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ARTICLE

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Abstract Private copying is one of the most contested areas of EU copyright law. This paper surveys that nebulous area and examines the issue of copies made from unlawful sources in light of the ECJ's *ACI Adam* decision. After describing the legal background of copyright levies and the facts of the litigation, the paper scrutinizes the Advocate General's Opinion and the Court's decision. The latter is analyzed against the history of copyright levies, the ECJ's extensive case law on the private copying limitation and Member States' regulation of unlawful sources. This paper further reflects on the decision's implications for end-users, rights holders, collective management organizations and manufacturers/importers of levied goods. It concludes that, from a legal and economic standpoint, the decision not only fails to be properly justified, but its consequences will likely diverge from those anticipated by the Court. Most worrisome is the Court's stance on the three-step test, which it views as a restrictive, rather than enabling, clause. In its interpretation of the test, the decision fails to strike the necessary balance between competing rights and interests. This is due to multiple factors: overreliance on the principle of strict interpretation; failure to consider the fundamental right of privacy; lack of justification of the normative and empirical elements of the test's second condition; and a disregard for the remuneration element in connection with the test's third condition. To the contrary, it is argued that a flexible construction of the three-step test is more suited to the InfoSoc Directive's balancing aims.

Keywords Private copying · Levies · Limitations · Three-step test · *ACI Adam*

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1 Introduction

Copyright levies have been a polarizing topic in EU copyright law since they first made it to the harmonization agenda in 1988.[1] After a failed promise by the Commission to propose a directive on the topic, private copying entered the *acquis* through a partial regulation in Art. 5(2)(b) InfoSoc Directive.[2] That provision and the related recitals have been at the origin of significant judicial and institutional activity, in part justified by the economic significance of levies: in 2010 alone, the overall amount of private copying levies collected in the EU surpassed € 600 million.[3]

As part of its active role in interpreting the InfoSoc Directive,[4] the ECJ has ruled on the provision in *Padawan*, *Stichting de Thuiskopie*, *Luksan*, *VG Wort*, *Amazon.com* and, most recently, in *ACI Adam*.[5] At the time of writing, at least one significant case is pending.[6]

At the institutional level, there have been stakeholder consultations in 2006 and 2008, with further references to comprehensive action in the field in a 2011 communication outlining the Commission's strategy for intellectual property rights.[7] The last few years have been prolific. 2013 brought the much debated recommendations of mediator António Vitorino.[8] Between January and March 2014

[1] "Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action". *COM* (88) 172 final, 7 June 1988, at 99–142. *See also* Poort and Quintais (2013).

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) (22 June 2001) *OJ* L 167, pp. 10–19. On the history of the provision, *see* Hugenholtz (2012).

[3] IP/13/80 (31 January 2013), "Mediation on private copying and reprography levies: António Vitorino presents his Recommendations to Commissioner Barnier", available at http://europa.eu/rapid/press-release_IP-13-80_en.htm?locale=en.

[4] On which *see* Leistner (2014).

[5] *See* ECJ Case C-467/08 – *Padawan v. SGAE* (2010) ECR I-10055; ECJ Case C-462/09 – *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH and Others* (2011) ECR I-5331; ECJ Case C-277/10 – *Martin Luksan v. Petrus van der Let* (9 February 2012) ECLI:EU:C:2012:65; ECJ Joined Cases C-457-460/11 – *VG Wort v. Kyocera and Others* (27 June 2013), ECLI:EU:C:2013:426; ECJ Case C-521/11 – *Amazon.com International Sales Inc. and Others v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* (11 July 2013), ECLI:EU:C:2013:515; ECJ Case C-435/12 – *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* (10 April 2014), ECLI:EU:C:2014:254, *see* this issue of *IIC* at doi:10.1007/s40319-014-0294-8.

[6] Case C-463/12, *Copydan Båndkopi v. Nokia Danmark*, *OJ* 2012, C 399/13–14. *See* Opinion of A.G. Villalón in *Copydan Båndkopi* (18 June 2014), ECLI:EU:C:2014:2001 [not available in English], particularly paras. 81–96. At the time of writing, the following cases were also pending: ECJ, Case C-470/14 – *EGEDA and Others*; and ECJ, Case C-572/14 – *Austro-Mechana*.

[7] Documents relating to stakeholder consultations available at http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm. *See COM* (2011) 287 final (24 May 2011), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a Single Market for Intellectual Property Rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe", at 12–13, 23. For a subsequent and less comprehensive approach to copyright levies, *see also COM* (2012)789 final, "Communication on content in the Digital Single Market", 18 December 2012, at 4 *et seq.*

[8] Vitorino (2013).

the Commission launched a public consultation "as part of its ongoing efforts to review and modernize EU copyright rules", which included a section on private copying and reprography, reflecting insights from the Vitorino recommendations and recent ECJ decisions, but not explicitly dealing with the issue of the nature of the source from which private copies are made; the subsequent Commission Report summarizing the results of the consultation also lacks any significant contribution to this discussion, beyond identifying it as a topic of concern to end-users/consumers, intermediaries, distributors and other service providers.[9] In February 2014 the European Parliament passed a resolution on private copying levies where it considers it a "virtuous system in need of modernization and harmonization" and identifies a set of challenges that need to be addressed, including the possibility of levying cloud services.[10]

In *ACI Adam*, the ECJ ruled that the private copying limitation, when interpreted in light of the three-step test, only allows Member States to exempt from authorization reproductions made for private use from lawful sources. The Court mostly followed the Opinion of Advocate General Villalón.[11] There are several reasons why the decision is important.

First, it qualifies multiple daily acts of end-users – such as downloading of entertainment content from unlicensed Internet sites – as clearly infringing, thereby extending the scope of the exclusive right of reproduction. Second, it impacts the way in which copyright levies are calculated, albeit not necessarily in the way the Court intended. Third, it affects the interpretation of the three-step test and the scope of limitations harmonized under the InfoSoc Directive. The restrictive approach followed by the Court might have far-reaching effects for existing national laws and judicial decisions in this area.

This article critically examines these implications and suggests that a closer examination of the Court's decision casts doubts on whether its outcome is beneficial for end-users, rights holders and manufacturers/importers of levied goods. For that purpose, the following sections clarify the legal background to EU copyright levies (2), the factual background to *ACI Adam* (3), examine the Opinion of the Advocate General (4), describe the judgment of the Court (5) and provide an analysis thereof (6). Part 7 offers conclusions.

[9] *See* "Public Consultation on the review of the EU copyright rules", available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf, at 31–33. (Questions 64–71); IP/13/1213 (05/12/2013), "Copyright – Commission launches public consultation", available at http://europa.eu/rapid/press-release_IP-13-1213_en.htm?locale=en; and European Commission – Directorate General Internal Market and Services, "Report on the responses to the Public Consultation on the Review of the EU Copyright Rules", July 2014, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf, at 72–77.

[10] European Parliament Resolution of 27 February 2014 on private copying levies (2013/2114(INI)). On the private copying issues of cloud-based services, *see* Senftleben (2013). On stakeholders concerns surrounding the interaction between cloud services and private copying, see European Commission, "Report on the responses to the Public Consultation…", *supra* note 9, at 72–77.

[11] Opinion of A.G. Villalón in *ACI Adam* (9 January 2014), ECLI:EU:C:2014:1.

2 Legal Background

Interpretation of the private copying limitation requires articulation of several provisions in the InfoSoc Directive:[12]

- Article 2, defining a broad exclusive right of reproduction, regulating most acts of digital reproduction online, which therefore require authorization;
- Article 5(2)(b), containing the private copying limitation to the right of reproduction, subject to certain conditions;
- Article 5(5), setting out the three-step test;
- Article 6(1), (3) and (4) clarifying certain interfaces between limitations and the application of technological protection measures (TPMs); and
- Recitals 22, 31, 32, 35, 38 and 44, which supplement the interpretation of the abovementioned articles.

