signatory countries include countries with thriving musical industries, such as the United States, and countries with less musical popularity, like the Holy See. See *id.* For additional information on laws in the Holy See, see generally Stephen E. Young & Alison Shea, *Separating State from Church: A Research Guide to the Law of the Vatican City State*, 99 LAW LIBR. J. 589 (2007).

40. *Id.* at art. 2(1). Article 2 also protects alternative works like translations, encyclopedias, and altered musical arrangements. *Id.* at art. 2(3), (5). However, certain works, such as news and other “miscellaneous facts having the character of mere items of press information,” are not afforded protection under the Berne Convention. *Id.* at art. 2(8). A country’s governmental documents also fall outside the Berne Convention’s protection so that countries can make governmental documents readily available to citizens. *Id.* at art. 2(4). Finally, each country that signs the Berne Convention is allowed, through legislation, to list categories of works that are to not be protected unless fixed in a tangible medium. *Id.* at art. 2(2).

41. *Id.* at art. 3.

42. *Id.* at art. 3(1)(a), (2).

43. *Id.* at art. 3(1)(b). Publication can be done through a variety of mediums as long as the author consents to the publication. *Id.* at art. 3(3). Concurrent publication occurs when a work is published in a minimum of two countries within a thirty-day period. *Id.* at art. 3(4).

extended the copyright protection of an author's work across international borders by mandating that a work protected by one signing country receive the same protection in all other signing countries.<sup>44</sup> This clause strengthened authors' rights across borders.<sup>45</sup>

Among the protections the Berne Convention conferred on authors was the exclusive right to reproduce their protected works.<sup>46</sup> However, each signing country may create exceptions to the author's exclusive ownership through legislation, so long as the exceptions do not excessively harm the author.<sup>47</sup> The right of exclusive reproduction and the exceptions thereon applies to both sound and visual recordings.<sup>48</sup> However, a musical work recorded for private use in one signing country may be duplicated in other signing countries without the author's permission because signatories treat all citizens of all signing countries equally, and where there is a private copying exception, the signatories reciprocate fair compensation to the rightsholder regardless of residency.<sup>49</sup> The fair compensation owed to rightsholders in a given signing country must be established by a "competent authority"<sup>50</sup> to ensure equal remunerations to national and foreign rightsholders.<sup>51</sup> To date, the Berne Convention has provided guidelines and served as an international roadmap for the protection of literary and artistic works.

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44. See *id.* art. 2(6). Ultimately, this requirement imposed parity of protection for the nationals of all the countries that signed onto the Berne Convention. Berne Convention, *supra* note 6, art. 2(6). The Berne Convention has been ratified by 167 countries. See *Contracting Parties Berne Convention*, *supra* note 39. All Member States of the European Union have signed or ratified the Berne Convention. Compare *id. with Countries*, EUROPEAN UNION, [http://europa.eu/abouteu/countries/index\\_en.htm](http://europa.eu/abouteu/countries/index_en.htm) (last visited Mar. 16, 2014).

45. See Berne Convention, *supra* note 6, art. 2(6).

46. Berne Convention, *supra* note 6, art. 9(1); Reinbothe, *supra* note 17 (describing the exclusive right of reproduction as "commonplace" because of the Berne Convention). Many countries that have signed onto the Berne Convention have the same exclusive reproduction rights provision in their own laws. See U.S. CONST. art. 1, § 8, cl. 8; see also CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. 121–28 (Fr.); Copyright, Designs and Patents Act, 1988, c. 48, § 2 (U.K.).

47. Berne Convention, *supra* note 6, art. 9(2). Nationally enacted special conditions and restrictions on the musical author's exclusive rights only apply in countries that have imposed similar conditions and restrictions. *Id.* at art. 13(1).

48. *Id.* at art. 9(3).

49. See *id.* at 13(2). However, if a musical work is protected by Article 13(1) and (2), and recordings of the protected work are "imported without permission from the parties concerned into a country where they are treated as infringing recordings," the recordings will be subject to seizure. *Id.* at art. 13(3).

50. *Id.* at art. 13(1).

51. *Id.*

### B. The WPPT

The WPPT is the most recent treaty on international practices concerning the rights of performers and producers.<sup>52</sup> The WPPT confirms that rightsholders have the exclusive right of reproduction for their works.<sup>53</sup> The treaty also requires each contracting party to confer equal protection among its own nationals and the nationals of the other WPPT signing countries.<sup>54</sup> To ensure equal treatment, Articles 20 and 21 prevent the contracting parties from restricting any of the artists' rights listed in the treaty.<sup>55</sup>

However, the WPPT grants signatory countries the flexibility to implement exceptions to the protections afforded in the treaty.<sup>56</sup> Each country can limit the rights of performers and producers of phonograms as long as the exceptions and limitations "do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."<sup>57</sup> Although the WPPT does not include an explicit private copying exception, some signatory countries, like the United States and some Member States of the European Union, have enacted private copying exceptions.<sup>58</sup> Thus, creating a private copying exception to the exclusive right of reproduction is deemed to not conflict or prejudice the performers and producers of phonograms.<sup>59</sup> Furthermore, because Article 15(3) of the WPPT requires signatory countries to apply their copyright laws uniformly to national and non-national rightsholders, exceptions like the private copying exception are even less likely to harm rightsholders because of the consistent application to all rightsholders.<sup>60</sup>

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52. The WPPT was enacted in 1996. WPPT, *supra* note 10. In 2002, the United States adopted the WPPT, followed by the European Union eight years later. See *Circular 38A: International Copyright Relations of the United States*, U.S. COPYRIGHT OFFICE (Jan. 2014), available at <http://www.copyright.gov/circs/circ38a.pdf>; *WPPT Notification No. 78*, WORLD INTELLECTUAL PROP. ORG. (Dec. 2009), [http://www.wipo.int/treaties/en/notifications/wppt/treaty\\_wppt\\_78.html](http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_78.html).

53. WPPT, *supra* note 10, at art. 7, ("Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form."). A performance must be fixed to give the rightsholder the exclusive right of reproduction. See *id.*

54. *Id.* at art. 4(1).

55. *Id.* at art. 20–21.

56. WPPT, *supra* note 10, at art. 16.

57. *Id.* at art. 16(2).

58. See generally, WPPT, *supra* note 10; see *infra* note 77 (noting that the United States has a private copying exceptions and explaining its parameters).

