

European Court of Justice, 16 July 2009, Infopaq v DDF



COPYRIGHT

Reproduction in part

- An extract comprising 11 words can be a reproduction in part if the elements reproduced are the expression of the intellectual creation of their author

[...] that an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

Harmonized work concept

- copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.

It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.

Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.

[...].

As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

Scope of protection

- With respect to the scope of such protection of a work, it follows from recitals 9 to 11 in the preamble to Directive 2001/29 that its main objective is to introduce a high level of protection, in particular for

authors to enable them to receive an appropriate reward for the use of their works, including at the time of reproduction of those works, in order to be able to pursue their creative and artistic work.

Consequently, the protection conferred by Article 2 of Directive 2001/29 must be given a broad interpretation.

- Regarding the elements of such works – newspaper articles – covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

Words as such do not, therefore, constitute elements covered by the protection.

- Given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article.

Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.

- the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination.

Printing is not transient in nature – consent needed

- Consequently, the answer to questions 2 to 12 is that the act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders

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European Court of Justice, 16 July 2009

(K. Lenaerts, T. von Danwitz, R. Silva de Lapuerta, G. Arestis and J. Malenovský)
JUDGMENT OF THE COURT (Fourth Chamber)
16 July 2009 (*)

(Copyright – Information society – Directive 2001/29/EC – Articles 2 and 5 – Literary and artistic works – Concept of ‘reproduction’ – Reproduction ‘in part’ – Reproduction of short extracts of literary works – Newspaper articles – Temporary and transient reproductions – Technological process consisting in scanning of articles followed by conversion into text file, electronic processing of the reproduction, storage of part of that reproduction and printing out)

In Case C-5/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of 21 December 2007, received at the Court on 4 January 2008, in the proceedings

Infopaq International A/S

v

Danske Dagblades Forening,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008,

after considering the observations submitted on behalf of:

– Infopaq International A/S, by A. Jensen, advokat,

– Danske Dagblades Forening, by M. Dahl Pedersen, advokat,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by H. Krämer and H. Støvlbæk, acting as Agents,

after hearing the [Opinion of the Advocate General](#) at the sitting on 12 February 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the interpretation of Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) and, secondly, the conditions for exemption of temporary acts of reproduction within the meaning of Article 5 of that directive.

2 The reference was made in the context of proceedings between Infopaq International A/S (‘Infopaq’) and Danske Dagblades Forening (‘DDF’) concerning the dismissal of its application for a declaration that it was not required to obtain the consent of the rightholders for acts of reproduction of newspaper articles using an automated process consisting in the scanning and then conversion into digital files followed by electronic processing of that file.

Legal context

International law

3 Under Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘the TRIPs Agreement’), as set out in Annex 1C to the Mar-

rakesh Agreement establishing the World Trade Organisation, which was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1):

‘Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. ...’

4 Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 (‘the Berne Convention’) reads as follows:

‘(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; ...

...

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

...

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.’

5 Under Article 9(1) of the Berne Convention, authors of literary and artistic works protected by that convention are to have the exclusive right of authorising the reproduction of those works, in any manner or form.

Community law

6 Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) provided:

‘1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. ...

...

3. A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.’

7 Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20) provides:

‘In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.’

8 Directive 2001/29 states the following in recitals 4, 6, 9 to 11, 20 to 22, 31 and 33 in the preamble thereto:

‘(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure ...

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work ...

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives [91/250] ... and [96/9], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as be-

tween the different categories of rightholders and users of protected subject-matter must be safeguarded. ...

...

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.’

9 According to Article 2(a) of Directive 2001/29:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works.’

10 Article 5 of the same directive provides:

‘(1) Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

11 According to Article 6 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12):

‘Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1 [which specifies the duration of the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention]. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.’

National law

12 Articles 2 and 5(1) of Directive 2001/29 were transposed into Danish law by paragraphs 2 and 11a(1) of Law No 395 on copyright (lov n°395 om ophavsret) of 14 June 1995 (Lovtidende 1995 A, p. 1796), as amended and consolidated by, inter alia, Law No 1051 (lov n°1051 om ændring af ophavsretsloven) of 17 December 2002 (Lovtidende 2002 A, p. 7881).

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Infopaq operates a media monitoring and analysis business which consists primarily in drawing up summaries of selected articles from Danish daily newspapers and other periodicals. The articles are selected on the basis of certain subject criteria agreed with customers and the selection is made by means of a ‘data capture process’. The summaries are sent to customers by email.

14 DDF is a professional association of Danish daily newspaper publishers, whose function is inter alia to assist its members with copyright issues.

15 In 2005 DDF became aware that Infopaq was scanning newspaper articles for commercial purposes without authorisation from the relevant rightholders. Taking the view that such consent was necessary for processing articles using the process in question, DDF complained to Infopaq about this procedure.

16 The data capture process comprises the five phases described below which, according to DDF, lead to four acts of reproduction of newspaper articles.

17 First, the relevant publications are registered manually by Infopaq employees in an electronic registration database.

18 Secondly, once the spines are cut off the publications so that all the pages consist of loose sheets, the publications are scanned. The section to be scanned is selected from the registration database before the publication is put into the scanner. Scanning allows a TIFF (‘Tagged Image File Format’) file to be created for each page of the publication. When scanning is completed, the TIFF file is transferred to an OCR (‘Optical Character Recognition’) server.

19 Thirdly, the OCR server translates the TIFF file into data that can be processed digitally. During that process, the image of each letter is translated into a character code which tells the computer what type of letter it is. For instance, the image of the letters ‘TDC’ is translated into something the computer can treat as the letters ‘TDC’ and put in a text format which can be recognised by the computer’s system. These data are saved as a text file which can be understood by any text processing program. The OCR process is completed by deleting the TIFF file.

20 Fourthly, the text file is processed to find a search word defined beforehand. Each time a match for a search word is found, data is generated giving the publication, section and page number on which the match was found, together with a value expressed as a percentage between 0 and 100 indicating how far into the text it is to be found, in order to make it easier to read the article. Also in order to make it easier to find the search word when reading the article, the five

words which come before and after the search word are captured (‘extract of 11 words’). At the end of the process the text file is deleted.

21 Fifthly, at the end of the data capture process a cover sheet is printed out in respect of all the pages where the relevant search word was found. The following is an example of the text of a cover sheet:

‘4 November 2005 – Dagbladet Arbejderen, page 3:

TDC: 73% “a forthcoming sale of the telecommunications group TDC which is expected to be bought”’.

22 Infopaq disputed the claim that the procedure required consent from the rightholders and brought an action against DDF before the Østre Landsret (Eastern Regional Court), claiming that DDF should be ordered to acknowledge that Infopaq is entitled in Denmark to apply the abovementioned procedure without the consent of DDF or of its members. After the Østre Landsret dismissed that action, Infopaq brought an appeal before the referring court.

23 According to the Højesteret, it is not disputed in this case that consent from the rightholders is not required to engage in press monitoring activity and the writing of summaries consisting in manual reading of each publication, selection of the relevant articles on the basis of predetermined search words, and production of a manually prepared cover sheet for the summary writers, giving an identified search word in an article and its position in the newspaper. Similarly, the parties in the main proceedings do not dispute that genuinely independent summary writing per se is lawful and does not require consent from the rightholders.

24 Nor is it disputed in this case that the data capture process described above involves two acts of reproduction: the creation of a TIFF file when the printed articles are scanned and the conversion of the TIFF file into a text file. In addition, it is common ground that this procedure entails the reproduction of parts of the scanned printed articles since the extract of 11 words is stored and those 11 words are printed out on paper.

25 There is, however, disagreement between the parties as to whether there is reproduction as contemplated by Article 2 of Directive 2001/29. Likewise, they disagree as to whether, if there is reproduction, the acts in question, taken as a whole, are covered by the exemption from the right of reproduction provided for in Article 5(1) of that directive.

26 In those circumstances, the Højesteret decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction which are protected (see Article 2 of [Directive 2001/29])?’

(2) Is the context in which temporary acts of reproduction take place relevant to whether they can be regarded as “transient” (see Article 5(1) of Directive 2001/29)?’

(3) Can a temporary act of reproduction be regarded as “transient” where the reproduction is processed, for example, by the creation of a text file on the basis of an image file or by a search for text strings on the basis of a text file?

(4) Can a temporary act of reproduction be regarded as “transient” where part of the reproduction, consisting of one or more text extracts of 11 words, is stored?

(5) Can a temporary act of reproduction be regarded as “transient” where part of the reproduction, consisting of one or more text extracts of 11 words, is printed out?

(6) Is the stage of the technological process at which temporary acts of reproduction take place relevant to whether they constitute “an integral and essential part of a technological process” (see Article 5(1) of Directive 2001/29)?

(7) Can temporary acts of reproduction be an “integral and essential part of a technological process” if they consist of manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium?

(8) Can temporary acts of reproduction constitute an “integral and essential part of a technological process” where they consist of printing out part of the reproduction, comprising one or more text extracts of 11 words?

(9) Does “lawful use” (see Article 5(1) of Directive 2001/29) include any form of use which does not require the rightholder’s consent?

(10) Does “lawful use” (see Article 5(1) of Directive 2001/29) include the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, for use in the business’s summary writing, even where the rightholder has not given consent to those acts?

(11) What criteria should be used to assess whether temporary acts of reproduction have “independent economic significance” (see Article 5(1) of Directive 2001/29) if the other conditions laid down in the provision are satisfied?

(12) Can the user’s efficiency gains from temporary acts of reproduction be taken into account in assessing whether the acts have “independent economic significance” (see Article 5(1) of Directive 2001/29)?

(13) Can the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, without the rightholder’s consent be regarded as constituting “certain special cases which do not conflict with a normal exploitation” of the newspaper articles and “not unreasonably [prejudicing] the legitimate interests of the rightholder” (see Article 5(5) of Directive 2001/29)?

The questions referred for a preliminary ruling

Preliminary observation

27 It should be noted as a preliminary point that the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the

law of the Member States for the purpose of determining their meaning and scope, as is the case with Article 2 of Directive 2001/29, they must normally be given an autonomous and uniform interpretation throughout the Community (see, in particular, [Case C-245/00 SENA \[2003\] ECR I-1251, paragraph 23](#), and [Case C-306/05 SGAE \[2006\] ECR I-11519, paragraph 31](#)).

28 Those considerations are of particular importance with respect to Directive 2001/29, in the light of the wording of recitals 6 and 21 in the preamble to that directive.

29 Consequently, the Austrian Government cannot successfully contend that it is for the Member States to provide the definition of the concept of ‘reproduction in part’ in Article 2 of Directive 2001/29 (see, to that effect, with respect to the concept of ‘public’ as referred to in Article 3 of the same directive, SGAE, paragraph 31).

The first question

30 By its first question, the national court asks, essentially, whether the concept of ‘reproduction in part’ within the meaning of Directive 2001/29 is to be interpreted as meaning that it encompasses the storing and subsequent printing out on paper of a text extract consisting of 11 words.

31 It is clear that Directive 2001/29 does not define the concept of either ‘reproduction’ or ‘reproduction in part’.

32 In those circumstances, those concepts must be defined having regard to the wording and context of Article 2 of Directive 2001/29, where the reference to them is to be found and in the light of both the overall objectives of that directive and international law (see, to that effect, SGAE, paragraphs 34 and 35 and case-law cited).

33 Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author’s right to authorise or prohibit reproduction is intended to cover ‘work’.

34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.

35 Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author’s own intellectual creation.

36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.

37 In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation.

38 As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

39 In the light of the considerations referred to in paragraph 37 of this judgment, the various parts of a work thus enjoy protection under Article 2(a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.