Article 5 is of particular importance here. Its first paragraph contains the Directive's sole mandatory exception/limitation, applying to transient copies, which purpose is to facilitate the activities of Internet service providers.[13] Article 5(2)–(4) contains an exhaustive list of 20 optional exceptions/limitations, applying to the otherwise exclusive rights of reproduction, distribution and communication/making available to the public. Where Member States choose to implement these limitations, some are conditional upon the grant of fair compensation.[14] Article 5(2)(b) sets forth the private copying limitation by stating that:

> […M]ember States may provide for exceptions or limitations to the reproduction right […] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

The limitation covers reproductions on all technologies and media, of all types of protected subject matter, with the exception of computer programs and databases.[15] To qualify, reproductions must be for private use, meaning for personal purposes of the natural person beneficiary and within his/her private sphere, which can include a broader or narrower circle of family and friends.[16] Reproductions cannot be for direct or indirect commercial ends. That terminology offers an unclear boundary, which

[12] *ACI Adam*, paras. 3–6, identifying the relevant provisions.

[13] Hugenholtz et al. (2006).

[14] Namely, those in Art. 5(2)(a), (b) and (e) InfoSoc Directive.

[15] Article 1(2)(a) and (e) InfoSoc Directive.

[16] *See* von Lewinski and Walter (2010). The term "private use" features also in Art. 15(1)(a) Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (27 December 2006) (Rental and Lending Directive), *OJ* L 376, pp. 28–35, and Arts. 6(2)(a) and 9(a) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive) (27 March 1996), *OJ* L 77, pp. 20–28. For further implications of this concept, *see*: Poort and Quintais, *supra* note 1, at 207–209; Karapapa (2012).

national laws attempt to define by setting objective and subjective criteria such as the infringing intent of the copier (actual or constructive knowledge, linked to the profit-making aim) and the definition of a maximum number of permitted copies.[17]

Beyond the above-noted requirements, the Directive's broad wording in relation to types and purposes of copying encompasses a plethora of different consumer acts. It can apply, for example, to making copies of TV broadcasts for time-shifting, clone copies of CDs or DVDs for playback or to share with family and friends, making backup copies of works, and downloading and storing works from unauthorized sources from the Internet (and making subsequent copies thereof).[18]

The condition of fair compensation aims at compensating rights holders for reproductions enabled by the limitation, but not directly authorized by rights holders. The "form, detailed arrangements and possible level" of the compensation for this legal license depend on the "circumstances of each case"; one significant criterion in determining these is "the possible harm … resulting from the act in question".[19] Where rights holders have already received payment for the use (e.g. through license fees), it is possible that no additional (or double) payment is due.[20] Fair compensation is therefore linked to a concept of harm.[21]

Here, the limitation interfaces with the regulation of TPMs. These are devices or components aimed at restricting unauthorized access or uses of works, for example through encryption or copy control mechanisms; circumvention of "effective" TPMs is prohibited.[22] Where a work is made available online, subject to licensing terms restricting private copying and accompanied by TPMs, the Directive allows for the possibility that the limitation is set aside.[23] Outside that scenario, whenever the limitation is implemented and TPMs are used by rights holders, they must articulate with the condition of fair compensation and the three-step test.[24]

The logic of these provisions is the following. TPMs can restrict acts of digital reproduction and subject them to additional payment, even where those acts would otherwise be covered by the private copying limitation. That would make payments through a levy system unwarranted, because there would be no unauthorized copies or harm to compensate. Consequently, application of effective TPMs could lead to "phasing-out" levies in the digital environment.[25]

[17] Poort and Quintais, *supra* note 1, at 208 (and references cited therein).

[18] *Id.* at 216.

[19] Recital 35 InfoSoc Directive.

[20] *Id.*

[21] *See Padawan*, paras. 38–42. *See also* Poort and Quintais, *supra* note 1, at 208, noting the difference to the concept of equitable remuneration [Art. 8(2) Rental and Lending Directive], based on the value of the use in trade. See ECJ Case 245/00 – *Sena v. Nos* (2003) ECR I-1251, paras. 36–37, and ECJ Case 192/04 – *Lagardère* (2005) ECR I-7199, para. 50.

[22] Article 6(1)–(3) InfoSoc Directive.

[23] Article 6(4), fourth subparagraph, and Recital 53 InfoSoc Directive. *See also* Poort and Quintais, *supra* note 1, at 209.

[24] *See* Recitals 52 and 39 InfoSoc Directive.

[25] *See* Hugenholtz et al. (2003), Helberger and Hugenholtz (2007) and van Eechoud et al. (2008). *Contra* the argument that the InfoSoc Directive provides for automatic phasing out of levies, *see* von Lewinski and Walter, *supra* note 16, at 1034.

Finally, the Directive's version of the three-step test states that exceptions/limitations are to be applied only: (1) "in certain special cases"; (2) "which do not conflict with a normal exploitation of the work or other subject-matter"; (3) "and do not unreasonably prejudice the legitimate interests of the rightholder".[26]

The test, which originally applied to the reproduction right, as stated in Art. 9(2) Berne Convention, currently extends to all economic rights, by virtue of Arts. 13 TRIPS, 10 WCT (and its agreed statements) and 16 WPPT. In the copyright *acquis*, the test also applies to the Computer Programs Directive,[27] Database Directive[28] and the Rental and Lending Directive.[29,30]

3 Factual Background

ACI Adam and other companies are Dutch manufacturers and importers of blank media (e.g. CDs, CD-Rs) used for the reproduction of works by consumers. Those media are designated for payment of the private copying levy, imposed primarily on the aforementioned companies, which can then pass it on to consumers in the retail price.[31]

In the Netherlands, Stichting de Thuiskopie is the organization responsible for the collection of levies from debtors and its distribution to rights holders. The level of remuneration and levy targets are decided by the foundation SONT, which board is composed of representatives of rights holders (namely Stichting de Thuiskopie), representatives of entities liable for payment (manufacturers and importers) and an independent chairman appointed by the Minister of Justice.[32]

Article 16C(1) and (2) Dutch Copyright Act implements the private copying limitation and imposes liability for payment on manufacturers and importers of reproduction media. ACI Adam and others started a proceeding at the District Court of The Hague, arguing that Stichting de Thuiskopie and SONT have determined and collected the levy incorrectly, as they take into account copies from unlawful sources.[33]

The district court rejected those claims, after which ACI Adam and others filed for an appeal with The Hague Court of Appeals. That appeal was unsuccessful on the grounds that neither the InfoSoc Directive nor the Dutch Copyright Act make a distinction between copies originating from lawful or unlawful sources. Therefore,

[26] Article 5(5) InfoSoc Directive, emphasis added to identify the three "steps" or conditions of the test.

[27] Article 6(3) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) (5 May 2009) (Computer Programs Directive), *OJ* L 111, pp.16–22.

[28] Article 6(3) Database Directive.

[29] The application of the Rental and Lending Directive test to this instrument operates by virtue of Art. 11(1)(b) InfoSoc Directive.

[30] For an in depth influential analysis of the three-step test *see* Senftleben (2004).

[31] *ACI Adam*, para. 12.

[32] *Id.* para. 13. *See also* Visser (2012).

[33] *ACI Adam*, paras. 10, 14.

copying from an unlawful source would be permitted as long as there is no technical measure available to prevent such acts. Because no such measure exists, imposition of a levy was deemed the best solution to address the damage caused by copies made from unlawful sources. The court of appeals considered this in line with the Directive's three-step test.[34]

The case made its way to the Dutch Supreme Court, which stayed proceedings and referred several questions to the ECJ for preliminary ruling.[35] The remainder of this article focuses on the first two questions, summarized as follows:[36]

- Does the InfoSoc Directive's private copying limitation, when taking into account the three-step test, prevent national implementations of the limitations (such as in the Dutch Copyright Act) that do not distinguish between situations where a private copy is made from a lawful source from those where the source is unlawful?
- Is the answer to that question affected by considerations on the availability of TPMs to restrict unauthorized acts?

4 Opinion of the Advocate General

Under the three-step test, the application of the private copying limitation must not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of rights holders.

According to the Advocate General, while the requirements of Art. 5(2)(b) provide an illustration of a *certain special case*, the condition that the exception is subject to the payment of fair compensation – through a levy – is aimed at satisfying the third step, i.e. that the exception does not unreasonably prejudice the legitimate interests of right holders.[37] As such, the present reference would allow the ECJ to make a ruling on the second step in connection to the private copying limitation, on which Art. 5 is silent.[38]

The Advocate General argues that the Directive's failure to explicitly distinguish the source of reproduction acts cannot lead to the conclusion that the limitation includes copies from unlawful sources.[39] In fact, following the principle of strict interpretation of limitations, national laws that allow private copies from unlawful

[34] *Id.* paras. 15–19; Opinion of A.G. Villalón in *ACI Adam*, paras. 12–18.