59. WPPT, *supra* note 10, at art. 16.

60. See *id.* at art. 15(3).

### C. The United States Copyright Act

The United States enacted its first copyright law in 1790 under the power granted to Congress by the Copyright Clause of the United States Constitution.<sup>61</sup> Congress has the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>62</sup> Congress gave the Library of Congress the power to administer copyright protection.<sup>63</sup> The United States Copyright Office, as a separate department of the Library of Congress, monitors and reviews copyright requests as well as drafts new legislation.<sup>64</sup> Copyright protection is used to promote authorship and progress<sup>65</sup> with a secondary public policy purpose of advancing the social good.<sup>66</sup>

Copyright law in the United States revolves around two central requirements. For a work to receive protection it must be original and fixed.<sup>67</sup> Accordingly, the Copyright Act restricts mere ideas from receiving copyright protection.<sup>68</sup>

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61. See H.R. REP. NO. 94-1476, at 47, (1976), *reprinted in* 17 U.S.C.C.A.N. 5659, 5660. Although the United States has enacted its own copyright laws to govern intellectual property, the United States is also a contracting party to the Berne Convention and the WPPT. 134 Cong. Rec. D1375, 1377 (1986).

62. U.S. CONST. art. 1, § 8, cl. 8. Courts take a broad view of what constitutes a writing, and thus what can qualify for copyright protection. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (considering photographs as writings and thus afforded copyright protection).

63. 17 U.S.C. § 701 (2012) (outlining the responsibilities of the Copyright Office as a branch of the Library of Congress); *History of the Library*, LIBRARY OF CONGRESS, <http://www.loc.gov/about/history-of-the-library/> (last visited Apr. 15, 2014) (elaborating on the history of Library of Congress and copyright procedures).

64. *A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circla.html> (last visited Mar. 28, 2014); see also Damich, *supra* note 4, at 382–84 (noting the functions of the Copyright Office and also explaining that, due to the powers it possesses, the Copyright Office functions more like an executive agency than a legislative branch entity).

65. See U.S. CONST., art. 1, § 8, cl. 8.

66. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (concluding that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare”).

67. See 17 U.S.C. § 102(a) (2012). A work is fixed when the work is set “in a tangible medium of expression . . . in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable.” 17 U.S.C. § 101 (2012). Although there is no requirement establishing how long a work must be embodied on a tangible medium for it qualify as “fixed,” digital works appearing on a screen for seconds are considered fixed, and thus copyrightable. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding that a copy of software is fixed and thus qualifies as a copy); *Williams Elec., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3rd Cir. 1982) (rejecting the argument that images appearing in an audiovisual game were not fixed because they were transient). Fixation is also a WPPT requirement that United States copyright law must comply with as a contracting party to the WPPT. See WPPT, *supra* note 10, at art. 7.

68. 17 U.S.C. § 102(b). Section 102(b) established the idea-expression dichotomy which explicitly only extends protection to the expression of an idea, not the idea itself. *Id.*; Feist Publ’ns.

Protectable works include literature, music, sound recordings, motion pictures, and architecture.<sup>69</sup> Ownership<sup>70</sup> of a copyright under United States law is initially vested with the author.<sup>71</sup> Owners of musical copyrights have the exclusive right to reproduce the work in copies or phonorecords.<sup>72</sup> The exclusive right of reproduction allows the rightsholder to sue for infringement.<sup>73</sup>

*1. The Audio Home Recording Act (“AHRA”) and Royalty Payments*

The United States established an exception to the exclusive right of reproduction by passing AHRA.<sup>74</sup> AHRA was enacted in 1992 and provides compensation to rightsholders in reaction to the consumers’ ability to make digital copies of legally obtained works for private use.<sup>75</sup> The United States allows private copying only if the rightsholders of the protected works are compensated.<sup>76</sup>

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Serv., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349–50 (1991) (citing *Baker v. Selden*, 101 U.S. 99, 103 (1880)). Under the idea-expression dichotomy, if there is only one way to express an idea, such method is not afforded copyright protection. See *Baker*, 101 U.S. at 105 (holding that the defendant’s book explaining accounting methods did not give him the exclusive rights to make and use accounting books).

69. 17 U.S.C. § 102(a). Copyright law draws a clear distinction between the protection of tangible works and the ideas and procedures to create the works. See *id.* at § 102(b). Copyright protection is not available to abstract notions and processes, on the product of the ideas. *Id.*

70. Owners of musical copyrights have the exclusive right to publicly display, and manually or digitally perform the protected work. *Id.* at § 106.

71. 17 U.S.C. § 201(a) (2012). United States copyright law allows authors to transfer ownership rights after they are initially conferred. *Id.* § 201(d).

72. 17 U.S.C. § 106.

73. 17 U.S.C. § 501 (2012). Intent is irrelevant for infringement. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997–99 (1982) (explaining that even unconscious copying is still an infringement).

74. See Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–1010 (2012)).

75. The AHRA builds upon § 114(b) of the 1976 Act to compensate rightsholders for granting consumers the right to make digital copies of legally obtained works for private use. See 17 U.S.C. §§ 1001–1010; see also *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 649 (N.D. Ill. 2002) (quoting *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.* 180 F.3d 1072, 1079 (9th Cir. 1999)); Shafer, *supra* note 4, at 523. Digital recording devices allow for unlimited reproductions to be made from one recording, which enables “pirates” to distribute duplications of a protected work without obtaining proper licenses for the work. *Diamond Multimedia Sys.*, 180 F.3d at 1073.

76. See *PASSMAN*, *supra* note 8, at 248. The AHRA provides that a consumer does not infringe on a copyright by making a noncommercial copy on a digital audio recording device. 17 U.S.C. § 1008. The United States recognizes and uses the private copying exception to balance the protection of authors’ rights against the social benefit created when works are publicly available. See *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 432 (1984).

The AHRA prohibits manufacturing and importing “digital audio recording devices”<sup>77</sup> unless proper notice is filed and applicable royalties are paid.<sup>78</sup> Digital audio recording devices must also conform to the Serial Copy Management Systems (“SCMS”).<sup>79</sup> A SCMS digitally flags lawful copies of original works to prevent devices from making a copy of an existing copy.<sup>80</sup>

Royalties are applied to the first manufacturers and importers of digital recording devices and media in the United States.<sup>81</sup> Under the AHRA, copyright parties who are eligible to collect the levy include the owner of the exclusive right of reproduction, the legal or beneficial owner of the right to reproduce the musical work, the performer on the sound recording, or the organization representing any of the previously listed parties.<sup>82</sup> The AHRA also outlines the royalty distribution procedure, conflict-resolution procedures, and the available remedies.<sup>83</sup>

## 2. Private Copying and the Supreme Court

The Supreme Court has only indirectly addressed the issue of private copying. In evaluating private copying, the Supreme Court has noted that some authors

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77. The AHRA defines a “digital audio recording device” as a “machine or device of a type commonly distributed to individuals for use by individuals . . . the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making digital audio copied recording for private use.” 17 U.S.C. § 1001(3) (2012). Professional devices and “dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds” are not considered digital audio recording devices. *Id.* § 1001(3)(A)–(B). According to the Senate Report on the AHRA, Congress intended the AHRA “to cover those object commonly understood to embody sound recordings and their underlying works.” S. REP. NO. 102-294, at 36 (1992).