40 With respect to the scope of such protection of a work, it follows from recitals 9 to 11 in the preamble to Directive 2001/29 that its main objective is to introduce a high level of protection, in particular for authors to enable them to receive an appropriate reward for the use of their works, including at the time of reproduction of those works, in order to be able to pursue their creative and artistic work.

41 Similarly, recital 21 in the preamble to Directive 2001/29 requires that the acts covered by the right of reproduction be construed broadly.

42 That requirement of a broad definition of those acts is, moreover, also to be found in the wording of Article 2 of that directive, which uses expressions such as ‘direct or indirect’, ‘temporary or permanent’, ‘by any means’ and ‘in any form’.

43 Consequently, the protection conferred by Article 2 of Directive 2001/29 must be given a broad interpretation.

44 As regards newspaper articles, their author’s own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29.

45 Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

46 Words as such do not, therefore, constitute elements covered by the protection.

47 That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.

48 In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.

49 It must be remembered also that the data capture process used by Infopaq allows for the reproduction of multiple extracts of protected works. That process reproduces an extract of 11 words each time a search word appears in the relevant work and, moreover, often operates using a number of search words because some clients ask Infopaq to draw up summaries based on a number of criteria.

50 In so doing, that process increases the likelihood that Infopaq will make reproductions in part within the meaning of Article 2(a) of Directive 2001/29 because the cumulative effect of those extracts may lead to the reconstitution of lengthy fragments which are liable to reflect the originality of the work in question, with the result that they contain a number of elements which are such as to express the intellectual creation of the author of that work.

51 In the light of the foregoing, the answer to the first question is that an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

Questions 2 to 12

52 If the acts at issue in the main proceedings do come within the concept of reproduction in part of a protected work within the meaning of Article 2 of Directive 2001/29, Articles 2 and 5 of that directive make it clear that such reproduction may not be made without the consent of the relevant author, unless that reproduction satisfies the conditions laid down in Article 5 of that directive.

53 In that context, by questions 2 to 12, the referring court asks, essentially, whether acts of reproduction occurring during a data capture process, such as that at issue in the main proceedings, satisfy the conditions laid down in Article 5(1) of Directive 2001/29 and, therefore, whether that process may be carried out without the consent of the relevant rightholders, since it is used to draw up summaries of newspaper articles and consists of scanning those articles in their entirety to produce a digital file, storing an extract of 11 words and then printing out that extract.

54 Under Article 5(1) of Directive 2001/29, an act of reproduction may be exempted from the reproduction right provided for in Article 2 thereof only if it fulfils five conditions, that is, where

- the act is temporary;

- it is transient or incidental;
- it is an integral and essential part of a technological process;
- the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter; and
- the act has no independent economic significance.

55 It must be borne in mind that those conditions are cumulative in the sense that non-compliance with any one of them will lead to the act of reproduction not being exempted pursuant to Article 5(1) of Directive 2001/29 from the reproduction right provided for in Article 2 of that directive.

56 For the interpretation of each of those conditions in turn, it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly (Case C-476/01 Kapper [2004] ECR I-5205, paragraph 72, and Case C-36/05 Commission v Spain [2006] ECR I-10313, paragraph 31).

57 This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.

58 This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

59 In accordance with recitals 4, 6 and 21 in the preamble to Directive 2001/29, the conditions laid down in Article 5(1) thereof must also be interpreted in the light of the need for legal certainty for authors with regard to the protection of their works.

60 In the present case, Infopaq claims, first, that the acts of reproduction at issue in the main proceedings fulfil the condition relating to transient nature, since they are deleted at the end of the electronic search process.

61 The Court finds, in the light of the third condition referred to in paragraph 54 of this judgment, that a temporary and transient act of reproduction is intended to enable the completion of a technological process of which it forms an integral and essential part. In those circumstances, given the principles set out in paragraphs 57 and 58 of this judgment, those acts of reproduction must not exceed what is necessary for the proper completion of that technological process.

62 Legal certainty for rightholders further requires that the storage and deletion of the reproduction not be dependent on discretionary human intervention, particularly by the user of protected works. There is no guarantee that in such cases the person concerned will actually delete the reproduction created or, in any event, that he will delete it once its existence is no

longer justified by its function of enabling the completion of a technological process.

63 This finding is supported by recital 33 in the preamble to Directive 2001/29 which lists, as examples of the characteristics of the acts referred to in Article 5(1) thereof, acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently. Such acts are, by definition, created and deleted automatically and without human intervention.

64 In the light of the foregoing, the Court finds that an act can be held to be ‘transient’ within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.

65 In the main proceedings, the possibility cannot be ruled out at the outset that in the first two acts of reproduction at issue in those proceedings, namely the creation of TIFF files and text files resulting from the conversion of TIFF files, may be held to be transient as long as they are deleted automatically from the computer memory.

66 Regarding the third act of reproduction, namely the storing of a text extract of 11 words, the evidence submitted to the Court does not permit an assessment of whether the technological process is automated with the result that that file is deleted promptly and without human intervention from the computer memory. It is for the national court to ascertain whether the deletion of that file is dependent on the will of the user of the reproduction and whether there is a risk that the file might remain stored once the function of enabling completion of the technological process has come to an end.

67 It is common ground, however, that, by the last act of reproduction in the data capture process, Infopaq is making a reproduction outside the sphere of computer technology. It is printing out files containing the extracts of 11 words and thus reproduces those extracts on a paper medium.

68 Once the reproduction has been affixed onto such a medium, it disappears only when the paper itself is destroyed.

69 Moreover, since the data capture process is apparently not likely itself to destroy that medium, the deletion of that reproduction is entirely dependent on the will of the user of that process. It is not at all certain that he will want to dispose of the reproduction, which means that there is a risk that the reproduction will remain in existence for a longer period, according to the user’s needs.

70 In those circumstances, the Court finds that the last act in the data capture process at issue in the main proceedings, during which Infopaq prints out the extracts of 11 words, is not a transient act within the meaning of Article 5(1) of Directive 2001/29.

71 There is, moreover, nothing in the case-file submitted to the Court – and nor has it been pleaded – that such an act is liable to be incidental in nature.

72 It follows from the foregoing that that act does not fulfil the second condition laid down in Article 5(1) of Directive 2001/29; accordingly, such an act cannot be exempted from the reproduction right provided for in Article 2 thereof.

73 It follows that the data capture process at issue in the main proceedings cannot be carried out without the consent of the rightholders and, consequently, it is not necessary to consider whether the four acts which make up that process fulfil the other conditions laid down in Article 5(1).

74 Consequently, the answer to questions 2 to 12 is that the act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders.

Question 13

75 In the light of the answer given to questions 2 to 12, it is not necessary to answer question 13.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

2. The act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders.

OPINION OF ADVOCATE GENERAL
TRSTENJAK

delivered on 12 February 2009 (1)

Case C-5/08

Infopaq International A/S

v

Danske Dagblades Forening

(Request for a preliminary ruling from the Højesteret (Denmark))

(Directive 2001/29 – Articles 2 and 5 – Harmonisation of certain aspects of copyright and related rights in the information society – Reproduction right – Exceptions and limitations – Temporary acts of reproduction – Monitoring and analysis of the media – Extracts from newspaper articles composed of 11 words)

I – Introduction

1. This case raises the sensitive issue of the balance between the protection of copyright and technological development in the information society. The protection of copyright should not on the one hand prevent the normal functioning and the development of new technologies, but on the other hand it is necessary to ensure an adequate protection of copyright in the information society. Technological development allows in fact faster and easier reproduction of works, for which reason protection of copyright must adapt to this technological development.

2. The questions referred to the Court in this case concern first of all whether the storing and printing of extracts from newspaper articles, where the extract is composed of the search word and the five preceding and five subsequent words, in the same order as in the newspaper article, can be regarded as reproduction within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2) ('Directive 2001/29'). The questions also concern whether the production of those extracts, which covers the scanning of newspaper articles leading to the creation of an image file and the conversion of this image file into a text file, and the storing of an extract consisting of 11 words, are permitted on the basis that they are reproduction activities which fulfil the conditions of Article 5(1) of Directive 2001/29. By its questions, the national court wishes to know, lastly, whether the acts of reproduction in this case fulfil the conditions of Article 5(5) of Directive 2001/29.

3. Those questions have been raised in the context of proceedings between Infopaq International A/S ('Infopaq') and the professional association of Danish daily newspaper publishers, in which Infopaq requested the national court to find that for the production of extracts from newspaper articles which are composed of search words and the five preceding and five subsequent words it does not require authorisation from the holders of copyright over the newspaper articles.

II – Legal framework

4. Recitals 4, 5, 9, 10, 11, 21, 22, 31 and 33 in the preamble to Directive 2001/29 provide:

'(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ... Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

...

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.'

5. Article 2 of Directive 2001/29, entitled 'Reproduction right', provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...'

6. Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', provides:

'1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (3)

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

...

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made

available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

7. Article 2 of Directive 2001/29 was transposed into Danish law by Article 2 of the Ophavsretslov (Law on copyright) (4) which provides:

'1. Subject to the limitations laid down in this law, copyright shall entail the exclusive right to dispose of the work by reproducing it and by making it accessible to the public, whether in the original or modified form, in translation, in adaptation into another literary or artistic form or into other technology.

2. Any direct or indirect, temporary or permanent reproduction, in whole or in part, by any means and in any form shall be considered as reproduction. The recording of the work on devices which can reproduce it, shall also be considered as a reproduction.

...

8. Article 5(1) of Directive 2001/29 was transposed into Danish law by Article 11bis(1) of the Ophavsretslov, which provides:

'It shall be permitted to make temporary copies which

- (i) are transient or incidental;
- (ii) are an integral and essential part of a technological process;
- (iii) have as their sole purpose to enable a transmission of a work in a network between third parties by an intermediary, or a lawful use of a work; and
- (iv) have no independent economic significance.'

III – Facts, main proceedings and questions referred for a preliminary ruling

9. Infopaq operates a media monitoring and analysis business. The media monitoring consists of drawing up summaries (5) of selected articles from Danish daily newspapers and other periodicals. The articles are selected on the basis of subject criteria agreed with Infopaq's customers; the summaries are then sent to customers by email. On request, Infopaq also sends hardcopy clippings of newspaper articles to its customers.

10. The articles are selected on the basis of a 'data capture process' which has five stages.

11. In the first stage, basic information in respect of each publication is registered manually by Infopaq employees in an electronic database.

12. In the second stage, they scan the publications. Before the scanning, the spine of the publication is cut off so that all the pages are loose sheets; the selected extract is then scanned. On the basis of the scanning, an image file (6) is created for each page of the publication. The image file is then transferred to an Optical Character Recognition server. (7)

13. In the third stage, the Optical Character Recognition server converts the image file into a text file. To be more precise, the image of each letter is converted into an 'ASCII code', (8) which allows the computer to recognise each individual letter. Thus, for example, the image of the letters TDC is converted into something the computer can recognise as the letters TDC. The image of a word is therefore converted into an actual word which is saved as a text file and which can be understood by any text processing programme. The process using the Optical Character Recognition server is completed by deletion of the image file.

14. In the fourth stage, the text file is processed to find predefined search words. Each time the search word appears in the text, it is saved in a file giving the title of the publication, the section and the page in which the word in question is found. In addition, the file indicates a value, expressed as a percentage between 0 and 100, which indicates where the search word is to be found in the text. To further simplify finding the word when the article is later read, the five words preceding and following the word are indicated. This stage concludes by deletion of the text file.