[35] *ACI Adam*, paras. 15–19.

[36] The Court examines these questions jointly in *ACI Adam*, paras. 20–58. The third and final question refers to whether or not the Enforcement Directive (2004/48/EC) applies to proceedings "in which those liable for payment of the fair compensation bring an action before the referring court for a ruling against the body responsible for collecting that remuneration and distributing it to copyright holders, which defends that action". The Court answers in the negative. *See ACI Adam*, paras. 7–8, 59–65. *See also* Opinion of A.G. Villalón in *ACI Adam*, paras. 85–91.

[37] Opinion of A.G. Villalón in *ACI Adam*, paras. 51–54.

[38] *Id.* para. 55.

[39] *Id.* paras. 57, 63.

sources would *conflict with the normal exploitation of the work*, and so violate the second step.[40]

In their oral observations before the Court, Stichting Thuiskopie, and the Dutch and Austrian Governments argued that a literal, systematic and teleological interpretation of the relevant provisions would not exclude private copying from unlawful sources, as there exists no technological means to prevent such acts. Consequently, the levy is the sole instrument to effectively deal with these mass unauthorized uses, configuring a *normal exploitation of works* and not unreasonably prejudicing the legitimate interests of the rightholders.[41]

In this regard, the Advocate General pointed out that Dutch legislation tolerates downloading of protected works from unlawful sources (under the limitation), and only prohibits the uploading of such materials (covered by the exclusive right of communication/making available to the public). In doing so, he argues, Dutch law indirectly enables the mass distribution of works through unlawful sources. Such legal configuration is therefore the cause for the harm which the levy aims to compensate, and necessarily conflicts with the normal exploitation of works.[42]

In fact, he continues, levies can hardly compensate for the harm caused to the normal exploitation of works online and, in order to ensure payment of fair compensation, levies would need to be raised disproportionately, affecting the fair balance between rights holders and users.[43]

The Advocate General concluded that the levy cannot cover acts of reproduction from unlawful sources and that, as a result, it can only be calculated on the basis of reproductions made from lawful sources.[44] Taking into consideration copies from unlawful sources would be tantamount to a sui generis compensation system, contrary to the autonomous and uniform concept of "fair compensation" and in violation of the first and second steps of the three-step test (by going beyond a certain special case and conflicting with the normal exploitation of works).[45]

5 Judgment of the Court

In its judgment, the Court emphasizes a key point from the outset: while nothing in the Directive mentions the possibility of Member States implementing limitations by extending their scope, Recital 44 admits the possibility of reducing that scope in connection with "certain new uses" of copyrighted content.[46]

[40] *Id*. paras. 71–72.

[41] *Id*. paras. 35–36, 64–69.

[42] *Id*. paras. 72, 75.

[43] *Id*. paras. 76–77.

[44] *Id*. paras. 79–84, 92.

[45] *Id*. paras. 80–84, 92.

[46] *ACI Adam*, paras. 25–27.

Despite the Directive's silence on the issue of the source of reproductions, ECJ case law clarifies that exceptions/limitations are to be interpreted strictly.[47] Therefore, and in light of the context and objectives of the limitation,[48] Art. 5(2)(b) cannot impose on rights holders that they tolerate "infringements […] which may accompany the making of private copies".[49]

That line of interpretation is weaved into the Court's analysis of the three-step test. Notably, the judgment states that national laws allowing reproductions from unlawful sources may infringe the second and third conditions of the test.[50] How?

In what concerns the *second step*, allowing reproductions from unlawful sources encourages piracy, which will "inevitably" reduce revenues from lawful sources and conflict with the normal exploitation of works.[51] Put differently, the Court believes there is a substitution effect between reproductions made from lawful sources and those made from unlawful sources. That assertion, which seems essential to the ruling and would rely at least partially on factual analysis, is not further explained.

Regarding the *third step*, consideration of unlawful sources would force rights holders to tolerate infringements accompanying the making of private copies, thereby unreasonably prejudicing their legitimate interests.[52] There is some circularity to this argument. It seems based on the principle of strict interpretation and ignores the historic role of the remuneration element (here: fair compensation) in satisfying the third step condition.[53]

In essence, the Court's decision turns on the principle of strict interpretation of limitations and potential substitution effects. In that light, it is concluded that Art. 5(2)(b) cannot cover private copies made from unlawful sources.[54]

In what concerns the impact of the availability (or non-availability) of TPMs for determining the relevance of the source of reproductions, the Court returns to its ruling in *VG Wort*.[55] In doing so, it states that TPMs relevant for private copying are those aimed at restricting unauthorized reproductions, therefore ensuring the proper application of the limitation.[56]

Although TPMs are applied by rights holders, Member States implement the limitation and authorize private copying (by law). Hence, they are responsible for

[47] *Id.* paras. 22, 29–30. *See also* ECJ Case C-5/08 – *Infopaq International A/S v. Danske Dagblades Forening* (2009) ECR I-6569, ECLI:EU:C:2009:465, para. 56 and case law cited therein.

[48] *See* Recitals 22 and 33 InfoSoc Directive.

[49] *ACI Adam*, paras. 31–37.

[50] *Id.* para. 38.

[51] *Id.* para. 39.

[52] *Id.* para. 40.

[53] *See infra* VI.0.

[54] *ACI Adam*, para. 41.

[55] On which, *see* J.P. Quintais, Case annotation of *VG Wort* judgement from 10 July 2013, "On copyright levies, printers, plotters and personal computers (VG Wort v Kyocera and others)", available at http://kluwercopyrightblog.com/2013/07/10/on-copyright-levies-printers-plotters-and-personal-computers-vg-wort-v-kyocera-and-others/.

[56] *ACI Adam*, para. 43.

ensuring the proper application of the limitation, including restricting unauthorized acts.[57]

Following that rationale, national laws that do not exclude reproductions from unlawful sources cannot ensure the proper application of the limitation. Such conclusion, the Court posits, is independent of, and remains unaffected by, the non-availability of effective TPMs to prevent unauthorized reproductions.[58]

The Court further notes that, when interpreting the condition of fair compensation in light of previous case law (namely *Padawan* and *Stichting de Thuiskopie*) and Recital 31, a levy system which does not distinguish the source of copies fails to respect the fair balance between the rights and interests of authors and users that the InfoSoc Directive intends to safeguard.[59]

That is because under such a system the "harm" on the basis of which fair compensation is calculated includes "an additional, non-negligible cost" for reproductions made from unlawful sources. That cost is ultimately passed on to consumers purchasing levied goods. As a result, those consumers are "indirectly penalised". Why? Because they will contribute towards compensating for harm caused by reproductions not allowed under the Directive.[60]

In sum, the joint reading of the Directive's private copying limitation and three-step test provisions led the Court to conclude that national laws which do not distinguish between lawful and unlawful sources of the reproduction act are not in conformity with EU law, irrespective of the availability of effective TPMs.[61]

6 Analysis

6.1 A Brief History of Private Copying

The private copying model emerged in the 1950s–1960s in the wake of litigation by the collecting society GEMA, predominantly against manufacturers of recording devices. Landmark decisions by the German Federal Supreme Court extending the scope of the reproduction right to the private sphere and imposing contributory liability on manufacturers (who indirectly contributed and advertised for infringing uses), whilst balancing the need for technological innovation and respect for the constitutional right of privacy, led to the first copyright levy system, which was based on Sec. 53(5) of the 1965 German Copyright Act, and subject to significant amendments in 1985.[62]

[57] *Id*. para. 44.

[58] *Id*. paras. 45–46.

[59] *Id*. paras. 47–54, 57. Recital 31 mentions the need adjust the degree of harmonization of exceptions and limitations in light of cross-border exploitation of works and the new electronic environment in light of the objectives of ensuring "the proper functioning of the internal market" and achieving a "fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users".

[60] *ACI Adam*, paras 55–56.

[61] *Id*. para 58.

[62] *See* Reinbothe (1981), Collová (1991) and Hugenholtz, *supra* note 2, at 180–191.