78. 17 U.S.C. § 1003(a).

79. *Id.* § 1002(a)(1); *Diamond Multimedia Sys.*, 180 F.3d at 1075.

80. See Kevin M. Dious, Note, *Is Home Recording Dead? A Discussion of the Atlantic v. XM Satellite Radio Litigation and Audio Home Recording Rights*, 14 J. INTELL. PROP. L. 269, 278 (2007); Brendan M. Schulman, Note, *The Song Heard ‘Round the World: The Copyright Implications of MP3s and the Future of Digital Music*, 12 HARV. J.L. & TECH. 589, 609–10 (1999).

81. 17 U.S.C. § 1004(a)(1). Royalty payments are divided into two categories: the Sound Recording Fund and the Musical Works Fund. *Id.* § 1006(b); BRABEC, *supra* note 4, at 354. The AHRA divides digital devices into two categories: digital audio recording devices (“DARD”) and digital audio recording media (“DARM”). 17 U.S.C. §§ 1001(3)–(4). DARDs are designed and marketed for personal use with the purpose of reproducing audio works for private use. *Id.* § 1001(3). DARMs are also marketed to individuals, but are used to make reproductions of audiovisual works. *Id.* § 1001(4).

82. 17 U.S.C. § 1001(7). Individual interested copyright parties may opt to be represented in all procedural and litigation aspects of AHRA by collectives. Severine Dusollier & Caroline Colin, *Collective Management of Copyright: Solution or Sacrifice?: Peer-to-Peer File Sharing & Copyright*, 34 COLUM. J.L. & ARTS 809, 817–18 (2011); see Reinbothe, *supra* note 17; *What Can AARC Do For Me?*, ALLIANCE OF ARTISTS & RECORDING COS., <http://wp.aarcroyalties.com/what-can-aarc-do-for-you/> (last visited Mar. 16, 2014) (describing the mechanics of being represented by a collective).

83. 17 U.S.C. §§ 1009–1010.

have encouraged copying of their works for legitimate uses.<sup>84</sup> The Supreme Court has also determined that, without more, equipment that merely has recording capabilities does not incur an automatic copyright infringement.<sup>85</sup> Ultimately, the Supreme Court has recognized the necessity of the private copying exception as a means of balancing the promotion of authorship against the social benefit that is created when works are made available to the public.<sup>86</sup>

*D. European Union Directive 2001/29's Vagueness Results in Incongruent Interpretations.*

Directive 2001/29 is an order issued by the European Commission to harmonize copyright laws and the treatment of protected works throughout the European Union by requiring all Member States to adapt their domestic laws to conform to the Directive's terms.<sup>87</sup> Directive 2001/29 not only stresses the importance of intellectual property as a whole,<sup>88</sup> but also the necessity of promoting creativity and culture.<sup>89</sup> To incentivize innovation in the arts, the authors of protected works in the European Union have the exclusive right of reproduction.<sup>90</sup> However, Article 5 of Directive 2001/29 allows Member States

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84. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005). *But see* Brief of Amici Curiae Law Professors in Support of Respondents at 5–6, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (expressing displeasure with private copying). In fact, the private copying levy can provide a source of income for rightsholders of musical works. See PASSMAN, *supra* note 8, at 248–49. *But see id.* at 250–51 (stating that many recording companies now include clauses in their contracts that provide recording companies with a claim to a portion of the musician's AHRA royalties).

85. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (“The sale of copying equipment . . . does not constitute contributory infringement if the product . . . is merely capable.”), *superseded by statute*, Digital Millennium copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, *as recognized in* *Real Networks Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009); *see also* *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (noting that an intended use of a device does not bar its protection).

86. There cannot be copyright infringement when a noncommercial copy is made on a digital audio recording device by a consumer. 17 U.S.C. § 1008; *Sony Corp. of Am.*, 464 U.S. at 432.

87. See Directive 2001/29, *supra* note 8, at para. 1. Directives are mandatory regulations enacted by the European Union with the goal of harmonizing national laws of Member States. Member States must meet each Directive's goal, but have liberty to choose the methods of implementation. *What are EU Directives?*, EUROPEAN COMMISSION, [http://ec.europa.eu/eu\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/eu_law/introduction/what_directive_en.htm) (last visited Mar. 16, 2014).

88. “Intellectual property has therefore been recognized as an integral part of property.” Directive 2001/29, *supra* note 8, at art. 8.

89. Directive 2001/29, *supra* note 8, at paras. 9–12. The scope of coverage of Directive 2001/29 includes all types of communications between the protected work's author with the public through various mediums. Directive 2001/29, *supra* note 8, at para. 23.

90. See Directive 2001/29, *supra* note 8, at art. 2 (granting the exclusive right of reproduction to authors, performers, and phonogram producers); *see also* Directive 2001/29, *supra* note 8, at (2)–(3) (explaining the purpose of the Directive is to “stimulate the development” and to “foster substantial investment in creativity and innovation”).

to carve out exceptions to the authors' exclusive rights by enacting national legislation.<sup>91</sup>

Article 5(2)(b) explicitly allows a Member State to enact a private copying exception that allows for "reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial."<sup>92</sup> If a Member State enacts a private copying exception, it must include fair compensation for rightsholders.<sup>93</sup> Directive 2001/29's goal of harmonization has been unsuccessful thus far because the Directive gives insufficient guidance on how to apply the private copying exception and fails to define "fair compensation."<sup>94</sup> The ambiguous terms drafted by the legislature have left the interpretation of Directive 2001/29 in the hands of the Court of Justice.

#### *E. The Padawan Manufacturers Loophole*

Without European Union legislative direction, Member States' domestic legislatures and collectives are free to form their own interpretations of Directive 2001/29.<sup>95</sup> The lack of harmonization and certainty in the application of Directive 2001/29 quickly led to litigation for which the Member States' respective courts submitted issues to the European Union Court of Justice for clarification. In *Padawan SL v. Sociedad General de Autores y Editores de España*, the Court of Justice was asked to interpret Directive 2001/29.<sup>96</sup> Padawan is a company that markets CDs, DVDs, MP3 players, and other recording devices, but refused to pay the private copying levy on recording devices it marketed in Spain, resulting in *Sociedad General de Autores y Editores de España* ("SGAE") bringing suit to recover the unpaid levies.<sup>97</sup> SGAE is a Spanish society that collects and manages intellectual property rights on behalf of songwriters, composers, and music publishers.<sup>98</sup>

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91. See Directive 2001/29, *supra* note 8, at art. 5(2)–(4). Article 5 is permissible under the Berne Convention so long as an exception does not excessively harm the rightsholder. Berne Convention, *supra* note 6, at art. 9(1).

92. *Id.* at art. 5(2)(b). When enacting a private copying exception, Member States must take measures to ensure protection continues in the face of technological advances. Directive 2001/29, *supra* note 8, art. 6(1).