15. During the fifth and sixth stages of the process, a document is printed out for each page of the newspaper in which the search word appears; this document contains the search word and the five words which precede and follow it. The national court gives an example of such a document:

'4 November 2005 – Dagbladet Arbejderen, page 3: TDC: 73% "forthcoming sale of the telecommunications group TDC, which is expected to be bought".'

16. The Danske Dagblades Forening ('DDF') is the professional association of Danish daily newspapers whose function is to assist its members with any questions concerning copyright. In 2005, DDF became aware that Infopaq was producing extracts from press articles, without authorisation from the copyright holders – it informed Infopaq of this.

17. Infopaq disputed the claim that it required authorisation from the copyright holders to carry out its business and consequently brought an action against DDF before the Østre Landsret to obtain a declaration that it had the right to apply the 'data capture process' without the consent of DDF or its members. The Østre Landsret dismissed the action as unfounded, for which reason Infopaq lodged an appeal before the referring court (Højesteret).

18. In its order, the national court states that it is not disputed in this case that consent from the copyright holders is not necessary in so far as monitoring of the

written press and the drawing up of summaries of newspaper articles is involved, if a person physically reads each publication, if the articles are selected manually on the basis of predefined search words and if, on that basis, a document is produced manually, indicating the search word in the article in question and the position of that article in the publication. Nor is it disputed that, in itself, the drawing up of summaries does not require the consent of copyright holders.

19. It is thus not disputed in this case that the 'data capture process' involves two acts of reproduction, namely: (1) the scanning of newspaper articles on the basis of which an image file is created and (2) the conversion of the image file into a text file. The national court states moreover that this process also involves the continual reproduction of the articles thus processed as (3) the search word is stored with the five words which precede and follow it and (4) those 11 words are then printed out. The national court makes clear that the parties in the main proceedings disagree as to whether the acts referred to in (3) and (4) constitute reproduction within the meaning of Article 2 of Directive 2001/29.

20. Under those circumstances, the national court, by order of 21 December 2007, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling: (9)

'(1) Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction (10) which are protected by Article 2 of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)? (11)

(2) Is the context in which temporary acts of reproduction take place relevant to whether they can be regarded as "transient" (see Article 5(1) of Directive 2001/29)?

(3) Can a temporary act of reproduction be regarded as "transient" where the reproduction is processed, for example, by the creation of a text file on the basis of an image file or by a search for text strings on the basis of a text file?

(4) Can a temporary act of reproduction be regarded as "transient" where part of the reproduction, consisting of one or more text extracts of 11 words, is stored?

(5) Can a temporary act of reproduction be regarded as "transient" where part of the reproduction, consisting of one or more text extracts of 11 words, is printed out?

(6) Is the stage of the technological process at which temporary acts of reproduction take place relevant to whether they constitute an "integral and essential part of a technological process" (see Article 5(1) of Directive 2001/29)?

(7) Can temporary acts of reproduction be an "integral and essential part of a technological process" if they consist of manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium?

(8) Can temporary acts of reproduction constitute an "integral and essential part of a technological process" where they consist of printing out part of the reproduction, comprising one or more text extracts of 11 words?

(9) Does "lawful use" (see Article 5(1) of Directive 2001/29) include any form of use which does not require the rightholder's consent?

(10) Does "lawful use" (see Article 5(1) of Directive 2001/29) include the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, for use in the business's summary writing, even where the rightholder has not given consent to those acts?

(11) What criteria should be used to assess whether temporary acts of reproduction have "independent economic significance" (see Article 5(1) of Directive 2001/29) if the other conditions laid down in the provision are satisfied?

(12) Can the user's efficiency gains from temporary acts of reproduction be taken into account in assessing whether the acts have "independent economic significance" (see Article 5(1) of Directive 2001/29)?

(13) Can the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, without the rightholder's consent, be regarded as constituting "certain special cases which do not conflict with a normal exploitation" of the newspaper articles and "not unreasonably [prejudicing] the legitimate interests of the rightholder" (see Article 5(5) of Directive 2001/29)?'

IV – Procedure before the Court

21. The order for reference was received at the Court on 4 January 2008. In the context of the written procedure, Infopaq, DDF and the Commission submitted observations. During the hearing on 20 November 2008, Infopaq, DDF and the Commission made oral statements and replied to the Court's questions.

V – Arguments of the parties

A – First question referred

22. Infopaq considers that the storing and subsequent printing of an extract from the text of a newspaper article which contains the search word and the five words which precede and follow it do not constitute partial acts of reproduction within the meaning of Article 2 of Directive 2001/29. Infopaq points out that Directive 2001/29 does not lay down a minimum threshold for the number of words below which there is no longer reproduction in part, even though such a de minimis threshold must in any case exist. Infopaq considers that the 11 words which are stored and printed do not go beyond the particular minimum number which is the prerequisite for the existence of a reproduction in part.

23. The Commission and DDF on the contrary take the view that the storing and subsequent printing of an extract from the text of a newspaper article which contains the search word and the five words which precede

and which follow it are acts of reproduction which are protected by Article 2 of Directive 2001/29.

24. The Commission considers that the storing and printing of an extract from an article are forms of reproduction. It states that it is apparent from Article 2 of Directive 2001/29 that the exclusive reproduction right of authors covers also reproduction in part and that an extract of an article consisting of 11 words constitutes reproduction in part within the meaning of that article.

25. DDF states, like the Commission, that the storing and printing of an extract from an article consisting of 11 words constitutes reproduction in part within the meaning of Article 2 of Directive 2001/29. DDF points out that when the search words appear a number of times in an article, large parts of that article will be reproduced; to illustrate this point it submits an article in which two search words with the five words which precede and follow them are underlined. It disagrees with the position of the Austrian Government, (12) that the part of the work of the author which is reproduced must in itself fulfil the conditions in that regard in order that it can be defined as a work. It considers that the fact that the meaning and the conditions for the existence of a work are not harmonised in Directive 2001/29 does not prohibit the Court from interpreting the meaning of reproduction in part of a work. The assessment of the question of whether in this case there is reproduction in part of a work must take place independently of the conditions laid down by national law for the existence of a work.

26. The Austrian Government takes the view that Article 2 of Directive 2001/29 certainly gives authors the exclusive right of reproduction in part of the work, but it does not define the meaning of work nor give guidelines as to the specific circumstances under which such a work is protected. In so far as the conditions governing the protection of works are not harmonised by Community law, it is necessary according to the Austrian Government to assess them on the basis of national law. Taking account of that fact, the Austrian Government points out that the part of the work which is reproduced must fulfil in itself the conditions required for it to be defined as a work.

B – Second to twelfth questions referred

27. Infopaq and the Austrian Government consider that the process of production of extracts from articles must be considered as a temporary act of reproduction within the meaning of Article 5(1) of Directive 2001/29; this process is permissible as it fulfils all of the conditions laid down by that article: first, because a transient act is involved, secondly, because that act is an integral and essential part of the technological process, thirdly, because its sole purpose is to allow the lawful use of the work or of the subject-matter of related rights and, fourthly, because that act has no independent economic significance.

28. Infopaq states with regard to the first condition, ('transient' act) that Article 5(1) of Directive 2001/29 is not limited only to temporary acts of reproduction in the form of browsing and the making of 'cache' copies. The condition that the act must be 'transient' only con-

cerns the duration of the temporary act of reproduction and acts of reproduction the duration of which is less than or equal to 30 seconds must be considered as 'transient'.

29. Concerning the second condition ('integral and essential part of a technological process'), Infopaq considers that it can clearly be seen from the meaning of integral part that the stage of the technological process at which the temporary act of reproduction takes place is irrelevant.

30. Concerning the third condition ('lawful use'), Infopaq states that it does not follow from Article 5(1), nor from recital 33 in the preamble to Directive 2001/29, that 'lawful use' means only use of the Internet in the form of browsing and the making of 'cache' copies. 'Lawful use' means any use of a work in respect of which the consent of the copyright holder is not necessary. Moreover it is not important as regards 'lawful use' to know who uses the work; this can be the end-user or any other person. The decisive factor for the reply to the question of whether there is 'lawful use' is whether in the context of the proceedings in question an original of the publication is being used which was obtained lawfully.

31. Concerning the fourth condition ('independent economic significance'), Infopaq states that the question of independent economic significance must be considered from the point of view of the author. Moreover, as regards that condition, it is sufficient to find whether the temporary act of reproduction has an independent economic significance and not whether the whole technological process has such a significance. Infopaq points out that the final purpose of the technological process which it uses is the production of summaries which is in itself lawful and does not infringe the copyright of the publications; the temporary acts of reproduction in the form of image files and text files do not, in themselves, have independent economic significance for the rightholders. If the 'independent economic significance' were contingent on the copyright holder's not receiving remuneration, there would, according to Infopaq, be a contradiction with the purpose of Article 5(1) of Directive 2001/29.

32. The Austrian Government, like Infopaq, believes that the conditions of Article 5(1) of Directive 2001/29 are fulfilled and states that these conditions are not limited to intermediate copies which are stored during transmission between the different programmes (software) on the Internet. In its opinion, the creation of an image file and its conversion into a text file are 'transient' acts because these reproductions are of short duration; these acts are at the same time also an 'integral and essential part of a technological process'. The Austrian Government also considers that the use of the works is 'lawful' because the extracts from newspaper articles do not fulfil the conditions for copyright protection. The process used by Infopaq has the sole purpose of producing extracts from newspaper articles on the basis of search words, for which reason they do not, according to the Austrian Government, have 'independent economic significance'.

33. DDF and the Commission consider on the contrary that the conditions of Article 5(1) of Directive 2001/29 are not fulfilled.

34. DDF states that Article 5(1) of Directive 2001/29 must be interpreted in the light of the purpose of that Directive and refers in this respect to recitals 9 and 10 in the preamble to the Directive, from which it is apparent that its purpose is to ensure a high level of protection for authors who must receive appropriate reward for the use of their works. The provisions of the Directive which ensure that protection must be interpreted widely, whilst the provisions which provide for exceptions to that protection must be interpreted strictly.

35. DDF considers concerning the first condition ('transient' act), that the acts of reproduction are not transient because the reproductions are lasting and are not deleted, while the definition of 'transient' means that the reproductions are of short duration.

36. Concerning the second condition ('integral and essential part of a technological process'), DDF states that the purpose of that condition is to exclude reproductions which are automatically produced in the context of such a process. In the present case, the reproductions are not however produced automatically because the scanning of the articles and conversion of an image file into a text file are only a transient stage in the technical processing of these texts. This is therefore not an intermediate technological process. Moreover, the reproduction of 11 words is not an 'integral and essential part of a technological process' because those 11 words are printed out.

37. Concerning the third condition ('lawful use'), DDF is of the view that use which would otherwise be unlawful cannot become lawful under Article 5(1) of Directive 2001/29. According to DDF, the present case concerns an unlawful use.

38. Concerning the fourth condition ('independent economic significance'), DDF points out that this condition concerns the fact that the use of the reproduction in the present case cannot have independent economic significance either for the user (namely Infopaq) or for the rightholder. DDF states that the reproductions have independent economic significance for Infopaq because it would require DKK 2 to 4 million if the reproduction work was manual rather than automated. The reproductions also have independent economic significance for DDF's members because they could receive increased remuneration through the granting of licences for the reproduction of their works.

39. The Commission likewise considers that in the present case the conditions of Article 5(1) of Directive 2001/29 are not fulfilled.