The German model initially regulated home taping. It imposed a statutory license granting directly to end-users permission for private copying of sound/visual recordings, on the basis of a copyright limitation and a remuneration right. Remuneration was collected through levies targeting first devices and later media "suitable" for private copying (and thus not for professional) purposes, within the law's jurisdiction. Levies were charged jointly to manufacturers and importers of devices/media for the opportunity these offered of making private copies. Said entities were entitled to pass-on that amount to consumers in the retail price. In any scenario, end-users would retain the legal "permission". Determination of the remuneration was made either on a percentage basis or via statutory tariffs, which attempted to reflect usage of works.[63]

The German system was based on the consideration that home recording technology posed a conflict between the creative sphere of authors and the private sphere of users. Authors initially prevailed due to the recognition of a natural right to a "just pecuniary reward" from uses of their works, which home taping endangered. Consequently, copyright regulation for the first time extended from the market to the private sphere. Monitoring and enforcement challenges, users' right of privacy, the susceptibility of recording devices for non-infringing uses, and the lack of proportionality of generic bans on sales of devices were contributing factors to the Federal Supreme Court's refusal to fully extend the exclusivity model regarding home taping, and in steering the German legislator towards a statutory licensing system, based on an equitable remuneration right and managed by collecting societies. Those same rationales impacted selection of levy debtors (importers/manufacturers) and targets. Link to the actual user was ensured by the possibility to pass-on the levy at the retail level. That design choice was considered privacy respecting and equitable insofar as debtors share the burden of activities from which they benefit.[64]

The German levy system disseminated through Europe and is currently a staple of most Member States' national copyright laws. At the international level, the topic was discussed in the 1967 Stockholm revision of Berne and in the preparatory works for the 1996 WIPO Treaties. At Stockholm, debates on the German model were pivotal for introducing the right to equitable remuneration as condition sufficient to broaden the admissibility of copyright limitations, by reducing to acceptable levels the prejudice to rights holders.[65] It thus helped shape the three-step test formula, especially its third condition.

At the EU level, the debate on harmonization of private copying started in 1988 and featured promises for a specific directive. The end-result was an optional private copying limitation allowing for a levy system, implemented in Art. 5(2) InfoSoc Directive. The limitation follows and expands upon the German model, by covering digital reproductions and all subject matter. It apparently departs from it insofar as it

[63] *See* Collová, *supra* note 62, at 42–48; Reinbothe, *supra* note 62, at 37–47; Hugenholtz, *supra* note 2, at 180–191.

[64] *See* Hilty and Nérisson (2012), noting that "Consideration of privacy and of the weak feasibility of any control in such an area explains the fact why lawmakers authorized the private copy".

[65] *See* Records Berne Convention (1967 Stockholm), at 752, 757–762, 771–772. *See also* Senftleben 2004, *supra* note 30, at 53–56.

does not grant a remuneration claim based on a natural right of the author, but instead a fair compensation right based on the notion of harm.[66]

However, it is arguable that the "harm" in question relates to the impossibility of monetizing private uses, which in turn is caused either by the impossibility to license and enforce (market failure) and/or the undesirability to do so (privacy rationale). From that standpoint, it is possible to retain a fundamental rights justification to this model of restrictions to exclusivity, which subsists even where market failures are curable (which is still not the case, as full digital control of copyright uses and the phasing-out of levies have not come to fruition). To be sure, privacy concerns are at the root of the InfoSoc Directive's provision, as explicitly stated in its 1997 explanatory memorandum.[67]

6.2 Private Copying in the ECJ and *ACI Adam*[68]

6.2.1 Fair Compensation

The ECJ considers fair compensation an autonomous concept of EU law, subject to uniform interpretation in countries that have implemented the private copying limitation.[69] Such uniform interpretation is required by the InfoSoc Directive's objectives of establishing an high level of protection and ensuring a functioning Internal Market, as well as balancing the rights and interests of rights holders and users.[70]

In light of these objectives and the fact that the Directive imposes on Member States an obligation of result regarding the actual recovery of fair compensation, the respective right not only vests in the individual rights holder of the affected right, but must also be qualified as unwaivable.[71]

Member States are left with some discretion regarding the determination of the compensation system, which is however limited by Recitals 35 and 38 InfoSoc Directive, the three-step test and the principle of effectiveness.[72]

[66] Hugenholtz, *supra* note 2, at 192–193.

[67] *COM* (1997) 628 final, Brussels, 10 December 1997. On the privacy justification of private copying; *see also* Helberger and Hugenholtz, *supra* note 25, at 1068–1069.

[68] Because it is unrelated to the core of the *ACI Adam* judgment, this section does not discuss the Court's decisions related to the liability and effective burden of compensation in levy systems, on which *see* Padawan, paras. 44–46, 57; Stichting de Thuiskopie, paras 35; Amazon.com, paras. 16–37. *See also* Leistner, *supra* note 4, at 588–589.

[69] *Padawan*, paras. 32, 37.

[70] Recitals 31 and 32 InfoSoc Directive. *See Padawan*, paras. 34–35. Clarifying the different objectives of the Directive, *see* ECJ Joined Cases C-403 and 429/08 – *Football Association Prelimer League Ltd, netMed Hellas SA, Multichoice Hellas SA* (C-403/08) *v. QCLeisure et al., and Karen Murphy v. Media Protection Services Ltd* (C-429/08) (2011) ECR I-9083, para. 186; ECJ Case C-510/10 – *DR and TV2 Danmark v. NCB* (26 April 2012) ECLI:EU:C:2012:244, para. 35; ECJ Case C-145/10 – *Eva-Maria Painer v. Standard VerlagsGmbH and Others* (1 December 2011) I-12533, para. 132.

[71] *Luksan*, paras. 88 *et seq.* 96–106. *See also Stichting the Thuiskopie*, para 34. *See* Leistner, *supra* note 4, at 587–588.

[72] *See Stichting the Thuiskopie*, paras. 33 *et seq.*; *Padawan*, paras. 7, 39–41. *See also* Leistner, *supra* note 4, at 587.

In this respect, the Court has noted that fair compensation is to be perceived "as recompense for the harm suffered by the author" for the introduction of the limitation, and that its calculation should therefore be based on the criterion of harm.[73]

After *VG Wort* it appears that, where end-user acts fall within the scope of the limitation, any authorization of those acts by rights holders is irrelevant for the application or calculation of fair compensation.[74] That is because uses covered by the limitation are permissible regardless of rights holders' authorization, which is "devoid of legal effects" and therefore does not impact the potential harm caused by the copying.[75] Outside the cases of licensed interactive services with TPMs, where the Directive allows for the limitation to be set aside, this interpretation creates the risk that end-users are subject to double payment when making digital private copies: first, for the licensed uses (which price into the purchase subsequent copies), and for the levy, to be calculated as if no copy is priced into the purchase.[76]

In the section cited in *ACI Adam*, the *VG Wort* decision states that the voluntary application of TPMs by rights holders helps delimiting the scope of the private copying limitation, which delimited scope forms the basis of the calculation of fair compensation; as such, even where TPMs are available but not voluntarily applied, the condition of fair compensation remains applicable.[77] Member States are allowed to adjust the level of compensation in light of the application of TPMs, hence encouraging its adoption and better definition of the limitation.[78]

In a different reading of *VG Wort*, Professor Alexander Peukert suggests that the Court left open the question of whether levies are due if rights holders have made available a work online subject to payment (e.g. a license fee). The answer should be provided in *Copydan Bandkopy*, on which there has been an Opinion by Advocate General Cruz Villalón. According to the latter, if the authorized content has been subject to "a payment or other form of fair compensation", no private copying levy is due as that would lead to an unjustified double payment.[79] This interpretation, argues Professor Peukert, recognizes a two-tier system: (1) where rights holders impose access controls and registration requirements for the use of their works, only individual payments from consumers or advertisers are admissible as compensation; (2) where no such restrictions are in place (e.g. Wikipedia), rights holders are entitled to *collective* payment under the levy system. Following *ACI Adam*, rights holders can alternate between tiers and even present parallel offers, insofar as digital private copying excludes both unlawful and remunerated copies.

[73] *Padawan*, paras. 40, 42; *Stichting the Thuiskopie*, paras 24.

[74] *VG Wort*, para. 40. Proposing a different interpretation *see* Opinion of A.G. Villalón in *Copydan Båndkopi*, paras. 57–68.