93. *Id.*; Reinbothe, *supra* note 17. "As a mechanism for 'fair compensation', 22 out of 27 European Union members have chosen to meet the requirement through a levy system." KRETSCHMER, *supra* note 13, at 10.

94. See generally Directive 2001/29, *supra* note 8.

95. See Directive 2001/29, *supra* note 8, at (7) (allowing for each Member State to keep in force their national laws that do not contradict or disrupt the express language and goals of European Union directives).

96. Case C-467/08, *Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10098, para. 1.

97. *Id.* at paras. 16–17.

98. *Id.*

Padawan argued that “the application of that [private copying] levy to digital media, indiscriminately and regardless of the purpose for which they were intended (private use or other professional or commercial activities), was incompatible with Directive 2001/29.”<sup>99</sup> Padawan also argued that indiscriminate application of the private copying levy to all digital media was inconsistent with Directive 2001/09.<sup>100</sup> The Provincial Court of Barcelona referred five questions to the Court of Justice before it could make a ruling.<sup>101</sup>

*1. Legislative Flexibility in Interpreting Fair Compensation .*

The first issue the Provincial Court of Barcelona asked the Court of Justice to clarify was whether Directive 2001/29’s goal of harmonizing fair compensation throughout the Member States takes priority over the Member States’ ability to enact unique collecting systems for private copying levies.<sup>102</sup> The court declared that fair compensation “is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on them to determine . . . detailed arrangements for financing and collection, and the level of that fair compensation.”<sup>103</sup> Therefore, under the Court of Justice’s ruling each Member State has the freedom to customize its own private copying levy system provided that it affords rightsholders fair compensation.<sup>104</sup>

*2. Balancing the Harm Caused by Individual Users of Recording Devices with Fair Compensation*

Second, the Court of Justice considered whether under Directive 2001/29, a private copying compensation system adopted by a Member State, must balance the harm caused to rightsholders through private copying by providing fair compensation for the harm incurred and, if so, how to accomplish this.<sup>105</sup> Relying on Directive 2001/29’s preamble, the Court reasoned that the legislature’s intention was “to establish a specific compensation scheme triggered by the existence of harm to the detriment of the rightsholders, which gives rise, . . . to the obligation to ‘compensate’ them.”<sup>106</sup> The Court held that a fair balance between compensation and allowing for private copying requires

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99. *Id.* at para. 17.

100. *Id.*

101. *Id.* at para. 19.

102. *Id.* at para. 19(1) (asking whether fair compensation “entail[s] harmonisation, irrespective of the Member States’ right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightholders affected by the adoption of the private copying exception or limitation”).

103. *Id.* at para. 37.

104. *Id.*

105. *Id.* at para. 38. A “fair balance” should weigh the harm caused to the rightsholders from the private copying exception against the compensation the rightsholders receives from the levy. *Id.* at para. 50.

106. *Id.* at para. 41.

that the rightsholders be compensated for the private copies made.<sup>107</sup> Furthermore, the Court established that individuals making private copies have undoubtedly caused harm to the rightsholders, and it is the private users who should remedy the harm caused to the rightsholders.<sup>108</sup>

The Court realized the impracticability of identifying every individual guilty of causing harm to rightsholders.<sup>109</sup> To achieve the goal of fair compensation for the harm done by private users, the levy is applied to recordable devices capable of making copies.<sup>110</sup> This practice charges the private copying levy to those parties responsible for providing the equipment and media used to make and store a private copy.<sup>111</sup> The Court concluded that the parties providing the equipment could be charged the levy costs in accordance with fair compensation under the presumption that the manufacturers and importers of such devices could easily pass the levy costs onto the individuals purchasing the digital reproduction devices to make private copies.<sup>112</sup>

### *3. Creating the Loophole: The Permissibility of Imposing the Levy on Digital Recording Implements as a Proxy for Individual Copiers and the Limitations Thereon*

After the Court held that Article 5(2)(b) ensures fair compensation, it addressed the Provincial Court of Barcelona's third and fourth issues together.<sup>113</sup> The third issue addressed the validity of the common presumption that all recordable devices are used for making reproductions of protected works, and thus should be charged the private copying levy.<sup>114</sup> The fourth issue was conditional upon the holding of the third issue, such that if the reproduction presumption was valid, would the presumption extend to obligate private copying levies on devices that are clearly marketed and widely used for professional copying.<sup>115</sup> The Court upheld the reproduction presumption to be valid because there is "a necessary link between the application of the private copying levy to the digital reproduction equipment, devices and media and their use for private copying."<sup>116</sup> It does not need to be affirmatively proven that private copies were produced with the device.<sup>117</sup> The devices' recording capabilities justify being charged with the private copying levy.<sup>118</sup>

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107. *Id.* at paras. 39–42.

108. *Id.* at paras. 44–45.

109. *Id.* at para. 46.

110. *Id.* at paras. 46–50.

111. *Id.*

112. *Id.*

113. *Id.* at para. 51.

114. *Id.* at para. 19(3).

115. *Id.* at para. 19(4).

116. *Id.* at para. 52.

117. *Id.* at paras. 54–56.

118. *Id.*

However, the Court also declared that indiscriminately applying the private copying levy to digital devices that are not used for private purposes is contradictory to the meaning of fair compensation in Directive 2001/29.<sup>119</sup> Undeniably, these holdings create a loophole for manufacturers and importers to argue that the levy should not apply because 1) the devices are not marketed or going to be used for private purposes; and 2) the devices will be exported and would be charged the levy when imported into another territory, and thus should not have to pay a similar private copying levy in the Member State where the device is manufactured.<sup>120</sup> This loophole creates an ambiguity in the already incongruent interpretations of the private copying exception and levy applications by deferring to the manufacturers and importers, the parties responsible for paying the levy, the ability to ultimately determine the amount they will be charged.

#### 4. Applying the Court's Holdings

The Court did not answer the fifth question referred by the Spanish court because each Member State has the power to apply the Court of Justice's holdings as it sees fit.<sup>121</sup> While the *Padawan* decision began to refine private copying, it did not provide clear guidelines on how Directive 2001/29's fair compensation requirement should be accomplished, and the decision created a problematic loophole for manufacturers and importers to evade levy payments. Private copying under Directive 2001/29 needed to be further interpreted to increase harmonization throughout the European Union.

#### F. *Stichting*<sup>122</sup> and the Importance of Fair Compensation for Private Copying

Only one year after deciding *Padawan*, the Court of Justice heard *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH, et al.*<sup>123</sup> The Court used *Padawan* as support throughout its *Stichting* analysis.<sup>124</sup> In *Stichting*, the European Union Court of Justice interpreted Article 5(2)(b) and (5) of Directive 2001/29's private copying exception.<sup>125</sup> This case arose from a controversy involving the failure of Opus Supplies Deutschland GmbH ("Opus"), a German

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119. *Id.* at paras. 53–54.