40. Concerning the first condition ('transient' act), the Commission is of the view that temporary acts of reproduction are transient if their duration is short, for example a reproduction made during browsing on the Internet. The Commission considers that it is necessary, when deciding whether acts of reproduction are transient, to take into account the technological process in the context of which the reproduction takes place and

in particular whether a lasting reproduction has been made or not during that process. In the context of the process used by Infopaq, a lasting reproduction consisting of the 11 printed words has been made and consequently the fact that the image and text files created are deleted when the 11 words are printed does not mean that the act of reproduction is transient. The Commission further points out that the fact that the part of the reproduction which contains one or several extracts of 11 words is printed is irrelevant in assessing whether the temporary act of reproduction can be considered as transient.

41. Concerning the second condition ('integral and essential part of a technological process'), the Commission believes that the stage of the technological process during which the temporary acts of reproduction are made is irrelevant to whether they must be considered as an 'integral and essential part of a technological process'. The Commission points out that Infopaq physically checks the reproduction several times during the process and that it may have copies stored in paper or electronic form for a long time after having sent the extracts to its customers. The electronic copies moreover allow use which goes beyond simple electronic transmission in a network; in the present case, the electronic copies are in fact the basis for the creation of the text files. The Commission also considers that those temporary acts of reproduction cannot be an 'integral and essential part of a technological process' if they cover manual scanning of entire newspaper articles whereby the latter are converted from a printed medium into a digital medium as this procedure goes well beyond what is necessary to produce an extract. The Commission is also of the view that printing of an extract is not a temporary act of reproduction and therefore cannot be an 'integral and essential part of a technological process'.

42. Concerning the third condition ('lawful use'), the Commission is of the view that 'lawful use' does not only cover all types of use which do not require the copyright holder's consent but on the contrary also types of use which the rightholder authorises or which are not covered by the exclusive right of the copyright holder or fall within the exceptions to the exclusive right. It also states that the process for the production of extracts used by Infopaq is not a lawful use of the works because it involves modification of the work with the objective of creating a short text extract.

43. Concerning the fourth condition ('independent economic significance'), the Commission points out that the criteria for assessing that condition stem from recital 33 in the preamble to Directive 2001/29 and that pursuant thereto acts of reproduction do not have 'independent economic significance' if they do not modify the information and if they do not interfere with lawful use of the technology which is widely recognised and used by industry to obtain data on the use of the information. The Commission also considers that the process used by Infopaq allows it to increase its productivity because such production of extracts is much quicker and cheaper; according to the Commis-

sion it is necessary to take account of this fact when assessing whether the acts have ‘independent economic significance’.

C – Thirteenth question referred

44. Infopaq considers concerning the thirteenth question that Article 5(5) of Directive 2001/29 does not lay down independent conditions which could be fulfilled in addition to the conditions of Article 5(1) of that directive; if the conditions of Article 5(1) are fulfilled, it is not necessary to examine the conditions of Article 5(5) of the Directive.

45. The Austrian Government considers that the conditions of Article 5(5) of Directive 2001/29 are fulfilled, but it does not provide reasons for its position.

46. DDF considers concerning the thirteenth question that the acts of reproduction do not fulfil the conditions of Article 5(5) of Directive 2001/29. Infopaq uses those acts of reproduction to reduce its costs vis-à-vis its competitors. According to DDF, acts of reproduction are moreover so extensive and significant that they cannot be regarded as normal exploitation of a work; they unreasonably prejudice the legitimate interests of copyright holders who could obtain remuneration by granting licences authorising such a use.

47. The Commission considers that in principle it is unnecessary to reply to the thirteenth question because Infopaq’s activities do not fall within the exception in Article 5(1) of Directive 2001/29, but it nevertheless offers a reply to that question. It states that Article 5(5), known as the ‘three-step test’, is comparable to Article 13 of the TRIPS Agreement. The Commission points out that in principle the ‘three-step test’ of Article 5(5) must be applied separately from the assessment on the basis of Article 5(1), and that the condition of Article 5(5) which concerns ‘normal exploitation of the work’ is similar to the condition of Article 5(1) of Directive 2001/29 according to which the temporary act of reproduction must have ‘independent economic significance.’ The fundamental question as regards the two conditions referred to is therefore whether the acts of reproduction allow the electronic transmission of data without independent economic significance or whether they add such a significance which goes beyond the transmission of data. In so far as the acts of reproduction in the present case do have economic significance for Infopaq, this is not a matter of normal exploitation of a work, for which reason the conditions of Article 5(5) are not fulfilled in the Commission’s view.

VI – Assessment of the Advocate General

A – Introduction

48. The present case concerns the interpretation of the scope of the reproduction right and the exceptions and limitations to the reproduction right as regulated by Directive 2001/29, which harmonises certain aspects of copyright and related rights in the information society. (13) The reproduction right represents the essence of copyright, (14) the author’s exclusive right to authorise or prohibit the reproduction of his work. The scope of the author’s exclusive right vis-à-vis the reproduction

depends on the scope of the definition of reproduction of a work.

49. In the past it was easier to define reproduction, given the limited number of methods of reproduction, (15) but with the development of information technology and the possibility of digital reproduction, there are now more possibilities of easier and faster reproduction. Because reproduction is easier and faster it is necessary, on the one hand, to ensure adequate protection of copyright; that protection must however and on the other hand be flexible enough not to hinder the development or the normal functioning of the new technologies. (16) In order to reply to the questions referred in the present case, it is necessary to take as a basis an appropriate balance between protection of copyright which is sufficiently high and at the same time sufficiently flexible.

50. The questions referred by the national court in the present case can be classified into three categories which will also be followed in the structure of this Opinion. The first category, which covers the first question referred, concerns the interpretation of the concept of ‘reproduction’ contained in Article 2 of Directive 2001/29. The second category, which covers the second to twelfth questions referred, concerns the interpretation of the exception to the reproduction right in Article 5(1) of that directive which, under certain conditions, authorises a temporary act of reproduction. The third category, which covers the thirteenth question referred, concerns the interpretation of Article 5(5) of the Directive, under which the exceptions and limitations to the right of reproduction can only apply in certain special cases which are not contrary to a normal exploitation of a work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

51. In this Opinion, I will first briefly set out the essential characteristics of the process of production of extracts from newspaper articles before replying to the questions referred in the context of the analysis of the three categories.

B – Essential characteristics of the process for the production of extracts from newspaper articles used by Infopaq

52. As stated by the national court, it is undisputed in the present case that the process for the production of newspaper articles (that is, the ‘data capture process’), as used by Infopaq, undoubtedly covers two acts of reproduction, namely (1) the creation of an image file on the basis of the scanning of newspaper articles and (2) the conversion of the image file into a text file. However, there is no consensus on whether the reproduction also covers (3) the storing of each search word with the five words which precede and follow it and (4) the printing of those 11 words.

53. I will therefore deal below with the question whether the storing of the search word with the five words which precede and follow it and the printing of these 11 words constitutes reproduction within the meaning of Article 2 of Directive 2001/29.

– **Interpretation of Article 2 of Directive 2001/29 (first question referred)**

54. By its first question, the national court asks essentially if the storing and subsequent printing of an extract from the text of a newspaper article containing the search word and the five words which precede and follow it can be considered as a reproduction within the meaning of Article 2 of Directive 2001/29.

55. Article 2 of Directive 2001/29 provides that Member States must provide for ‘the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ for authors and for their works. It follows therefore from this article that the reproduction of works is not possible without the authorisation of the author, irrespective of whether reproduction of all or part of those works is at issue. Article 2 of Directive 2001/29 does not however define ‘reproduction’ just as it does not define when and under what conditions reproduction is ‘partial’; for this reason I will examine the two concepts in the context of the analysis of the first question.

56. As is apparent from the case-law of the Court of Justice, it is necessary, when defining the concepts of ‘reproduction’ and ‘reproduction in part’, to take into account the fact that the requirement of uniform application of Community law means that the concepts and conditions of provisions of Community law must be given an autonomous and uniform interpretation throughout the Community where, as in the case of the provisions of Directive 2001/29, there is no express reference to the law of the Member States for the purpose of determining their meaning and scope. (17) Given this requirement, I believe that ‘reproduction’ of a work can be defined as fixation of the work in a given information medium. (18) ‘Reproduction in part’ can then be understood as fixation of part only of a work in a given information medium.

57. It is apparent moreover from the wording of Article 2 of the Directive that the concept of ‘reproduction’ should be construed broadly because it covers reproduction which is ‘direct or indirect’ and ‘temporary or permanent’, and reproduction ‘by any means and in any form’ and ‘in whole or in part’. The requirement for a broad interpretation also follows from recital 21 in the preamble to that directive, which provides that the Directive must define ‘the scope of the acts covered by the reproduction right with regard to the different beneficiaries’ and that ‘a broad definition of these acts is needed to ensure legal certainty within the internal market’. The broad definition of reproduction is necessary to ensure the high level of protection of copyright which Directive 2001/29 seeks to establish. (19) An argument in favour of a broad interpretation of ‘reproduction in part’ can also be derived from the broad interpretation of ‘reproduction’, if ‘reproduction’ is interpreted broadly it is necessary a *maiori ad minus* to interpret broadly all types of reproduction, including reproduction in part because only in this way can a high level of protection of copyright be ensured.

58. The interpretation of ‘reproduction in part’ must not however be an absurd or excessively technical one according to which any form of reproduction of a work would be included no matter how minimal or insignificant a fragment of the work it is. I believe it is necessary, in interpreting that concept, to strike a balance between a technically inspired interpretation and the fact that the reproduction in part must also have a content, a distinctive character and – as part of a given work – a certain intellectual value, for which reason it is necessary to give it copyright protection. I consider that, to determine whether in a given case there is reproduction in part, it is appropriate to take two aspects into account. First, it is necessary to establish whether the reproduction in part is actually identical to a part of the original of the work (element of identification). In the case of reproduction in part of a newspaper article, that means specifically that it is necessary to determine whether the same words are found in the reproduction as in the newspaper article and whether those words are in the same order. Second, it must be established whether one can, on the basis of the reproduction in part, recognise the content of the work or determine with certainty that it is an exact reproduction in part of a given work (element of recognition). In the case of reproduction in part of a newspaper article, that means that one can establish with certainty that the reproduced extract in question is indeed taken from a given newspaper article. (20) One cannot therefore define reproduction in part in a strictly quantitative manner (21) or on the basis of a *de minimis* criterion, which would determine in a precise manner what percentage of a work must be reproduced in order to constitute reproduction in part or, in the present case, how many words of a given work suffice to constitute reproduction in part. (22) The existence of reproduction in part must be established on an individual basis.

59. According to the criteria laid down in point 58, I believe that in the present case the storing and subsequent printing of an extract from a text from a newspaper article which includes the search word and the five words which precede and follow it can be defined as reproduction in part of that article within the meaning of Article 2 of Directive 2001/29. Both the criterion of identification and the criterion of recognition are in fact fulfilled.

60. First, in the present case, the 11 words which are printed in the extract are the same as the 11 words in the newspaper article; their order is also the same as in the article. Secondly, the sequence of 11 words is in my opinion long enough – comparing the extract with the newspaper article – to allow it to be stated that that sequence of words in the extract indeed comes from a given newspaper article. It must be emphasised that, in the present case, the extracts composed of the search word and the five words which precede and follow it have precisely the purpose of facilitating for the reader the location of the search word in the article. (23)

61. It must moreover be noted in the present case that Infopaq prints, for each article, the search word and the five words which precede and follow it each

time that the word appears in the article. Thus, as DDF rightly points out, (24) most of a newspaper article may therefore be printed which undoubtedly means reproduction in part of that article within the meaning of Article 2 of Directive 2001/29.