[75] *VG Wort*, paras. 34–39. In this point, the Court diverges from the Opinion of A.G. Sharpston in *VG Wort*, paras. 119–121. *See* Poort and Quintais, *supra* note 1, at 210.

[76] Poort and Quintais, *supra* note 1, at 210, 218–219.

[77] *VG Wort*, paras. 48–57. With a broader interpretation of Member States' discretion, *see* Opinion of A.G. Sharpston in *VG Wort*, para. 104. *See* Poort and Quintais, *supra* note 1, at 211.

[78] *VG Wort*, para. 58.

[79] *See* Opinion of A.G. Villalón in *Copydan Båndkopi* (18 June 2014), especially paras. 57–68, ECLI:EU:C:2014:2001 (not available in English).

It is beyond the scope of this paper to analyze in detail the implications of this interpretation, but it would certainly lead to a radical change in the role of collective management organizations in this field, which relevance (as administrators of levy amounts) would now be tied to the growth of an access and sharing culture.[80]

6.2.2 *Regulation of Unlawful Sources*

ACI Adam is the first ECJ case to deal with the nature of the source from which a private copy is made. Data on national regulations of the source of reproductions in connection with the exception is scarce. Perhaps the most accurate and current information in this respect can be found in the annual WIPO international survey on private copying, which contains relatively detailed information regarding 27 Member States.[81]

The survey's executive summary states that, in general, downloading from unauthorized sources on the Internet – "peer-to-peer network, newsgroups, torrent sites and the like, where music and films have been uploaded without consent from the rights holders" – is prohibited in most EU Member States.[82] However, a closer analysis of the report paints a much different portrait.

Of the 27 Member States mentioned, six are not dealt with, as they have not implemented the optional limitation or have amended the provision in such terms as to render it ineffective.[83] Of the remaining 21 Member States, a majority (12) have apparently not enacted specific legal provisions expressly excluding private copying from unlawful sources.[84] Where the country-specific information on levy calculation and setting does not detail criteria for considering the source of downloads, the logical conclusion would be that these countries do not explicitly exclude from the limitation copies from unlawful sources. Therefore, they would arguably have to amend their laws or at least their levy calculation and tariff setting procedures to accommodate the ruling in *ACI Adam*.

[80] The position expressed in this paragraph was described by Professor Alexander Peukert in a recent panel discussion at the Institute for Information Law's "Information Influx" Conference. *See*, for additional detail, Quintais (2014).

[81] WIPO, "International Survey on Private Copying. Law and Practice 2013", available at http://www.wipo.int/export/sites/www/freepublications/en/copyright/1037/wipo_pub_1037_2013.pdf. The one Member State not referred in the survey is Slovenia, which however does not seem to include specific regulation of this topic. *See* Trampuz (2012), analyzing Art. 50 Slovenian Copyright Act and implementing regulations.

[82] WIPO, *supra* note 81, at 4.

[83] *Id.* at 2–3, referring in the first group Cyprus, Ireland, Luxembourg, Malta and the UK, and in the second Bulgaria. However, the UK has since implemented a narrow and uncompensated private copying exception. *See* "The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014", available at http://www.legislation.gov.uk/uksi/2014/2361/contents/made.

[84] WIPO, *supra* note 81. The Member States in question are Croatia, Czech Republic, Estonia, Finland, Greece, Hungary, Latvia, Netherlands, Poland, Portugal, Romania, Slovakia. However, note that Finnish law apparently does stipulate that private copying is only admissible if copies "are made from a legally obtained original". *See* Geiger (2008), making reference to Sec. 11(5) Finnish Copyright Act of 8 July 1961, as amended in 2005. Moreover, as per Karapapa, in Hungary the "source copy must be legal according to the Copyright Experts Council". *See* Karapapa, *supra* note 16, 182.

Of the remaining nine Member States, the WIPO Survey is often vague on the exact text of the statutory provision regulating the source of private copies; in addition, information on the levy calculation procedure is not transparent on how the criteria is made operational.[85] It is therefore helpful to examine some examples.

In Belgium, the copyright law establishes as a general condition for the application of exceptions that the copied or communicated work was "lawfully published".[86] However, as noted by Vanbrabant and Strowel, most scholars tend to see here not a reference to "the lawful character of the copy that serves if necessary as the source for the reproduction", but rather to the right of disclosure.[87] Where "lawful publication" is a requirement for the application of the exception, such as happens also in Lithuania and Greece, this interpretation is the most persuasive.[88] Put differently, the understanding that domestic laws including lawful publication as a requirement for the private copying limitation do not permit copies from unlawful sources is at least debatable.

Other legal texts are clearer. The German Copyright Act restricts the scope of the limitation to private copies that have not "obviously been produced or made publicly available illegally"; what exactly constitutes "obvious" remains to be clarified by case law.[89] Similarly, since 2006, Spanish copyright law limits the scope of private copying to copies "obtained from works that have been lawfully accessed", a language Xalabarder deems "directly intended to rule out P2P downloading" but which does not entail the requirement of ownership of the copy.[90] The Spanish levy system, which since 2011 is paid out of the State budget, was further changed in 2014. In a bill to amend the law of intellectual property (TRLPI) the Spanish Government re-organized different provisions regulating the limitation and further reduced its scope to reproductions done "from copies of works 'acquired by commercial purchase' or received by radio or tv broadcast"; clearly, copies made outside these cases are not covered by the exception.[91] In France, a 2011 amendment to Art. L. 311-1 of the Intellectual Property Code added the requirement of lawful source (i.e. lawful access to a protected work) for the application of the private copying limitation ("*copies ou reproductions réalisées à partir d'une source*

[85] WIPO, *supra* note 81, at 20 (Austria), 24 (Belgium), 44 (Denmark), 55–56 (France), 63 (Germany), 77–78 (Italy), 95–96 (Lithuania), 128–129 (Spain), 131 (Sweden).

[86] *See* Art. 22, Sec. 1, 5° Belgian Copyright Act (Law of 30 June 1994), and Royal Decree of 18 October 2013 on the right to remuneration for private copying. *See also* WIPO, *supra* note 81, at 24.

[87] *See* Vanbrabant and Strowel (2012).

[88] For Lithuania, *see* Art. 20 Lithuanian Law on Copyright and Related Rights, WIPO, *supra* note 81, at 95, and von Mizaras (2012). For Greece, *see* Kallinikou (2012).

[89] *See* Sec. 53(1) German Copyright Act. *See* Dreier and Specht (2012). *See also* WIPO, *supra* note 81, at 63.

[90] *See* Xalabarder (2012). *See also* WIPO, *supra* note 81, at 128–129 (making reference to Arts. 21 and 31(2) Consolidated Text of the Spanish Law on Intellectual property – Law 23/2006, of 7 July, as amended – and Real Decreto 1657/2012).

[91] *See* Xalabarder (2014). For a legal challenge before the ECJ regarding the validity of the Spanish law on private copying *see also* ECJ, Case C-470/14 – *EGEDA and Others*, on whether the levy scheme set up by Spanish law, financed from state resources and based on an estimate of the harm actually caused by private copying is compatible with Art. 5(2)(b) InfoSoc Directive.

licite").[92] Denmark and Sweden amended their copyright acts in the 2000s to the effect that the private copying limitation does not extend to copies made "on the basis of an unlawful representation of a work or an illegal circumvention of a technological measure", an amendment claimed to follow from the three-step test.[93] The Danish Copyright Act furthermore prohibits digital private copying "on the basis of a copy that has been lent or hired" without the consent of the author.[94] For its part, Italian law only allows private copying reproductions to be made by the natural person who has acquired the lawful possession of copies of the work/subject matter ("*acquisito possesso legittimo di esemplari dell'opera o del materiale protetto*") or had "lawful access" to it ("*accesso legittimo*").[95]

In sum, only a number of Member States' laws expressly and unequivocally exclude copies from unlawful sources from the exception's scope. How that criterion is made effective in practice is not transparent. In all other cases, the condition is either absent or derived by certain stakeholders from ambiguous requirements, such as "lawful publication" (which seems instead related to the right of disclosure). In the absence of levy setting criteria that make the source requirement operational, it is fair to conclude that private copies from unlawful sources fall within the scope of most national limitations, either de iure or de facto.