120. *See id.* at paras. 51–59.

121. *Padawan SL*, at paras. 61–63. The final question was whether Spain's indiscriminate application of its national private copying levy went against Directive 2001/29 "in so far as there is sufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of right justifying the compensation does not exist?" *Id.* at para. 19(5).

122. *Stichting de Thuiskopie* is Austria's collecting society for private copying levies. Case C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH*, 2011, E.C.R. I-5331, para. 9.

123. *Id.* at para. 1.

124. *See generally* Case C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH*, 2011, E.C.R. I-5331.

125. *Id.* at para. 1.

Internet-based company that heavily markets to consumers in the Netherlands, to pay the Netherlands' private copying levy that is collected and managed by Stichting de Thuiskopie ("Stichting").<sup>126</sup> The Supreme Court of the Netherlands stayed the proceedings until the European Union Court of Justice resolved two issues involving fair compensation under Directive 2001/29.<sup>127</sup>

### 1. *The Responsibility for Payment of the Levy*

First, the Court of Justice addressed whether Article 5(2)(b) and (5) of Directive 2001/29 dictates which entity owes fair compensation to the rightsholders for privately copying protected works.<sup>128</sup> The Court began its analysis by recognizing the vast discretion that is afforded to Member States through Directive 2001/29 in determining the responsible party for paying the private copying levy.<sup>129</sup> In emphasizing the importance of fair compensation for rightsholders, the Court first ruled that the final user who actually creates a private copy is responsible for paying the private copying levy.<sup>130</sup> This holding strengthens the *Padawan* decision by affirming that the individual who is responsible for violating the rightsholders' exclusive right of reproduction has the obligation to fairly compensate the rightsholders.<sup>131</sup> However, there is a caveat; Member States may charge the private copying levy to the manufacturers and importers of the recording equipment under the presumption that the levy's cost will be passed along to the final user.<sup>132</sup>

### 2. *Imposing the Levy on Importers and Manufactures*

Next, the Court addressed whether Directive 2001/29 dictates which party is responsible for paying "fair compensation" when recording devices are sold across Member States with different national private copying laws and levies.<sup>133</sup> Before answering the question, the Court made clear that one main objective of Directive 2001/29 was to ensure rightsholders were justly compensated.<sup>134</sup> The Court declared that a Member State may charge private copying levies to manufacturers and importers of recording devices in the Member State where

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126. *Id.* at paras. 9–10, 12–14. The Netherlands' copyright laws impose the private copying levy on importers and manufactures of devices used for reproducing works, in accordance with Directive 2001/29 and *Padawan*. See *id.* at paras. 7(1)–(3) (citing Law on Copyright, art. 16c(1)–(3) (*Auteurswet*, *Staatsblad* 2008, No. 538)). Opus sold and shipped recording devices to the Netherlands without paying the private copying levy. See *id.* at para. 10.

127. *Id.* at para. 17.

128. *Id.*

129. *Id.* at para. 23.

130. *Id.* at paras. 28–29.

131. *Id.*

132. *Id.*

133. See *id.* at para. 30.

134. See *id.* at para. 32 (stressing that without fair compensation the rightsholders would stop creating new intellectual works, and Directive 2001/29 was enacted, in part, to assure the continued "maintenance and development" of additional creative works).

the private copying harm occurs.<sup>135</sup> Both of the Court's holdings in *Stichting*, which are controlling throughout the European Union, narrow the broad language of Article 5(2)(b) of Directive 2001/29 while strengthening the earlier *Padawan* decision.<sup>136</sup>

## II. THE SIGNIFICANCE OF THE AMAZON DECISION IN THE EUROPEAN UNION

Most recently, the Court of Justice further harmonized Article 5(2)(b) of Directive 2001/29 throughout the European Union in *Amazon.com International Sales, Inc. v. Austro-Mechana*.<sup>137</sup> The *Amazon* matter was referred to the Court of Justice by the Austrian high court.<sup>138</sup> The controversy before the Court arose because Amazon placed digital recording devices into the Austrian market by fulfilling orders placed by Austrian residents through its website.<sup>139</sup> Austro-Mechana,<sup>140</sup> the society that collects the private copying levy for rightsholders, brought suit against Amazon in the Austrian courts to collect 1,856,275 € for payment of the private copying levies owed by Amazon from the first half of 2004 and demanded Amazon's records for the second half of 2004 to determine how much additional private copying levy funds Amazon owed.<sup>141</sup> The lower Austrian court ruled in favor of Austro-Mechana, and Amazon appealed the decision to Austria's highest court.<sup>142</sup> The Austrian high court stayed the

135. *See id.* at para. 41.

136. *See id.* at paras. 29, 41; *Court of Justice: Presentation*, CURIA, [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/#competences](http://curia.europa.eu/jcms/jcms/Jo2_7024/#competences) (last visited Mar. 16, 2014) (explaining that the European Union Court of Justice's response to a reference for preliminary ruling, as was requested in *Stichting*, is binding on all Member State national courts).

137. *See* Case C-521/11, *Amazon.com Int'l Sales, Inc. v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH*, CURIA, para. 1 (July 11, 2013), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5fd60d234a83f4364bf1fc6554ba55478.e34KaxiLc3eQc40LaxqMbN4OaNmQe0?text=&docid=139407&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=173684>.

138. *Id.* at para 14–15 (noting that the Oberster Gerichtshof is the Austrian court of final resort). Both *Stichting* and *Padawan* were brought before the Court of Justice under similar circumstances. *See Stichting de ThuisKopie*, 2011 E.C.R. I-5399, at para. 17; *Case C-467/08, Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10098, para. 19.

139. *See Amazon.com Int'l Sales*, at para. 11. Austrian law explicitly requires that remunerations be collected for rightsholders through a blank cassette levy, otherwise called a private copying levy, on recording devices that are suitable for reproducing protected works. Austrian Law on Copyright, *Urheberrechtsgesetz [UrhG]* [FEDERAL LAW ON COPYRIGHT IN WORKS OF LITERATURE AND ART AND ON RELATED RIGHTS] BUNDESGESETZBLATT [BGBl] No. 111/1936, ¶ 42b(1) (Austria).

140. Austro-Mechana is chartered under UrhG ¶ 42b(1). *See Amazon.com Int'l Sales*, at para. 9.

141. *Id.* at paras. 12–13. Austro-Mechana's original suit covered levies Amazon owed for recording implements sold from 2002 to 2004. *Id.* at para. 12.