62. In view of the arguments put forward, in my view the reply to the first question referred is that the storing and subsequent printing of an extract from a newspaper article which contains the search word and the five words which precede and follow it must be considered as a reproduction within the meaning of Article 2 of Directive 2001/29.

D – Interpretation of Article 5(1) of Directive 2001/29 (second to twelfth questions referred)

63. The national court asks several questions concerning the interpretation of Article 5(1) of Directive 2001/29, for which reason I will consider them together. These are the second to twelfth questions referred by which the national court asks essentially whether the process of production of extracts from newspaper articles as used by Infopaq may be applied without the authorisation of the copyright holders as it falls within the exception laid down in Article 5(1) of Directive 2001/29, which under certain conditions exempts temporary acts of reproduction from the reproduction right.

64. In the context of the following line of argument, I will first set out the content and the purpose of Article 5(1) of Directive 2001/29, before analysing the individual conditions in that article and the questions pertaining thereto.

1. Content and purpose of Article 5(1) of Directive 2001/29

65. Directive 2001/29 provides in Article 5(1) for an exception to the reproduction right for certain temporary acts of reproduction. Under Article 5(1), acts of reproduction which fulfil the following conditions are exempted from the reproduction right:

- the act of reproduction must be temporary;
- that temporary act of reproduction must also fulfil the four following conditions: first, it must be transient or incidental, secondly, it must be an integral and essential part of a technological process, thirdly, its only purpose must be to enable either a transmission in a network between third parties by an intermediary, or a lawful use of a work or of related rights and, fourthly, the act must have no independent economic significance.

66. The exception in Article 5(1) was included in Directive 2001/29 in order to exclude from the broad definition of reproduction right certain temporary acts of reproduction which are an integral part of a technological process; their sole purpose is to enable another form of use of a given work. (25) Recital 33 in the preamble to Directive 2001/29 gives as examples of temporary acts of reproduction which must be excluded from the reproduction right browsing and the making of 'cache' copies including those which enable transmission systems to function effectively. (26) Those acts of reproduction are authorised according to that recital 'provided that the intermediary does not modify the information and does not interfere with the lawful use of

technology, widely recognised and used by industry, to obtain data on the use of the information'. If such acts were not excluded from the broad definition of the reproduction right, that would mean that in the case of new technologies it would be necessary to obtain the authorisation of the copyright holder for any reproduction even if it was of short duration and technically necessary. (27) In practice, that would mean for example that it would be necessary to obtain the authorisation of the copyright holder for each act of caching, (28) which allows the normal use of information technology and the Internet thanks to the automatic creation of temporary copies of digital data. (29) Having regard to the foregoing, I would like to clarify that the exception in Article 5(1) of Directive 2001/29 does not concern only temporary acts of reproduction which take place on the Internet, but on the contrary all acts of reproduction which fulfil the general conditions referred to in that article. (30)

67. I also note that, in the context of the analysis of Article 5(1) of Directive 2001/29, it is necessary to clearly distinguish between, on the one hand, temporary acts of reproduction in respect of which it is necessary to examine whether they fulfil the conditions of that article and, on the other hand, the forms of use of a given work which those acts make possible. Thus, for example, acts of caching enable Internet users to read and inform themselves as to the content of the network. The temporary storing in the RAM memory of a computer (31) allows the user to create a copy of an audio or video recording. In the analysis of the basis of Article 5(1) of Directive 2001/29, it is always necessary to distinguish between temporary acts of reproduction and the final form of use of a given work which these temporary acts of reproduction make possible. That distinction will be particularly important for the analysis of the third condition of Article 5(1), pursuant to which temporary acts of reproduction must enable lawful use of the work. (32)

2. Condition for the application of Article 5(1): temporary acts of reproduction

68. It is clear from Article 5(1) of Directive 2001/29 that the exception provided for therein authorises only temporary acts of reproduction. The condition for the application of that exception is that a given act of reproduction is temporary; I will examine whether that temporary act of reproduction also fulfils the other conditions of that article. Before examining whether the process for the production of extracts from newspaper articles used by Infopaq fulfils the individual conditions of that article, I must therefore examine which acts of reproduction of that process could even be defined as temporary acts of reproduction.

69. A number of acts of reproduction can be identified in the process of production of extracts from newspaper articles as used by Infopaq. The newspaper articles are first scanned, creating an image file which is then converted into a text file; it is clear from the facts that the image file is deleted after having been converted into a text file, the latter is deleted after the production of the extract from the newspaper article.

The search words from the newspaper articles processed in this way and the five words which precede and follow them are then stored and printed.

70. The scanning and conversion of the image file into a text file are therefore only preparatory acts for the storing and printing of an extract of 11 words from a newspaper article. The image and text files are deleted during the process or directly afterwards, at the end of the process for the production of extracts. The scanning and the conversion of the image file into a text file can therefore, in my opinion, be defined as temporary acts of reproduction.

71. Concerning the question whether the storing of an extract of 11 words from a newspaper article can be defined as a temporary act of reproduction, in my opinion there is not enough information in the order for reference. The national court, in its order, states merely that the search word and the five words which precede and follow it are stored, (33) but it does not indicate for how long those words remain stored in the computer's memory. That fact should therefore be clarified by the national court.

72. However one defines the storing of the extracts of 11 words, the printing of that article cannot in my opinion be defined as a temporary act of reproduction. The printing on paper must in fact be treated as a lasting reproduction. (34) Lasting reproduction does not, of course, mean unlimited in time because it may be destroyed, but the user of that reproduction alone decides when to destroy it. I note concerning the printing of the extract that this is not an act which only enables another use of the work, the situation which the exception provided for in Article 5(1) of Directive 2001/29 is aimed at. The printing of an extract from a newspaper article is the final reproduction in the process for the production of extracts as applied by Infopaq, for which reason, in the present case, it is particularly important to know whether the final reproduction is a lawful use of the work, (35) which the temporary acts of reproduction, carried out in the context of that process, make possible.

73. I will examine below whether the scanning of articles, the conversion of image files and text files and the storing of extracts of 11 words which enable the printing of extracts of 11 words fulfil the conditions of Article 5(1).

3. Examination of the four conditions of Article 5(1) of Directive 2001/29

a) First condition: temporary acts (second to fifth questions)

74. The first condition that a temporary act of reproduction must fulfil in the context of Article 5(1) is that it must be transient or incidental. As the national court's questions in fact concern only whether the acts of reproduction in the present case are transient acts, I will limit myself to the interpretation of that condition and will not analyse whether these acts are incidental. The second to fifth questions referred concern the interpretation of the condition of transient act.

75. The national court has expressed the second question in such a way that it asks whether the circum-

stances under which temporary acts of reproduction take place are relevant to whether they can be regarded as transient within the meaning of Article 5(1) of Directive 2001/29. It does not specify however in the order for reference to which circumstances the question refers. It is not clear whether the national court has in mind the forms of reproduction (by scanner, Optical Character Recognition software and storage), the duration of existence of the reproduction or other circumstances. As I do not know precisely to which circumstances the national court refers and cannot therefore provide a simple affirmative or negative answer to the question, it seems appropriate to reformulate it in order to be able to offer a useful response.

76. It is therefore necessary to reformulate the second question in such a way that the national court asks which circumstances are relevant for the purposes of determining whether given temporary acts of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29.

77. By its third question, the national court asks whether a temporary act of reproduction can be regarded as transient within the meaning of Article 5(1) of Directive 2001/29, if the reproduction is produced by the processing of a text file on the basis of an image file or by a search for text strings on the basis of a text file. The third question must also be partially reformulated as the national court asks whether an act of reproduction is temporary if the reproduction is produced by a search for 'text strings on the basis of a text file'. As the mere search for text strings is not a reproduction, it is necessary to understand by the third question that the national court asks whether a temporary act of reproduction can be considered as transient if the reproduction is produced for example by the processing of a text file on the basis of an image file.

78. By its fourth question, the national court asks essentially whether a temporary act of reproduction (36) can be considered as transient within the meaning of Article 5(1) of Directive 2001/29 if part of the reproduction, consisting of one or more text extracts of 11 words, is stored.

79. By its fifth question, the national court asks essentially whether an act of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29 if part of the reproduction, consisting of one or more text extracts of 11 words, is printed.

80. To reply to these questions, it is first necessary to examine the significance of the fact that a temporary act of reproduction is transient.

81. An act of reproduction is transient in my opinion where the reproduction only exists for a very short period. (37) Of course, the question which immediately arises is what the difference is between a transient act of reproduction and a temporary act of reproduction. In my view, the difference is that a transient act of reproduction lasts for a very brief period while a temporary act of reproduction can last for a longer period. (38) Transient acts of reproduction are therefore temporary

acts of reproduction which last for an exceptionally short time, which are ephemeral and which at the same time disappear after arising. (39) The duration of temporary acts of reproduction is certainly limited in time but can be longer than the duration of transient acts of reproduction. (40) It is of course very difficult, if not completely impossible, to determine exactly from the outset for how long a reproduction must exist for it to be definable as transient; that must be determined on a case-by-case basis and taking into account all of the circumstances of the case.

82. In my view the answer to the second question referred is therefore that the decisive factor which is relevant to whether a given act of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29 is that the reproduction only lasts for a very brief period, even if it is necessary during the assessment to take into account all of the circumstances of the individual case.

83. In the present case, the image file which is created during the scanning of the newspaper article, like the text file which is created when the image file is converted, is subsequently deleted when the extract from the newspaper article is produced. Infopaq states in its written observations that the required duration is, at the most, 30 seconds. In my view, it can be found in the present case, on the basis of the fact that the required duration is exceptionally short and that the two files are deleted, that transient acts of reproduction are involved.

84. The answer to the third question referred must in my view therefore be that if a temporary act of reproduction is carried out by processing a text file on the basis of an image file and if those two files are deleted, in circumstances such as those of the present case, that act of reproduction must be considered as transient within the meaning of Article 5(1) of Directive 2001/29.

85. Concerning the storing of an extract from a newspaper article, I have already indicated at point 71 of this Opinion that the national court, in its order, does not state for how long the extract of 11 words is stored.

86. The answer to the fourth question referred must in my view therefore be that the national court must, on the basis of the criteria laid down in the reply to the second question referred, determine whether the act of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29, where part of the reproduction which consists of one or more extracts of 11 words is stored.

87. Concerning the printing of an extract from a newspaper article, I have already indicated at point 72 of this Opinion that in that case the act of reproduction is not temporary and that act cannot therefore a fortiori be considered as a transient act of reproduction.

88. In my view the answer to the fifth question referred should therefore be that an act of reproduction cannot be considered as transient within the meaning of Article 5(1) of Directive 2001/29 if, in circumstances such as those of the present case, part of the reproduc-

tion which consists of one or more extracts of 11 words is printed.

b) Second condition: integral and essential part of a technological process (sixth, seventh and eighth questions)

89. The second condition which must be fulfilled by a temporary act of reproduction in the context of Article 5(1) is that it must be an integral and essential part of a technological process. The interpretation of that condition in connection with the scanning and conversion of an image file into a text file is the subject of the sixth and seventh questions referred, while the eighth question referred concerns the printing of an extract from a newspaper article. The national court does not ask explicitly whether the storing of an extract from a newspaper article is also an integral and essential part of a technological process.

90. By its sixth question, the national court asks essentially whether the stage of the technological process at which temporary acts of reproduction take place is relevant to whether they can be considered as an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29.

91. By its seventh question, the national court asks essentially whether temporary acts of reproduction can be an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29, if they cover manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium.