If such scenario is correct, the potential impact of *ACI Adam* is greater than anticipated. The vagueness of the ECJ ruling likely allows some Member States to continue business as usual, but it is arguable that levy setting bodies should at least be required to be transparent about how their levy determination methods exclude reproductions from unlawful sources. This might prove challenging in practice and would require a better definition of what constitutes an unlawful source, beyond the modest contribution of *ACI Adam*. For example, are subsequent copies of copies initially made from an unlawful source excluded from the scope of the limitation? If so, how to deal with the problem of lack of information from users on the source of copies, given that many collecting societies calculate tariffs on the basis of user surveys? This would seem a matter better left for national courts, with the obvious risk of divergent solutions across Member States.

The risk is not negligible and could have disaggregating effects on the Internal Market. This would be due to differences in Member States that could hinder the cross-border and pan-EU provision of services/goods relying on the limitation. In fact, there are scenarios where the same end-user act qualifies as a legitimate private copy in one Member State but not in others. *Where the act is legitimate*, the user will not be subject to infringement liability, there is no risk of related secondary

[92] *See* Carre (2012), making reference to L. 311-1 of the French Intellectual Property Code and Law No. 2011-1898 of 20 December 2011. *See also* WIPO, *supra* note 81, at 56, referring to Arts. L311-1 up to L311-8 Intellectual Property Code. For the situation prior to the 2011 amendment, including a description of contradictory case law, *see* Geiger, *supra* note 84.

[93] Rognstad (2012), citing Sec. 12, fourth paragraph Swedish Copyright Act, and Sec. 11, second paragraph Danish Copyright Act (Consolidated Act on Copyright No. 202 of 27 February 2010, as amended). *See also* WIPO, *supra* note 81, at 44.

[94] Section 12, third paragraph Danish Copyright Act (WIPO translation).

[95] Article 71^{sexies}(4) Italian Copyright Act. *See* WIPO, *supra* note 81, at 77–78, and Sica and D'Antonio (2012).

liability for third party service providers, but intermediaries marketing specified goods (e.g. device manufacturers) must pay the levy, which they can choose to pass-on to users (either visibly, or not), causing price increase of levied goods and the amounts to be charged in the consumer's country of residence. *Where the act is not legitimate*, the user is a direct infringer, service providers are open to secondary liability and no levies can be charged in connection thereto.

The objective of ensuring a functioning internal market is further hindered by the Directive's unclear wording and the above-mentioned diverging national practices in defining what constitutes an unlawful source, as well as in reflecting that element in the calculation and distribution of levies. Imagine a Member State that has implemented Art. 6(4)(4) InfoSoc Directive in such a way as to prevent the private copying limitation from overriding the application of TPMs. Imagine further that it takes a conservative approach to *ACI Adam* and solely legitimizes private copying from lawfully acquired copies of works. In that State, the scope of lawful sources – and therefore of the limitation – would be significantly reduced, especially for markets where copies of works are successfully subject to copy- or access-protected formats. For example, in the audiovisual sector, lawful sources for permitted online digital private copying would be reduced to copies from webcasting content or on-demand content made available without TPMs; the resulting levy amounts would be insignificant.[96] The outcome would be different for Member States allowing for the application of the private copying limitation despite TPMs and/or with a broader understanding of what constitutes a lawful source: the limitation's scope would be broader, there would be additional levy targets and presumably additional amounts collected and distributed to rights holders.

In sum, the potential for diverse regulations of unlawful sources in the context of digital private copying leads to asymmetries in the application of the limitation, definition of levy targets and varying tariffs. These distortions cause negative cross-border effects to the functioning of the Internal Market, in contradiction to the objectives of the InfoSoc Directive and the rationale underlying harmonization of exceptions/limitations.

6.3 Stakeholder Reactions and Implications for Consumers

In its reaction to the decision, the Dutch government issued a communication stating that it will not change the Copyright Act, as the wording of Art. 16 can be interpreted in conformity with the ECJ's ruling. Accordingly, the decision "will immediately come into effect". However, the communication states that the primary means to safeguard intellectual property rights is private enforcement. It is noted that enforcement against end-users is not only difficult from the technical standpoint, but also raises privacy concerns. Therefore, the Dutch Government does not expect individual users who download from unlawful sources to face legal action.[97]

[96] Making this point, *see* Mazziotti (2013).

[97] *See* "Kamerbrief over Arrest ACI Adam BV e.a. tegen Stichting de Thuiskopie en Stichting Onderhandelingen Thuiskopie vergoeding" (17 April 2014), available at http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/04/18/arrest-aci-adam-bv-ea-tegen-stichting-de-thuiskopie-en-stichting-onderhandelingen-thuiskopie-vergoeding.html.

This comes in the wake of years of debates in the Netherlands within the Government and in Parliament, where criminalization of end-users, enforcement of a download ban and similar measures were repeatedly rejected, typically on privacy grounds.[98]

In a press release following the judgment, the Dutch anti-piracy organization Stichting Brein stated that it will not change its enforcement policy to include actions against end-users, but will rather continue to focus its efforts on illegal traders, such as those individuals and companies making a business out of providing unlawful access to works. Because providing access to unlawful copies of works is now also prohibited, Stichting Brein expects its enforcement efforts against those websites to be facilitated.[99]

The above would mean that the ruling will not leave end-users worse off in practice, despite the qualification of their acts as infringing, leading to civil and criminal liability. However, that is a difficult argument to accept,

First, rights holders can now bring additional infringement actions, even if at the moment they do not intend to do so. Downloading from unlawful sources becomes a restricted act, which rights holders can theoretically prohibit. Naturally, such prohibition risks clashing with end-users' fundamental right of privacy, as most downloads occur within the private sphere and comprise a form of enjoyment of works. Extending the exclusive right of reproduction and accompanying enforcement measures to this domain poses significant privacy risks, while simultaneously alienating consumers and contributing to "further diminishing of the public's respect for copyright law".[100] To the potential normative undesirability of such regulation, one might add the argument of unfeasibility: enforcement of this type against consumers is not practicable.[101] In a context where empirical studies in different countries show that heavy downloaders are also some of the content industries' best clients, a strong enforcement approach moreover risks alienating that customer base.[102]

If that is the case, and if current business models cannot capture these types of uses, then a levy is arguably the most adequate form of monetizing the same, while balancing the fundamental rights of privacy (Arts. 7 Charter and 8 ECHR) and property in copyright (Art. 17(2) Charter), and ultimately garnering greater public support for the law.[103] That is all the more so where the levy system is set up to

[98] For an historical account, *see* Consumentenbond and bureau Brandeis, Letter to the ECJ "Re: Opinion of Advocate-General Cruz Villalón regarding downloading from illegal sources" (9 April 2014), available at http://bureaubrandeis.com/press-room/consumentenbond-and-bureau-brandeis-call-on-ecj-do-not-ban-downloading-by-consumers/, at 4–5; and Visser, *supra* note 32, at 417–433.

[99] *See* Brein, "Hof van Justitie EU oordeelt dat downloaden van illegaal aanbod illegaal is" (10 April 2014), available at http://www.anti-piracy.nl/nieuws.php?id=322.

[100] Consumentenbond and bureau Brandeis, *supra* note 98, at 2.

[101] *Id.* at 9.

[102] *See* Poort and Leenheer (2012), and Karaganis and Renkema (2012).