142. *Id.* at para. 14 (stating that the lower court ruled that Amazon must produce the financial documents requested by Austro-Mechana to determine how much money Amazon owed in levies for 2004).

proceeding and referred four issues to the European Union Court of Justice for clarification.<sup>143</sup>

A. *Closing the Loophole: Indiscriminate Levy Applications Mandate a Reimbursement Option*

The first question the Court addressed was if devices are re-exported or not for private use, may the party who paid the private copying levy claim reimbursement from the Member State collecting society that indiscriminately applied a private copying levy regardless of the media's intended use.<sup>144</sup> This issue arose from the *Padawan* decision where the Court held that Member States could charge a private copying levy to recordable devices under the presumption that the devices were going to be used to make private copying.<sup>145</sup> In determining whether importers and manufacturers have reimbursement claims, the Court looked to *Padawan* and *Stichting* to affirm that a Member State may enact a private copying exception as long as the exception is accompanied by fair compensation for the rightsholders.<sup>146</sup> The *Padawan* Court outlawed the indiscriminate application of the private copying levy on devices not for private use.<sup>147</sup> Furthermore, the Court also reaffirmed its analysis in *Stichting* that a Member State is allowed, but not required, to enact private copying levies, and because Directive 2001/29 does not explicitly say who is responsible for paying the private copying levy, the Member State has discretion to delegate payment responsibility.<sup>148</sup>

As the Court previously held, the practice of charging the private copying levy to the manufacturers and importers of digital recording devices comports with fair compensation under the presumption that manufacturers and importers will pass the levy rates onto the consumer who actually causes the harm to rightsholders by making the unauthorized reproduction.<sup>149</sup> In narrowing down

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143. *Id.* at para. 15 (outlining the four issues presented to the Court of Justice).

144. *Id.* at para. 16.

145. Case C-467/08, *Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10098, paras. 52–54; *see supra* Part I.E.3 (explaining the Court's reasons for validating the presumption that recordable devices were going to be used to produce private copies).

146. *Amazon.com Int'l Sales*, at para. 19 (citing *Padawan*, at para. 30; *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH*, 2011, E.C.R. I-05331, para. 22).

147. *Padawan*, at paras. 52–54.

148. *Amazon.com Int'l Sales*, at para. 20, (citing *Stichting de Thuiskopie*, 2011 E.C.R. I-5349 at para. 23). It is established practice within the European Union to leave it to the discretion of decision makers in each Member State to determine the efficient and effective way of complying with a Directive if the Directive does not explicitly spell out criteria. *See Amazon.com Int'l Sales*, at para. 21 (citing Case C-36/05, *Comm'n of the European Cmty. v. Kingdom of Spain*, 2006, E.C.R. I-10313, para. 33); *see also* Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, 2003, E.C.R. I-1251, para. 34; Case C-433/02, *Comm'n of the European Cmty. v. Kingdom of Belg.*, 2003, E.C.R. I-12191, para. 19.

149. *Amazon.com Int'l Sales*, at paras. 23–28; *see also Stichting de Thuiskopie*, 2011, E.C.R. I-05331 at paras. 26–28; *Padawan SL*, 2010, E.C.R. 10098 at paras. 45–46.

that process to the issue at hand, the Court stated that a private copying exception “must ensure . . . effective recovery of the fair compensation” paid through the private copying levy.<sup>150</sup> The Court ultimately held that a Member State is not precluded from indiscriminately applying a private copying levy on commercial and private digital recording devices so long as a reimbursement process to recover the levy costs for the commercially used devices is available and not excessively difficult.<sup>151</sup> This holding closed the loophole created by the *Padawan* decision by not allowing manufacturers to claim that devices will be exported and later levied or that the device is for commercial use.<sup>152</sup> Even if devices are exported, and the exporter pays the private copying levy twice (once in the Member State where the device was manufactured and once in the Member State where the device was imported) the manufacturer and importer can seek reimbursement from the first Member State because the actual harm will not be committed in the manufacturing Member State.<sup>153</sup>

*B. Legal Responsibility for the Private Copying Levy Is Incurred When Devices Are First Placed in a Market*

The second issue the Court considered in *Amazon* was whether a Member State, under the meaning of fair compensation in Directive 2001/29, can charge the private copying levy to manufacturers and importers of digital recording devices.<sup>154</sup> The Court relied heavily on the *Padawan* decision, and the analysis involved answering the first issue in the case at hand.<sup>155</sup> Manufacturers and importers are liable for the private copying levy even though manufacturers and importers do not directly cause the harm to the rightsholders; the cost of the levy is presumed to be passed on to the private user.<sup>156</sup>

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150. *Amazon.com Int'l Sales*, at para. 32 (clarifying that “where such recovery presents difficulties, the Member State concerned is also required to resolve them by taking into account the circumstances of each case”).

151. *Id.* at para. 37. Each Member State has the discretion to decide “whether the practical difficulties justify such a system of financing fair compensation and if so whether the right to reimbursement of any levies paid in cases other than that under Article 5(2)(b) of the Directive 2001/29 is effective and does not make repayment of those levies excessively difficult.” *Id.* at para. 34.

152. *See supra* notes 120–21 and accompanying text.

153. *Amazon.com Int'l Sales*, at para. 37.

154. The basis for answering the second question was established in *Padawan*. As the *Padawan* court held, a Member State may validly presume that a device with recording capabilities will be used to make copies. *Padawan SL*, 2010, E.C.R. I-10098 at paras. 54–56. The *Padawan* court concluded that it is only logical to require fair compensation as a “recompense for the harm suffered by the author,” and thus should be calculated so authors can recuperate from the harm the private copying exception expelled to them. *Id.* at para. 40.

155. *Amazon.com Int'l Sales* at paras. 40–42 (affirming *Padawan* by reiterating that it is “sufficient to justify the application of the private copying levy” if a device with recording capabilities is marketed to the general population).

156. *Id.* at para. 48. The Court stated that:

This presumption is “justified and reflects the ‘fair balance’ to be struck between the interests of the holders of the exclusive right of reproduction and those users of the protected subject-matter.”<sup>157</sup> However, the presumption can be rebutted when a recordable device is not marketed to private persons and the final usage of the device is not for private copying, thus putting the device outside the scope of the private copying exception and levy.<sup>158</sup> When the presumption is successfully rebutted, the rebutting party is entitled to reimbursement as defined in the holding for the first question.<sup>159</sup> Ultimately, *Amazon* court held that Member States are allowed under Article 5(2)(b) of Directive 2001/29 to charge the private copying levy to manufactures and importers who first place a recording device in a Member State’s market under the presumption that the device will be used to reproduce copies of protected works.<sup>160</sup>

### C. Collectives’ Rightful Allocation of Private Copying Levies to Cultural and Social Funds

The *Amazon* court next considered whether collectives representing rightsholders of musical works may assign a percentage of private copying funds to cultural and social programs for the indirect benefit of their rightsholder members, instead of paying the funds directly to the rightsholders themselves.<sup>161</sup> As previously discussed, collectives in Member States are responsible for collecting and distributing the funds received from the private copying levies to the rightsholders.<sup>162</sup> Historically, collectives have been able to use a percentage of the private copying funds received towards social and cultural projects.<sup>163</sup>

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Activity of the persons liable to finance the fair compensation namely the making available to private users of reproduction equipment, . . . is the factual precondition for natural persons to obtain private copies. Second, nothing prevents those liable to pay the compensation from passing on the private copying levy in the price charged . . . Thus, the burden of the levy will ultimately be born by the private user who pays that price. In those circumstances, the private user . . . must be regarded in fact as the person indirectly liable to pay fair compensation.