92. By its eighth question, the national court asks essentially whether temporary acts of reproduction can be an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29 if they consist of a printed reproduction which contains one or more text extracts of 11 words.

93. For the reply to the sixth and seventh questions, it is first necessary to examine when a given act of reproduction is an integral and essential part of a technological process. (41) It should in particular be examined to what extent the interpretation of the condition that the temporary act of reproduction must be an integral and essential part of a technological process must be restrictive. It is apparent from legal commentators that the fundamental dilemma when interpreting that condition is whether the act of reproduction constitutes an integral and essential part of a technological process only when that act is a necessary element of the technological process and therefore without which that technological process would not be possible, or whether other acts which are not a necessary element of that technological process also fall within that category. (42)

94. In my opinion – and in that of the majority of legal commentators (43) – it is not necessary for the act of reproduction to be an indispensable element of a given technological process for it to constitute its integral and essential part. This may be seen from the explanatory memorandum to the proposal for Directive 2001/29, in which the Commission states that the purpose of Article 5(1) is to exclude temporary acts of

reproduction ‘which technology dictates’. (44) It may also be deduced that the stage of the technological process at which the temporary act of reproduction takes place is irrelevant.

95. The answer to the sixth question referred must in my view therefore be that the stage of the technological process at which temporary acts of reproduction take place is irrelevant to whether they constitute an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29.

96. To reply to the seventh question in this case, it is necessary to examine what, in the context of the process for the production of extracts from newspaper articles, constitutes a technological process. Does technological process cover only the scanning and the conversion of the image file into a text file or on the contrary does it cover the entire process for the production of extracts from newspaper articles?

97. In my view, the technological process in this case covers the entire process for the production of extracts from newspaper articles. The scanning and the conversion of the image file into a text file, and the storing and printing of the search word with the five words preceding and following it therefore fall within that process. All of the elements mentioned are therefore part of the same technological process. From that point of view, the scanning of articles and the conversion of the image file into a text file are in any case an integral and essential part of the technological process.

98. The answer to the seventh question referred must in my view therefore be that where temporary acts of reproduction consist of manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium, in circumstances such as those of the present case, those acts of reproduction constitute an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29.

99. To reply to the eighth question, it is necessary to clarify whether the printing of a reproduction consisting of one or more text extracts of 11 words can be an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29. As I have already indicated at point 97 of this Opinion, the printing of an extract from a newspaper article must in principle also be considered as an integral and essential part of a technological process. It must however be noted in that respect that printing is not a temporary act of reproduction, for which reason it does not fulfil the condition for the application of Article 5(1) of Directive 2001/29.

100. The answer to the eighth question referred must in my view therefore be that, in circumstances such as those of the present case, the printing of an extract is not a temporary act of reproduction, for which reason it cannot fall within Article 5(1) of Directive 2001/29 and consequently it is irrelevant whether that act of reproduction can be an integral and essential part of a technological process.

c) Third condition: acts the purpose of which is to enable a lawful use (ninth and tenth questions)

101. The third condition of Article 5(1) requires that the sole purpose of the temporary act of reproduction is to enable either transmission in a network between third parties thanks to an intermediary, or a lawful use of the work. As it is clear that in the present case there is no transmission in a network, and as the question referred only concerns the part of the third condition which concerns lawful use of the work, I will concentrate in my analysis on examining the condition of lawful use. The ninth and tenth questions referred concern the condition of lawful use.

i) General remarks on the condition of lawful use (ninth question)

102. By its ninth question, the national court asks whether lawful use of a work within the meaning of Article 5(1) of Directive 2001/29 covers any form of use of a work which does not require the copyright holder’s consent.

103. To reply to the ninth question referred, it is necessary to clarify the meaning of the condition of lawful use of a work within the meaning of Article 5(1) of Directive 2001/29.

104. It is apparent from recital 33 in the preamble to Directive 2001/29 that the use of a work is considered to be lawful (45) ‘where it is authorised by the rightholder or not restricted by law’. It may be concluded on the basis of that recital that the use of a work is lawful in three cases. First, the use is lawful where it is a form of use of a work for which the copyright holder’s authorisation is not required – for example the reading of newspaper articles. If however there is use of a work in a form of reproduction such as that in the present case or another form of use for which in principle the copyright holder’s authorisation is required, (46) the use is lawful; secondly, if the copyright holder has explicitly authorised the use; or, thirdly, if that use is authorised pursuant to one of the exceptions and limitations laid down in Article 5(2) and (3) (47) of Directive 2001/29, if the Member State in question has transposed that exception or limitation into national law and if it meets the requirements of Article 5(5) of the Directive.

105. The answer to the ninth question referred in my opinion is therefore that the lawful use of a work within the meaning of Article 5(1) of Directive 2001/29 covers any form of use of a work which does not require the copyright holder’s consent or which is explicitly authorised by the copyright holder; in the event of use of a work in the form of a reproduction, the copyright holder’s consent is not required if the reproduction is authorised on the basis of one of the exceptions laid down by Article 5(2) and (3) of Directive 2001/29, if the Member State concerned has transposed that exception or limitation into national law and if the reproduction meets the requirements of Article 5(5) of Directive 2001/29.

ii) Lawful use in the present case (tenth question)

106. By its tenth question, the national court asks whether the lawful use of a work within the meaning of Article 5(1) of Directive 2001/29 covers the scanning by a commercial business of entire newspaper articles,

the subsequent processing of the reproduction and the storing and possible printing of the reproduction consisting of one or more text extracts of 11 words, for use in the business's summary writing, even where the copyright holder has not authorised that activity. The tenth question must in my view be reformulated, (48) and I will therefore set out below the reasons for the reformulation.

– Reformulation of the tenth question

107. The tenth question referred is set out in such a way that the condition of lawful use concerns all of the acts of reproduction which take place during the process of production of extracts from newspaper articles used by Infopaq. Formulated in this way, the question referred follows from a misunderstanding of Article 5(1) of Directive 2001/29. In fact the condition of lawful use of a work cannot be interpreted as meaning that the temporary acts of reproduction must constitute in themselves a lawful use of the work; that condition must on the contrary be understood as meaning that the temporary acts of reproduction must enable another use of the work which must itself be lawful. To take an example: if an education establishment makes a copy during a course and for illustration purposes – that is, a reproduction – of a given work, such as a video recording of an educational programme, and during that act of reproduction a copy of the video recording is temporarily registered in the RAM memory of the computer, that temporary copy which is created in the RAM memory enables a reproduction for illustration purposes during the course which is lawful pursuant to Article 5(3)(a) of Directive 2001/29. (49) The temporary copy which is created in the RAM memory is however lawful only if all of the other conditions of Article 5(1) of Directive 2001/29 are fulfilled, that is, if it is transient or incidental, if it is an integral and essential part of a technological process and if it has no independent economic significance. If the condition of lawful use of Article 5(1) of Directive 2001/29 were to be interpreted as meaning that the temporary act of reproduction had to be a lawful use, that would mean that, for the purposes of the lawfulness of that temporary act of reproduction, the other conditions of that article would no longer need to be fulfilled and Article 5(1) of Directive 2001/29 would be devoid of purpose.

108. When analysing Article 5(1) of Directive 2001/29, it is therefore necessary to clearly distinguish between the temporary acts of reproduction which must fulfil all of the conditions of that article and the final act of reproduction or another form of use of the work which those temporary acts of reproduction make possible and which must constitute a lawful use of the work. In the present case, the use of the work, that is, the newspaper article, takes the form of the printing of an extract from a newspaper article composed of 11 words.

109. It is not explicitly indicated in the order for reference whether those extracts from newspaper articles are used as an internal basis for the drafting of summaries of newspaper articles or only to assist in the choice of newspaper articles summaries of which are drawn up. There is no information in the order for reference as to

the method of production of summaries or whether they may contain a word-for-word quotation of the extract of 11 words. As the facts are not clear, it cannot be ruled out that Infopaq sends the extracts of 11 words directly to its customers, thus allowing them to deduce from the context which newspaper articles would be of interest to them. In any case, the extracts of 11 words are used in that way or in another in the context of Infopaq's commercial activity of drawing up summaries of newspaper articles.

110. Apart from that, it cannot in my view be claimed in the present case that the drawing up of summaries, which Infopaq sends to its customers, constitutes a use of the work and that the condition of lawful use of the work within the meaning of Article 5(1) of Directive 2001/29 is fulfilled, to the extent that the drawing up of summaries is permissible under Danish law. One cannot understand from the present case that the process of production of extracts from newspaper articles, as used by Infopaq, makes possible the drawing up of summaries. It is certainly true that the process for the production of those extracts simplifies, probably to a significant extent, the drawing up of summaries, but it cannot be maintained that it makes it possible. Infopaq could also produce summaries of press articles entirely without the use of the extracts of 11 words prepared beforehand. The drawing up of summaries is moreover not necessarily the consequence of the process for the production of the extracts of 11 words, for which reason one cannot interpret the drawing up of summaries as the last stage of the process for the production of the extracts which the latter makes possible.

111. The tenth question referred must therefore be understood as meaning that the national court asks essentially whether the scanning of entire newspaper articles, the subsequent processing of the reproduction and the storing of the work, consisting of one or more text extracts of 11 words, enables a lawful use of the work within the meaning of Article 5(1) of Directive 2001/29, in so far as the text extracts of 11 words are printed and used in the business's activity of drawing up summaries of newspaper articles, although the holder of the relevant rights has not given authorisation.

– Analysis of and reply to the tenth question

112. For an analysis of this question, the general point may first be made that the use of newspaper articles in the form of a reproduction in part, that is, of extracts of 11 words, is lawful in two cases: if the copyright holder explicitly authorises that reproduction in part, or if that reproduction in part can be justified on the basis of one of the exceptions and limitations to the reproduction right laid down by Directive 2001/29 in Article 5(2) and (3), if Denmark has provided for them in national law and if it fulfils the requirements of Article 5(5) of that Directive.

113. In the present case, it is evident from the facts that the copyright holders have not given their authorisation for the production of the extracts from newspaper articles and the production of those extracts cannot be lawful on that basis. I will therefore examine below whether in the present case the use of newspaper arti-

cles in the form of the reproduction of extracts from those newspaper articles can be lawful under one of the exceptions and limitations of Article 5(2) and (3) of Directive 2001/29. I will examine whether that act of reproduction meets the requirements of Article 5(5) of Directive 2001/29 in the context of the reply to the thirteenth question referred, which concerns the interpretation of Article 5(5) of that Directive.

114. Two points should be made concerning the exceptions and limitations to the reproduction right contained in Article 5(2) and (3). First, the exceptions and limitations contained in Article 5(2) and (3) are optional and the Member States only transpose them into national law if they choose to. This is evident from the introductory sentence to Article 5(2) and (3) of the Directive, which provides that the Member States ‘may’ provide for exceptions and limitations. (50) In the present case, the national court has not provided any information as to the exceptions and limitations which are provided for in national legislation in Denmark, for which reason I will merely analyse in this Opinion how the various exceptions and limitations should be interpreted; the final analysis on the basis of those exceptions and limitations has however to be carried out by the national court. In the present case, the national court will therefore have to examine which of the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 have been provided for by Denmark in its national legislation and establish whether a reproduction in part of newspaper articles in the form of extracts of 11 words can constitute a lawful use of the newspaper articles.

115. Secondly, the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 are – as is apparent from recital 32 (51) – listed exhaustively, which means that the Member States cannot introduce into national law exceptions and limitations other than those laid down by the Directive. Denmark cannot therefore make provision in its national law for the reproduction in part of newspaper articles in the form of extracts from those articles to be permissible in so far as it is used in the production of summaries, if that action is not permissible on the basis of one of the exceptions and limitations to the reproduction right laid down by Article 5(2) and (3) of Directive 2001/29.