[103] On ECJ case law regarding the need to interpreted EU law with respect for the right of privacy *see*, *e.g.* ECJ Case C-101/01 – *Criminal proceedings against Bodil Lindqvist* (6 November 2003) I-12971, para. 87; ECJ Case C-275/06 – *Productores de Música de España* (*Promusicae*) *v. Telefónica de España SAU*. (29 January 2008) I-00271, para. 68; ECJ Case C-557/07 – *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* (19 February 2009) I-01227, para. 28; ECJ Case C-70/10 – *Scarlet Extended* (24 November 2011) I-11959, para. 45.

divide the amounts collected through different categories of rights holders, therefore securing that individual creators receive a fair share, which some authors argue does not occur in commercial exploitation scenarios (e.g. iTunes and Spotify), where producers and other aggregators claim the majority of revenues.[104]

Second, the ECJ's failure to clarify what constitutes an unlawful source does not provide legal certainty regarding many online acts where works are made available without clear indication by rights holders of what subsequent uses are authorized.[105]

In its recent *Svensson* judgment, the ECJ ruled that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, as referred to in Art. 3(1) InfoSoc Directive.[106] Conversely, where the provision of a link allows users to circumvent restrictions put in place by the linked website in order to limit access to subscribers of the same, the link in question "constitutes an intervention without which those users would not be able to access the works transmitted"; in such cases, those users are considered a new public (not targeted by the initial communication) and an authorization by the copyright holders is required.[107]

In many instances, even if a work is unlawfully communicated to the public through a link that circumvents a website's technical measures, the same is subsequently reproduced in different websites and platforms, and ultimately downloaded by end-users. Is that final website an unlawful source, even if end-users are unaware of that fact? After *Svensson*, the correct answer is probably "yes". What if the rights holder is made aware of the presence of his/her work on the latter website and chooses to tolerate it? Does that mean the previously unauthorized act of communication to the public becomes authorized (e.g. through an implied license) and the source of the download becomes legal? If that is so, then how to contemplate these cases for calculation of levies, as they cross the "lawfulness border"? What if the rights holder later changes his/her mind?[108]

The above-mentioned hypotheses are meant to illustrate the legal certainty challenges created by following through the implications of *ACI Adam*, namely vis-à-vis consumers, who risk the consequences of copyright infringement and criminalization.[109]

[104] Consumentenbond and bureau Brandeis, *supra* note 98, at 3. For empirical data on levy distribution schemes, *see* WIPO, *supra* note 81, at 8–9.

[105] Also raising the issue and echoing similar concerns by the Dutch parliament, *see* Consumentenbond and bureau Brandeis, *supra* note 98, at 7.

[106] ECJ Case C-466/12 – *Nils Svensson and others v. Retriever Sverige AB* (13 February 2014) ECLI:EU:C:2014:76, para. 32. On the controversy between European copyright lawyers (namely the European Copyright Society and the ALAI) on the outcome of *Svensson*, *see* Leistner, *supra* note 4, at 573–274 (with additional references); Savola (2014). On this topic, *see* pending ECJ Case C-348/13 – *Best Water International v. Mehes and Potsch*, and Case C-279/13 – *C More Entertainment AB v Linus Sandberg*.

[107] *Svensson*, para. 31.

[108] Raising some of these issues in the analysis of *Svensson*, *see, e.g.* Arezzo (2014), Headdon (2014) and Savola, *supra* note 106, at 282–283.

[109] Consumentenbond and bureau Brandeis, *supra* note 98, at 6–7.

6.4 Fair Compensation: Determination and Calculation

From the economic standpoint, different types of private copying translate into diverse levels of utility for consumers and harm for rights holders. For example, time- and format-shifting allow consumers to enhance their utility from lawfully acquired/licensed recordings at a more convenient time, place or location, and by skipping ads. Differently, downloading from unlawful sources has the potential to significantly extend the circle of consumers who derive utility from an original unit of content.[110]

That difference has implications for the calculation of harm in connection with the concept of indirect appropriability. The latter refers to the "economic mechanism according to which, under certain conditions, the demand for originals will reflect the value that consumers place both on originals and subsequent copies they may make".[111] When the value of private copying can be priced into the initial purchase of the content item, that value is indirectly appropriated.[112]

Indirect appropriability is related to the ability of producers to price discriminate, by charging an higher price per copy of a work (e.g. a book) to users who are susceptible of allowing subsequent extensive copying (e.g. libraries), as well as to prevent arbitrage. However, that model functions in a scenario where the marginal costs of copies are increasing; where they are constant and near-zero (due to the availability of cheap copying technology), and the size of the copying group is not fixed – such as in the case of downloading from file-sharing websites – indirect appropriability is not feasible (and price discrimination becomes complex).[113]

Therefore, because the utility end-users derive from downloads from unauthorized sources cannot be priced into the initial purchase, rights holders cannot indirectly appropriate it.[114] Unless these uses can be controlled through TPMs, levying copies from unlawful sources would compensate rights holders for otherwise unremunerated uses. To be sure, there is a relatively stronger economic case for copyright levies regarding downloads from unlawful sources, than for other types of private copying. In ignoring this reasoning, *ACI Adam* strengthens exclusivity online and weakens the economic argument for levies.

However, if enforcement of the exclusive right is either not feasible and/or undesirable for the reasons noted above, reinforcing exclusivity makes little economic sense and restricting the scope of the limitation will reduce rights holders revenues.

To further understand how *ACI Adam* affects the economic case for levies, it is important to note the following. In theory, TPMs increase the opportunity for right holders to price discriminate and appropriate the additional utility derived from private copying, therefore reducing the case for levies.[115] In that context, the

[110] Poort and Quintais, *supra* note 1, at 216.

[111] *Id.* at 216.

[112] *Id.* at 216–218.

[113] Poort (2013), developing insights from Besen and Kirby (1989).

[114] Poort and Quintais, *supra* note 1, at 217.

[115] Koelman (2005).

decision not to apply TPMs could in fact translate into additional utility for consumers and should be taken into consideration in the determination of fair compensation.[116] To that effect, it has been argued that levies be phased out in function not of actual use, but market availability of TPMs.[117] However, following *VG Wort* and *ACI Adam*, it seems that the *availability* of TPMs is immaterial to both to the determination of the fair compensation and the scope of the limitation.

Moreover, *ACI Adam* implies a change in the calculation method of levies, which must now exclude reproductions from unlawful sources. At the date of the judgment, SONT benchmarked levy amounts in different Member States, whether or not they included reproductions from lawful sources, adjusted for each country's GDP per capita. Once the total amount of levies is determined, the relative percentage allocated to each device/media is defined, taking into consideration the amount of private copying it enables (both from lawful and unlawful sources).[118]

That approach is in theory harmonization-friendly and therefore consistent with the InfoSoc Directive's aims of ensuring a functioning Internal Market. It is known that certain Member States which explicitly exclude reproductions from unlawful sources have higher levy rates than the Netherlands (e.g. Germany and France).[119] Consequently, it does not follow from the judgment that levy amounts will (or should) be reduced in the Netherlands. What seems inevitable, however, is that even if the overall levy amounts are reduced, this will only benefit certain device/media manufactures or importers, namely those which market products typically used for copies from unlawful sources, for example USB sticks. If the benchmarking logic is kept, other devices/media used for lawful reproductions will likely see their share of the pie rise (e.g. set-top boxes). That, it is submitted, is not an outcome foreseen by the Court or welcomed by stakeholders.

6.5 Interpretation of the Three-Step Test and Scope of Limitations

The Court's adherence in *ACI Adam* to the principle of strict interpretation of limitations is consistent with what Leistner labels an essentially "economic" (rather than flexible) approach to the interpretation of exploitation rights in the InfoSoc Directive, which attempts to ensure appropriate remuneration for any independent act of exploitation by users mostly through an expansion of the reproduction right.[120]

Like in *Murphy* and *Painer*, the Court in *ACI Adam* articulates the principle with the need to strike a fair balance of interests between authors and users;[121] however, differently from the latter case, no reference is made to the impact of fundamental

[116] Poort and Quintais, *supra* note 1, at 218–219.

[117] Hugenholtz, Guibault and van Geffen, *supra* note 25, at 4.

[118] For details about the functioning of the Dutch levy system prior to *ACI Adam*, *see* WIPO, *supra* note 81, at 101–104.

[119] *Id.* at 6 (Fig. 1).

[120] Leistner, *supra* note 4, at 569 et seq.

[121] *Murphy*, paras. 163 *et seq. Painer*, para. 132.

rights in the interpretation of exceptions.[122] Given the private copying limitation's at least partial purpose of safeguarding end-users privacy interests, that omission is open to criticism, as it would provide an essential counterweight to the principle of strict interpretation. That aspect, raised by the Dutch Government and summarily (if unconvincingly) dismissed by the Advocate General,[123] is ignored in *ACI Adam*, with important consequences.