*Id.*

157. *Id.* at para. 43.

158. *Id.* at paras. 44–45. The Court recognizes the challenges involved in identifying the final use of the device, which validates the presumption. *Id.* at para. 45.

159. *Id.* at paras. 37, 45.

160. See *Amazon.com Int’l Sales*, at para. 45.

161. *Id.* at para. 46.

162. See *supra* note 7. Austro-Mechana is responsible for distributing the funds received from the private copying levy to the rightsholders. *Amazon.com Int’l Sales*, at para. 9. Austro-Mechana puts fifty percent of the private copying funds received towards social and cultural projects. *About Us*, AUSTRO-MECHANA, [http://aume.at/show\\_content2.php?s2id=1](http://aume.at/show_content2.php?s2id=1).

163. Such allocation has never been overruled or limited. See *Amazon.com Int’l Sales*, at paras. 46–55 (discussing the permissibility of a collective’s ability to allocate fifty percent of the private copying funds towards social and cultural programs). Collective management organizations, despite using funds to indirectly benefit the rightsholders, are long-believed to ultimately cut

The *Amazon* court upheld this practice reasoning that it is within Member States' and collectives' discretion to provide part of the fair compensation owed to rightsholders in the form of indirect compensation.<sup>164</sup> However, the Court emphasized that the social and cultural projects must actually benefit the rightsholders and cannot be discriminatory.<sup>165</sup> Ultimately, there is no legal reason barring indirect compensation through social and cultural projects, thus allowing collectives like Austro-Mechana to allocate a percentage of private copying levy funds to programs that indirectly benefit the rightsholders.

*D. Private Copying Levies Can Be Applied in a Member State to a Device that Has Already Been Charged a Similar Levy in Another Member State*

The Court next considered whether paying a private copying levy in one Member State on a device prohibits another Member State from charging a similar private copying levy on that same device simply because the device crossed borders.<sup>166</sup> To begin the analysis, the Court reiterated that it is the responsibility of the Member State, if it enacted a private copying exception, to ensure the fair compensation of rightsholders for the harm done to them by the final user making the reproduction.<sup>167</sup> The Court found that since the fair compensation obligation cannot be evaded, it does not make a difference if the sale occurs in another country or if the device was previously charged a private copying levy.<sup>168</sup> Therefore, the Court affirmed its holding in *Stichting* that Member States that have enacted private copying exceptions must ensure fair compensation for rightsholders for the harm caused by the private reproduction of protected works.<sup>169</sup> The harm occurs in the Member State where the private consumer uses the device, and that Member State is responsible for financing fair compensation to the rightsholders.<sup>170</sup> Not allowing the Member State where the device is imported and where the final users reside to charge a private copying levy would go against the Member State's obligation to fairly compensate rightsholders.<sup>171</sup>

The Court then extended its holding that a similar private copying levy already assessed in a Member State does not preclude another Member State from

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procedural costs when enforcing protection of copyrighted works. See Severine Dusollier & Caroline Colin, *Collective Management of Copyright: Solution or Sacrifice?: Peer-to-Peer File Sharing & Copyright*, 34 COLUM. J.L. & ARTS 809, 817–18 (2011).

164. *Amazon.com Int'l Sales*, at para. 49.

165. The Court defers to the Member States to judge discriminatory acts done by collectives. However, the Court expressly states that barring rightsholders from other countries from benefiting from the social and cultural programs is a discriminatory act. *Id.* at paras. 53–54.

166. *Amazon.com Int'l Sale*, at para. 56.

167. *See id.* at paras. 57, 59, 64.

168. *See id.*

169. *Id.* at para. 57 (citing Case C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*, 2011 E.C.R. I-5349, at para. 34).

170. *See Amazon.com Int'l Sales*, at paras. 58–59.

171. *See id.* at paras. 58–61, 64–66.

assessing its national private copying levy on the same device.<sup>172</sup> The Court reasoned that although the private copying levy can be charged to the same device twice, “a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law.”<sup>173</sup> The Court supported the mandated reimbursement option, which addresses the fact that a recording device can be charged a private copying levy in multiple Member States because fair compensation is needed for the private reproduction of protected works, not for the transferring of a device across international borders.<sup>174</sup>

### III. AMAZON'S PRIVATE COPYING HOLDINGS SIMULTANEOUSLY PROVIDE MORE PROTECTION BUT LESS DIRECT FUNDS FOR RIGHTSHOLDERS

Directive 2001/29's ambiguous language and failure to establish a uniform private copying exception for Member States has led to inconsistent private copying laws throughout the Member States.<sup>175</sup> The vague “fair balance” guideline fits with the European Union's goal of allowing Member States flexibility in interpreting European Union-made law, but with such flexibility comes a lack of congruency.<sup>176</sup> The string of cases the European Union Court of Justice has decided on private copying within three years exemplify the importance the European Union is putting on establishing uniform private copying practices throughout the Member States.<sup>177</sup>

The *Amazon* case strengthened private copying levy systems in the European Union by allowing devices to be assessed the private copying levy twice so long as there is a reimbursement option for manufacturers and importers.<sup>178</sup> This double-payment option benefits international rightsholders by closing the loophole the Court of Justice created in *Padawan*, which allowed manufacturers to claim the device was going to be charged the private copying levy when it was imported into another Member State and thus would be immune from being charged the levy in the Member State in which the device was manufactured.<sup>179</sup> The *Amazon* Court also positively expanded the scope of the private copying exception by allowing a Member State to presume that a blank media device

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172. *Id.* at para. 64.

173. *Id.* at paras. 65–66.

174. *Id.* at paras. 62, 66.

175. *See supra* Part I.D (explaining that under Directive 2001/29 each Member State is permitted to enact its own private copying law).

176. *See supra* note 90 and accompanying text (explaining the purposes of Directives in harmonizing European Union law).

177. *See generally* Case C-521/11, *Amazon.com Int'l Sales*; Case C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH*, 2011, E.C.R. I-05331; Case C-467/08, *Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10055.

178. *See Amazon.com Int'l Sales*, at paras. 64–65.