116. The only exception which could *prima facie* be relevant in the present case is that provided for in Article 5(3)(c), (52) which authorises reproduction in the press and the use of a work in connection with the reporting of current events. (53) That article provides for two exceptions to the reproduction right. The first exception that it authorises is ‘reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics ... in cases where such use is not expressly reserved, and as long as the source, including the author’s name, is indicated’. The second exception that it authorises is ‘use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author’s

name, is indicated, unless this turns out to be impossible’.

117. The fact remains, in my view, that none of the exceptions provided for in Article 5(3)(c) of Directive 2001/29 – even if Denmark has provided for them in its national legislation – can justify a reproduction in part of newspaper articles in the form of extracts of 11 words.

118. The first exception which is provided for in Article 5(3)(c) cannot justify such reproduction as it is not reproduction in the press as newspapers and magazines traditionally come under. (54) The present case does not concern distribution to the public or making published articles available to the public. (55) Communication to the public in fact includes transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. (56) Making available to the public means on the contrary making available a work to members of the public who are not present at the place where the act of publication originates. (57) Even if Infopaq sent its customers extracts from newspaper articles by email, this would not constitute communication to the public (58) or making available to the public. (59)

119. The reproduction in part of newspaper articles in the form of extracts thereof cannot therefore be justified on the basis of the second exception provided for in Article 5(3)(c) of the Directive, which authorises the reporting of current events. That exception in fact authorises the use of works in connection with the independent activity of providing information on current events; (60) a given work may therefore be used in the context of providing information on a given current event. Moreover, if it was allowed that newspaper articles could be reproduced on the basis of the exception which authorises reporting of current events, that would run counter to the purpose of the first exception provided for in Article 5(3)(c), which specifically concerns reproduction, communication to the public and making available of articles on current economic, political or religious topics or other subject-matter of the same character and which, as regards those articles, constitutes the *lex specialis* in relation to the second exception in that article.

120. The reproduction in part of newspaper articles cannot therefore constitute lawful use of those newspaper articles on the basis of one of the exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29.

121. The answer to the tenth question referred must in my view therefore be that the scanning of entire newspaper articles, subsequent processing of the reproduction and the storing of the reproduction which contains one or more text extracts of 11 words, in circumstances such as those of the present case, do not enable a lawful use of the work within the meaning of Article 5(1) of Directive 2001/29, as the text extracts of 11 words are printed and used in the business’s activity of writing of summaries of newspaper articles, although the rightholder has not authorised that activity.

d) Fourth condition: activities which have no independent economic significance (eleventh and twelfth questions)

122. The fourth condition that a temporary act of reproduction must fulfil pursuant to Article 5(1) of Directive 2001/29 to make it possible to exclude it from the reproduction right is that it must have no independent economic significance. (61)

123. The eleventh and twelfth questions referred concern the interpretation of that condition. By its eleventh question, the national court asks what criterion should be applied to assess whether temporary acts of reproduction have independent economic significance within the meaning of Article 5(1) of Directive 2001/29. By its twelfth question, it asks whether the user's efficiency gains due to temporary acts of reproduction can be taken into account in assessing whether those acts have independent economic significance within the meaning of Article 5(1) of Directive 2001/29.

124. The condition of independent economic significance is not defined in Directive 2001/29. Nor can the meaning of that condition be clarified from the explanatory memorandum to the proposal for the Directive, from which it is apparent that acts of reproduction which have independent economic significance are not covered by the Directive. (62) It is appropriate, when interpreting that condition, to clarify what is meant by stating that a given act of reproduction has economic significance, what is meant by stating that that economic significance is independent, and the person in respect of which (63) that act of reproduction must have independent economic significance.

125. Economic significance means that the temporary act of reproduction must involve an economic advantage for the person who carries it out; indirectly – or, if the copyright holder receives adequate compensation – that that act of reproduction also confers an economic advantage on the copyright holder. (64) The economic advantage may be, for example, a profit or a reduction in costs, an increase in productivity or similar advantages. (65)

126. The key issue in determining whether that economic significance is independent is in my opinion whether the economic advantages stem from the temporary acts of reproduction. There would, for example, be such independent economic significance if Infopaq sent to its customers, in addition to summaries of newspaper articles, scanned copies of those newspaper articles for which it received payment, or if Infopaq's customers had access to the scanned copies, for example via an Internet link. There would also be independent economic significance if Infopaq carried out scanning of newspaper articles as such which it sent to its customers by email and for which it received remuneration from its customers. (66) The mere possibility that Infopaq could obtain a concrete economic advantage from those two acts of reproduction is not sufficient to fulfil the condition of independent economic significance; the company must actually carry out that activity.

127. The answer to the eleventh question referred must in my opinion therefore be that in assessing whether temporary acts of reproduction have independent economic significance within the meaning of Article 5(1) of Directive 2001/29, it is necessary to establish whether an economic advantage stems directly from the temporary acts of reproduction.

128. In the present case, the scanning of newspaper articles, the conversion of the image file into a text file and the storing of extracts (67) from newspaper articles mean for Infopaq a reduction in costs, an increase in productivity and saving of time. It is not disputed that those acts of reproduction have economic significance for Infopaq, but in my opinion they do not have independent economic significance. In the present case, for there to be independent economic significance, it is not sufficient that the act of reproduction only contributes, in a general manner, to making Infopaq more efficient in the production of extracts. The scanning, the conversion of the image file into a text file and the storing of extracts from newspaper articles are in fact only part of a larger process for the production of extracts and do not have independent economic significance. (68) In the present case, the independent economic significance of the scanning, the conversion of the image file into a text file and the storing of extracts from newspaper articles must be assessed separately from the economic significance that the final printing of extracts from newspaper articles has for Infopaq. In my opinion it must therefore be found that the scanning of articles, the conversion of the image file into a text file and the storing of extracts do not have independent economic significance.

129. In my opinion the answer to the twelfth question referred is therefore that the user's efficiency gains from temporary acts of reproduction in circumstances such as those of the present case cannot be taken into account in assessing whether those acts have independent economic significance within the meaning of Article 5(1) of Directive 2001/29.

4. Conclusion concerning the interpretation of Article 5(1) of Directive 2001/29

130. On the basis of the analysis of the conditions of Article 5(1) of Directive 2001/29 and of the replies to the second to twelfth questions referred, I find that it is not possible to justify, on the basis of the exceptions to the reproduction right provided for in Article 5(1) of that Directive, the acts of reproduction which are produced during the process for the production of newspaper articles as used by Infopaq. This means in practice that Infopaq must obtain the copyright holder's consent to the production of the extracts.

E – Interpretation of Article 5(5) of Directive 2001/29 (thirteenth question referred)

131. By its thirteenth question, the national court asks essentially whether the scanning by a business of entire newspaper articles, subsequent processing of the reproduction and the storing and printing of the reproduction, which consists of one or more text extracts of 11 words, without the rightholder's consent, can be regarded as special cases which are not contrary

to a normal exploitation of the newspaper articles and do not unreasonably prejudice the legitimate interests of the rightholder within the meaning of Article 5(5) of Directive 2001/29.

132. Given that I have already established during the analysis of the conditions provided for in Article 5(1) of Directive 2001/29 that the acts of reproduction in the present case do not fulfil the conditions of that article of the Directive, in principle it is not necessary to investigate whether those acts of reproduction fulfil the conditions provided for in Article 5(5). Article 5(5) of Directive 2001/29 in fact sets out additional conditions which acts of reproduction must fulfil, if they fulfil the conditions provided for in Article 5(1). In case the Court finds that the acts of reproduction carried out by Infopaq fulfil the conditions provided for in Article 5(1) of Directive 2001/29, I will briefly examine below whether those acts of reproduction fulfil the conditions provided for in Article 5(5) of the Directive.

133. In the present case, in my opinion it is necessary, when analysing Article 5(5) of Directive 2001/29, to distinguish once more between final acts of reproduction – the printing of extracts from newspaper articles – and the acts of reproduction which those final acts of reproduction make possible – the scanning of newspaper articles, the conversion of the image file into a text file and the storing of the extract from the newspaper article. If the Court in fact finds during its consideration of Article 5(1) of Directive 2001/29 that the final act of reproduction which the temporary acts of reproduction make possible can constitute a lawful use of the work under one of the exceptions and limitations to the reproduction right provided for in Article 5(2) and (3) of the Directive, it would be necessary as regards fulfilment of the condition of lawful use to examine whether that final act of reproduction fulfilled the conditions provided for in Article 5(5) of the Directive. Only then would the condition of lawful use provided for in Article 5(1) of the Directive actually be fulfilled. It is only when that condition is fulfilled – along with all of the other conditions provided for in Article 5(1) of Directive 2001/29 – that one can examine whether the conditions of Article 5(5) of the Directive are also fulfilled by the acts of reproduction which enable that final use. I will therefore first examine below whether the final act of reproduction (the printing of extracts from newspaper articles) fulfils the conditions of Article 5(5) of Directive 2001/29 before further looking at whether those conditions are fulfilled by the acts of reproduction which that act makes possible (scanning of newspaper articles, conversion of the image file into a text file and storing (69) of the extract from the newspaper article).

1. Does the printing of extracts from newspaper articles fulfil the conditions provided for in Article 5(5) of Directive 2001/29?

134. It is apparent from Article 5(5) of Directive 2001/29 that the exceptions and limitations provided for in that article apply, first, only in clearly specified special cases which, secondly, are not contrary to a normal exploitation of the work and which, thirdly, do

not unreasonably prejudice the legitimate interests of the rightholders. (70) Those conditions are cumulative. The conditions provided for in Article 5(5) of Directive 2001/29, which are regularly referred to by legal commentators as the ‘three-step test’, (71) were included in the Directive following the model of international treaties, in particular Article 9(2) of the Berne Convention, (72) Article 10 of the World Intellectual Property Organization Copyright Treaty (73) and Article 13 of the TRIPS Agreement. (74) As is apparent from recital 44 in the preamble to Directive 2001/29, the exceptions and limitations provided for by the Directive must be applied in a manner consistent with international obligations. (75) Article 5(5) of Directive 2001/29 must therefore be interpreted taking account of those international treaties.

135. The first condition provided for in Article 5(5) of Directive 2001/29 is that the exceptions and limitations apply only in particular given cases. That condition means that the exceptions and limitations must be clearly defined and must be based on specified particular objectives. (76) Concerning the exception provided for in Article 5(3)(c), the particular objective on which that exception is based is informing the public about current events; it is however also the case that that this exception does not exclude the at least indirectly commercial objective of providing information on current events. (77)

136. If the Court finds that the reproduction of extracts from newspaper articles constitutes a lawful use pursuant to Article 5(3)(c) of Directive 2001/29, that would implicitly be on the assumption that the reproduction of extracts from newspaper articles constitutes informing the public. It can certainly be stated that that reproduction in part of newspaper articles in the form of extracts does not correspond entirely to that objective and that its primary objective is commercial, the provision of information being a secondary objective. However, when, for example, a journal publishes an article from another journal, when one hears on the radio a part of a newspaper article or records a certain part of an exhibition during a television programme on that exhibition, these media use the works not only to inform the public, but also on the contrary for commercial advantage. One can therefore, in my opinion, also state concerning the reproduction of extracts from newspaper articles that, when they are used to draw up summaries of those articles, they are used to inform the public. In my opinion it can therefore be found that this is a special case within the meaning of the first condition of Article 5(5) of Directive 2001/29. The first condition of Article 5(5) of Directive 2001/29 is therefore fulfilled as regards the printing of extracts from newspaper articles.