When implementing optional limitations, Member States are in general subject to the principle of proportionality and the boundaries of the three-step test; within those confines, their margin of discretion in specifying and qualifying the conditions of applicability of limitations is further subject to the principle of autonomous interpretation.[124]

By overly relying on the principle of strict interpretation, the Court's reading of the private copying limitation in connection with the three-step test apparently leaves Member States with a narrower margin of discretion for national implementation of limitations.[125] Such narrower margin of implementation and subsequent interpretation would be consistent with the requirement of coherent EU-wide application of the limitation and the objective of ensuring a functioning Internal Market.[126]

In fact, the Court favors the position that national laws' discretion can be used solely to restrict the scope of the limitation for "certain new uses of copyright works and other subject-matter".[127] It is debatable whether such position is consistent with the Court's understanding in *Murphy* that limitations be interpreted so as to enable the development and operation of new technologies, balancing the positions of right holders with that of users of new technologies.[128]

This restrictive understanding of the three-step test contrasts with more flexible constructions of the same by international and European copyright lawyers, which tend to see it also as an enabling clause, allowing the consideration of different interests at national level and the adequate balancing of rights and limitations.[129]

For example, Hugenholtz and Okediji argue "that limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test".[130]

In a famous declaration of academics, Geiger et al. state that a balanced interpretation of the test does not "require limitations and exceptions to be

[122] Leistner, *supra* note 4, at 585. Note also, more recently, ECJ Case C - 201/13 – *Deckmyn*, paras. 25–28.

[123] Opinion of A.G. Villalón in *ACI Adam*, para. 78. For criticism, *see* Consumentenbond and bureu Brandeis, *supra* note 98, at 3.

[124] Leistner, *supra* note 4, at 586.

[125] Similarly, *see* Rosati (2014).

[126] *Id.*, noting the Court's reliance on Recital 32 InfoSoc Directive. *See ACI Adam*, paras 33–34.

[127] *ACI Adam*, para 27, relying on Recital 44 of the Directive.

[128] *Murphy*, paras 163 *et seq*. The general point is made in Leistner, *supra* note 4, at 585.

[129] Hugenholtz and Okediji (2008); and European Copyright Society (2014).

[130] *Id.*, at 25.

interpreted narrowly".[131] In what concerns the first step, it is noted that the test does not prevent the national implementation of open-ended limitations, provided their scope "is reasonably foreseeable".[132] Regarding the second step, it is stated that there is no conflict with the normal exploitation of protected subject matter if limitations "are based on important competing considerations or have the effect of countering unreasonable restraints on competition, notably on secondary markets, particularly where adequate compensation is ensured, whether or not by contractual means".[133] Finally, the declaration states that the test as a whole "should be interpreted in a manner that respects the legitimate interests of third Parties", including fundamental rights, interests in competition and other public interests.[134]

In a recent but already influential work, Hugenholtz and Senftleben examine the copyright *acquis* and argue that the InfoSoc Directive's exhaustive list of limitations consists in many cases of "categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation", which in combination with the three-step test "would effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States".[135] Although the fair use analogy is certainly debatable, this interpretation, in line with the scholarship cited in the preceding paragraphs, seems more consistent with the InfoSoc Directive's normative balancing aims than the ECJ's restrictive stance in *ACI Adam*.

In fact, besides the lack of reference to the fundamental rights purpose of the private copying limitation, which speaks to a lack of desirability of a ban on downloading in general, the Court's argument that consideration of unlawful sources would conflict with the normal exploitation of works refers to both a normative and factual/empirical assessment. Borrowing from Senftleben's analysis of a WTO Panel on the second step, a "normal exploitation" (under Art. 13 TRIPS) "comprises those areas of market in which the copyright owner would ordinarily expect to exploit the work (empirical connotation) as well as those forms of exploitation that currently generate significant tangible revenue or could acquire considerable or practical importance (normative connotation)", limited to modes of exploitation "that yield significant or tangible commercial gains".[136] When examined in this light, the Courts' sporadic reasoning of substitution effects failed to argue or establish the existence of competing legal offers (which are scarce), of substitution between downloads from unlawful sources and legal channels (of which there is limited evidence), or the feasibility of enforcement of exclusive right of reproduction in these scenarios, which is unproven.[137]

[131] Geiger et al. (2008).

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] Hugenholtz and Senftleben (2011).

[136] Senftleben (2006).

[137] For criticism of the similar reasoning in the Opinion, *see* Consumentenbond and bureau Brandeis, *supra* note 98, at 9.

Therefore, doubts remain as to the accurateness of the Court's conclusion, especially given the potential far-reaching impact of its interpretation in restricting the scope of copyright limitations.

7 Conclusions

The InfoSoc Directive's private copying limitation is silent on the lawful/unlawful nature of source from which copies are made. Most national implementations of the limitation do not exclude from its scope copies from unlawful sources. Where they do, the operationalization of such exclusion is not transparent. In a ruling that is both significant and problematic, the Court in *ACI Adam* interpreted the limitation as encompassing solely copies from lawful sources.

For consumers, the decision is not kind. Downloading from unlawful sources now constitutes copyright infringement, leading to civil and (potentially) criminal liability. Enforcement of the prohibition risks clashing with the fundamental right of privacy, on which the limitation is (in part) historically justified. It likewise risks alienating consumers and, as a result, the public support and respect for copyright law. Because heavy downloaders are also good clients of content industries, strong enforcement may actually reduce revenues by pushing away clientele.

From a different perspective, the decision could actually benefit consumers by causing a decrease in levies and therefore in associated goods. However, taking into consideration the complexities of making the source requirement effective and actual levy setting procedures, it is not clear that levies will lower (or lower significantly). Simultaneously, while certain debtors will benefit from the decision, others actually risk paying more.

It is uncertain whether the ruling benefits right holders. Mass unauthorized online uses are not susceptible of indirect appropriability. For that reason, there is a stronger case for copyright levies regarding downloads from unlawful sources, than for other types of private copying. *ACI Adam* disregards this reasoning, thereby weakening the economic argument for levies. In tandem, enforcement remains too costly or unfeasible. Therefore, not collecting levies for copying that can neither be licensed nor enforced risks reducing revenues of rights holders.

In this context, levies provide a balancing proposition between opposing rights and interests: they immunize consumer acts and monetize otherwise uncontrollable and uncompensated uses, while respecting users' privacy and leaving intact the public image of the law. The levy model could also provide legal certainty vis-à-vis the treatment of copies from unlawful sources, an area where *ACI Adam* is ambiguous. Doubts as to what constitutes an "unlawful source" and how to calculate, collect and distribute the respective levies enables a wide spectrum of diverse national regimes. These have negative effects for the cross-border provision of related goods/services, and hence the functioning of the Internal Market.

Perhaps the major point of criticism is the Court's failure to consider the impact of the fundamental right of privacy in the interpretation of the three-step test, particularly in light of the historical link of the right to the private copying limitation. By adhering too closely to the principle of strict interpretation and failing

to adequately justify the normative and empirical elements of the second condition of the test, as well as to analyze in any detail the role of the remuneration element in satisfying the third condition, the Court failed to strike the necessary balance between the rights and interests at stake.

That is nowhere clearer than in the proposition that national laws can only restrict (but not widen) the scope of the InfoSoc Directive's limitations for new uses of works. On the contrary, it is submitted, a flexible construction of the three-step test as an enabling clause, which allows the consideration of different interests at national level and the adequate balancing of rights and limitations, is more in line with the Directive's aims and not prejudicial to a functioning Internal Market.

If *ACI Adam* is part of a more restrictive interpretation of copyright limitations by the ECJ, alternative approaches should be assessed. Those include the possibility of levying cloud-based services,[138] as well as reforms that legalize non-commercial acts of digital content sharing by users. The latter configure legal mechanisms that forsake the need for direct authorization of end-user acts (downloading, uploading, sharing, modifying), while simultaneously ensuring some level of compensation to creators or all rights holders. These so-called "alternative compensation systems", however, are a topic for a different paper.[139]

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[138] *See supra* note 10.

[139] Since the early 21st century legal and economics scholars, advocacy groups and even political parties have come forward with proposals under different labels: alternative compensation systems, tax-and-royalty systems, *license globale*, content/culture flat-rate, creative contribution, file-sharing levy, sharing license or alternative reward systems. For an ongoing research project in this field where the author is involved, including a list of bibliography, *see* Institute for Information Law, "Copyright in an Age of Access: Alternatives to Copyright Enforcement", available at http://www.ivir.nl/research/projects/acs.html. *See also* Quintais, *supra* note 80. For a recent skeptical perspective, *see* Mazziotti, *supra* note 96, at 87–89.

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