179. *See id.*

would be used for private reproduction purposes.<sup>180</sup> At the same time, the *Amazon* decision hurts international rightsholders by failing to eliminate or even limit the percentage of private copying levy money that collectives may allocate to social and cultural funds.<sup>181</sup>

#### A. Positive Results of the Reimbursement Option

The *Amazon* court held that fair compensation allows the private copying levy to be charged twice while also granting the payer a right of reimbursement for the first levy payment.<sup>182</sup> The reimbursement option balances protection of all parties involved in the private copying levy system.<sup>183</sup> The reimbursement option prevents manufacturers from claiming that they do not have to pay the private copying levy because the device will be exported.<sup>184</sup> The *Amazon* decision affords rightsholders more protection and compensation by preventing manufacturers from exploiting the *Padawan* loophole. The reimbursement option is added to give the manufacturers and importers of blank media devices the ability to sell products across borders without fear of paying twice and does not allow manufacturers, who are also exporters, to avoid paying the private copying levy in the Member State where manufacturing takes place.<sup>185</sup> International companies will be able to cut losses by seeking reimbursement of double-charged private copying levies.<sup>186</sup> This will ensure that the money received from private copying in a given Member State is an accurate account of the importing and manufacturing of digital recording devices within the Member State.

#### B. International Relations Among Collectives Representing Rightsholders of Musical Works

Collectives form bilateral contracts with other collectives to protect their rightsholder members internationally.<sup>187</sup> Yet, foreign collectives typically

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180. See *Amazon.com Int'l Sales*, at paras. 28, 41, 45.

181. *Id.* at para. 55 (holding that half of the funds may be paid to social and cultural institutions but failing to establish a percentage that would violate the notion of fair compensation).

182. *Id.* at paras. 64–65.

183. See *id.*

184. This practice was the result of the *Padawan* decision. See *Padawan SL v. Sociedad Gen. de Autores y Editores de España*, 2010, E.C.R. I-10055, paras. 51–59.

185. Although the manufacturer or importer would technically pay the private copying levy twice, the reimbursement process may not be excessively difficult. *Amazon.com Int'l Sales*, at para. 37.

186. See *Amazon.com Int'l Sales*, at paras. 64–65 (allowing for repayment for those who have been charged double).

187. Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing—Frequently Asked Questions 4 (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm).

reserve funds for “social and cultural establishments.”<sup>188</sup> In the majority of Member States, the collective determines the distribution processes, including the percentage that is allocated to social and cultural programs.<sup>189</sup> As the *Amazon* court explained, allowing collectives to allocate levy funds to social and cultural organizations comports with Directive 2001/29’s goal of enhancing creativity.<sup>190</sup> Although such social and cultural programs benefit the artist and music communities generally, they do not directly compensate the rightsholders for the exploitation of their protected works.<sup>191</sup>

International music collectives, like Austro-Mechana in the *Amazon* case, allocate percentages of the money received from private copying levies to social and cultural funds.<sup>192</sup> The *Amazon* decision affirmed Austro-Mechana’s ability to take fifty percent of the private copying levy money for social and cultural funds.<sup>193</sup> The practice of allocating a percentage of the private copying money decreases the amount of money paid directly to the rightsholders.<sup>194</sup>

The collective allocates money to the social and cultural fund before directly distributing the levy proceeds to the rightsholders.<sup>195</sup> The majority of programs paid for by the money allocated to the social and cultural fund are held in the respective country, and for a rightsholder to be able to even indirectly benefit from such programs, the rightsholder would need to be present in the respective

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188. See, e.g., *Amazon.com Int’l Sales*, at para. 46. In Austria, artists have established an “Art is Right” movement to raise awareness of intellectual property rights. Home, AUSTRO-MECHANA, <http://aume.at> (last visited Mar. 16, 2014).

189. *The Collective Management of Rights in Europe the Quest for Efficiency*, KEA EUROPEAN AFFAIRS 68 (July 2006) (detailing the governing structure of collectives in the European Union).

190. *Amazon.com Int’l Sales*, at para. 52 (citing Directive 2001/29, *supra* note 8, at paras. 10–11).

191. See *Amazon.com Int’l Sales*, at paras. 49–50, 53.

192. See, e.g., *The Social and Cultural Institutions of the Austro-Mechana*, AUSTRO-MECHANA, [http://aume.at/show\\_content2.php?s2id=83](http://aume.at/show_content2.php?s2id=83) (last visited Mar. 16, 2014) (noting that Austro-Mechana allocates fifty percent of private copy levy funds to cultural institutions).

193. *Amazon.com Int’l Sales*, at paras. 46–55.

194. *Id.* For additional information on the recent movement to regulate collectives in the European Union, see Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing—Frequently Asked Questions (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm).

195. See Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing—Frequently Asked Questions, 8–9 (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm) (discussing the need for transparency in collectives’ royalty deduction processes and the need for collectives to be able to substantiate all activities involving royalty accounts, including deductions used to fund social and cultural programs); see also *The Collective Management of Rights in Europe the Quest for Efficiency*, KEA EUROPEAN AFFAIRS, 79–80 (July 2006) (providing examples of social and cultural programs Member States fund through private copying levy monies).

country. These social and cultural programs are a way for the collective to benefit its national members more so than non-national rightsholders.<sup>196</sup>

Each collective in a bilateral agreement can, and often does, allocate a different percentage for social and cultural funds.<sup>197</sup> For example, the United States does not deduct royalties for social funds.<sup>198</sup> The disparity in countries' collectives' practices harm the rightsholders who cannot even indirectly benefit from the social and cultural activities offered in the withholding country because the money for the social and cultural funds gets deducted prior to distributing funds directly to rightsholders.<sup>199</sup> This method of indirect compensation for rightsholders is not beneficial to all rightsholders, especially American rightsholders. The Court of Justice could have ended this gross inequality by outlawing deductions for social and cultural activities, or at least limited the percentage of royalties that collectives are allowed to allocate to such unfair social and cultural funds.<sup>200</sup>

#### IV. CONCLUSION

The *Amazon* decision successfully clarified four issues surrounding Article 5 of Directive 2001/29 and eliminated the *Padawan* loophole. However, until a uniform unambiguous law is in place, the inconsistencies in private copying laws and the bias practices of collectives throughout the European Union will persist. The *Amazon* decision not only affects the rightsholders of musical copyrights in Member States, but also affects American rightsholders. As long as collectives around the world continue to deduct rightsholders' royalties for social and cultural funds, American rightsholders will be denied true fair compensation.

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196. Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing—Frequently Asked Questions (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm). (proposing increasing collective regulations).

197. See, e.g., *The Social & Cultural Institutions of the Austro-Mechana*, *supra* note 192.

198. See Alliance of Artists & Recording Comps., *supra* note 85.

199. See Memorandum from the European Commission on Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing—Frequently Asked Questions, 8–9 (Feb. 4, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm) (discussing a proposed memorandum to regulate collectives, including the amounts a collective is allowed to deduct from the funds collected).

200. *But see Amazon.com Int'l Sales*, at paras. 46, 55 (reaching an alternative conclusion).