137. The second condition provided for in Article 5(5) of Directive 2001/29 requires that the particular cases in which the exceptions and limitations apply are not contrary to a normal exploitation of the work. The normal exploitation of newspaper articles means that the newspapers in which the articles are published are sold and that a profit is made therefrom; the economic advantages which may be made from newspaper arti-

cles must go to the copyright holders. (78) If the effect on the newspaper market is noticeable and the sale of newspapers diminishes, this goes against normal exploitation. (79)

138. The reproduction of extracts from newspaper articles allows Infopaq to identify rapidly which articles are important and of which a summary must be drawn up. Infopaq can thus draw up summaries of all newspaper articles, for which reason its customers no longer need to buy newspapers. (80) The reproduction of extracts from newspaper articles therefore in my opinion affects the normal exploitation of those newspapers and the second condition of Article 5(5) of Directive 2001/29 is consequently not fulfilled.

139. The third condition provided for in Article 5(5) of Directive 2001/29 is that the particular cases in which the exceptions and limitations apply do not unreasonably prejudice the legitimate interests of the rightholders. In the context of the third condition, the mere effect on the legitimate interests of the rightholders – who are ultimately affected by each exception and limitation – is not sufficient; that effect cannot on the contrary be unjustified. (81) On this occasion the quantitative and qualitative nature of the effect must be taken into account. (82)

140. In the present case, an extract from a newspaper article is produced for all of the articles containing the relevant search words. If the search word appears frequently in those articles, that means quantitatively that extracts from newspaper articles may be produced for numerous articles. If several different search words appear in the same article, that also means that several extracts may be produced for an article. I have already found when analysing the second condition of Article 5(5) of Directive 2001/29 that the reproduction of those extracts has an indirect effect when summaries are produced on the sale of the newspaper articles, for which reason the copyright holders also have a legitimate interest in the profits made by Infopaq. Given that the extracts are produced for a large number of articles, that constitutes in my opinion an unreasonable prejudice to the legitimate interests of the rightholders. In my view it must therefore be found, concerning the printing of extracts from newspaper articles, that the third condition provided for in Article 5(5) of Directive 2001/29 is not fulfilled either.

141. The consequence of the fact that the printing of extracts from newspaper articles does not fulfil the third and fourth conditions provided for in Article 5(5) of Directive 2001/29 is that it cannot constitute a lawful use of the newspaper articles within the meaning of Article 5(1) of that directive.

2. Do temporary acts of reproduction fulfil the conditions of Article 5(5)?

142. As I found in point 141 of this Opinion that the printing of extracts from newspaper articles cannot constitute a lawful use of newspaper articles, it should be found that the scanning, the conversion of the image file into a text file and the storing (83) of extracts from newspaper articles do not enable a lawful use of the work and that thus they do not fulfil the conditions pro-

vided for in Article 5(1) of Directive 2001/29. In so far as those acts of reproduction cannot be justified on the basis of Article 5(1) of Directive 2001/29, they cannot be justified independently on the basis of the conditions provided for in Article 5(5) of that Directive. The conclusion must therefore be that the temporary acts of reproduction do not fulfil the conditions of Article 5(5) of that directive.

3. Conclusion concerning the interpretation of Article 5(5) of Directive 2001/29

143. Having regard to the analysis undertaken of Article 5(5) of Directive 2001/29, in my opinion the answer to the thirteenth question referred should be that the scanning by a commercial business of entire newspaper articles, the subsequent processing of the reproduction, and the storing and printing of part of the reproduction, consisting of one or more text extracts of 11 words, in circumstances such as those of the present case, cannot be considered as particular cases which are not contrary to a normal exploitation of newspaper articles and do not unreasonably prejudice the legitimate interests of the rightholder within the meaning of Article 5(5) of Directive 2001/29.

F – Conclusion

144. The analysis undertaken in this Opinion has shown that all of the acts carried out by Infopaq in the context of the process for the production of extracts from newspaper articles are acts of reproduction within the meaning of Article 2 of Directive 2001/29. Those acts of reproduction cannot be permissible on the basis of an exception to the reproduction right as provided for by Article 5(1) of Directive 2001/29 and they do not fulfil the requirements of Article 5(5) of that directive. Infopaq must therefore obtain the copyright holder's consent to carry out those acts.

VII – Conclusion

145. Having regard to all of the foregoing, I suggest that the Court reply as follows and in the same order to the questions referred by the Højesteret, in the circumstances of the case:

(1) The storing and subsequent printing of an extract from a newspaper article which contains the search word and the five words which precede and follow it must be considered as a reproduction within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

(2) The decisive factor which is relevant to whether a given act of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29 is that the reproduction only lasts for a very brief period, even if it is necessary during the assessment to take into account all of the circumstances of the individual case.

(3) If a temporary act of reproduction is carried out by processing a text file on the basis of an image file and if those two files are deleted, in circumstances such as those of the present case, that act of reproduction must be considered as transient within the meaning of Article 5(1) of Directive 2001/29.

(4) The national court must, on the basis of the criteria laid down in the reply to the second question referred, determine whether the act of reproduction can be considered as transient within the meaning of Article 5(1) of Directive 2001/29, where part of the reproduction which consists of one or more extracts of 11 words is stored.

(5) An act of reproduction cannot be considered as transient within the meaning of Article 5(1) of Directive 2001/29 if, in circumstances such as those of the present case, part of the reproduction which consists of one or more extracts of 11 words is printed.

(6) The stage of the technological process at which temporary acts of reproduction take place is irrelevant to whether they constitute an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29.

(7) Where temporary acts of reproduction consist of manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium, in circumstances such as those of the present case, those acts of reproduction constitute an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29.

(8) In circumstances such as those of the present case, the printing of an extract is not a temporary act of reproduction, for which reason it cannot fall within Article 5(1) of Directive 2001/29 and consequently it is irrelevant whether that act of reproduction can be an integral and essential part of a technological process.

(9) The lawful use of a work within the meaning of Article 5(1) of Directive 2001/29 covers any form of use of a work which does not require the copyright holder's consent or which is explicitly authorised by the copyright holder; in the event of use of a work in the form of a reproduction, the copyright holder's consent is not required if the reproduction is authorised on the basis of one of the exceptions laid down by Article 5(2) and (3) of Directive 2001/29, if the Member State concerned has transposed that exception or limitation into national law and if the reproduction meets the requirements of Article 5(5) of Directive 2001/29.

(10) The scanning of entire newspaper articles, subsequent processing of the reproduction and the storing of the reproduction which contains one or more text extracts of 11 words, in circumstances such as those of the present case, do not enable a lawful use of the work within the meaning of Article 5(1) of Directive 2001/29, as the text extracts of 11 words are printed and used in the business's activity of writing of summaries of newspaper articles, although the rightholder has not authorised that activity.

(11) In assessing whether temporary acts of reproduction have independent economic significance within the meaning of Article 5(1) of Directive 2001/29, it is necessary to establish whether an economic advantage stems directly from the temporary acts of reproduction.

(12) The user's efficiency gains from temporary acts of reproduction in circumstances such as those of the present case cannot be taken into account in assessing

whether those acts have independent economic significance within the meaning of Article 5(1) of Directive 2001/29.

(13) The scanning by a commercial business of entire newspaper articles, the subsequent processing of the reproduction, and the storing and printing of part of the reproduction, consisting of one or more text extracts of 11 words, in circumstances such as those of the present case, cannot be considered as particular cases which are not contrary to a normal exploitation of newspaper articles and do not unreasonably prejudice the legitimate interests of the rightholder within the meaning of Article 5(5) of Directive 2001/29.

1 – Original language: Slovenian.

2 – OJ 2001 L 167, p. 10.

3 – This footnote only concerns the Slovenian version of this Opinion.

4 – Bekendtgørelse af lov om ophavsret, No 763 of 30 June 2006 (consolidated version of the Law on copyright, No 763 of 30 June 2006). The translation into English of the consolidated version of the Danish Law on copyright is available on the website of the Danish Minister for Culture at: www.kum.dk/sw832.asp.

5 – The order for reference does not explain how these summaries are drawn up or what their exact content is. It is also not clearly indicated what the link is between these summaries and the clippings of newspaper articles composed of the search word and the five words preceding and following it (see point 15 of this Opinion). It is not explicitly indicated anywhere in the order for reference that the extracts of 11 words are used exclusively for internal purposes, or whether it is also possible that these extracts are sent to Infopaq's customers.

6 – This is a TIFF (Tagged Image File Format) file.

7 – This is an OCR (Optical Character Recognition) server.

8 – ASCII is the acronym for American Standard Code for Information Interchange.

9 – This footnote only concerns the Slovenian version of this Opinion.

10 – This footnote only concerns the Slovenian version of this Opinion.

11 – In its questions, the national court uses the expression 'Infosoc Directive' for Directive 2001/29; 'Infosoc' is the abbreviation of the English expression 'information society'. Because of the subsequent use of the abbreviation for that Directive in this Opinion I will use the expression 'Directive 2001/29'.

12 – For the Austrian Government's position, see point 26 of this Opinion.

13 – Directive 2001/29 places particular emphasis on protection of copyright and related rights in the information society but is not limited to that area. Its purpose is, on the one hand, through harmonisation of certain aspects of copyright and related rights in the information society, to participate in the functioning of the internal market and, on the other hand, to implement certain international obligations in this area.

Concerning the latter point, this means primarily, as may be seen from recital 15 in the preamble to Directive 2001/29, the implementation of obligations under two international conventions adopted in the context of the World Intellectual Property Organisation (WIPO), the ‘WIPO Copyright Treaty’ and the ‘WIPO Performances and Phonograms Treaty’. See, in the legal literature, for example, Lehmann, M., ‘The EC Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society – A Short Comment’, *International review of industrial property and copyright law*, No 5/2003, p. 521.

14 – See, to that effect, the Green Paper ‘Copyright and related rights in the information society’ COM(95) 382 final p. 49; Vivant, M., ‘Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, in Lodder, A.R., Kaspersen, H.W.K. (eds), *Edirectives: Guide to European Union Law on E-Commerce*, Kluwer Law International, Haag 2002, p. 98; Lehmann, M., *op. cit.* (footnote 13), p. 523, footnote 18.

15 – See, to that effect, the Green Paper ‘Copyright and related rights in the information society’ COM(95) 382 final.

16 – Allowing the development and normal functioning of new technologies means, for example, that reproduction which is technically necessary for the normal functioning of the Internet or for the use of software is authorised. That is clearly apparent from, for example, recital 33 in the preamble to Directive 2001/29, under which it is necessary to exclude from the reproduction right acts which enable browsing and the making of ‘cache’ copies; the requirement that the reproduction right does not make impossible the normal functioning of new technologies also follows from other directives such as Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes (OJ 1991 L 122, p. 42), which provides in its 17th recital that ‘the exclusive rights of the author to prevent the unauthorised reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer’.

17 – See, for example, Case C-306/05 SGAE [2006] ECR I-11519, paragraph 31; Case C-357/98 Yiadom [2000] ECR I-9265, paragraph 26; and Case C-245/00 SENA [2003] ECR I-1251, paragraph 23.

18 – See, in the legal literature, for example, Vivant, M., *op. cit.* (footnote 14), p. 98, who defines reproduction as ‘fixation’ of the work in a medium. Kritharas, T., ‘The Challenge of Copyright in Information Society. Copyright on the Internet: Current Legal Aspects’, *Revue hellénique de droit international*, No 1/2003, p. 22 (with references to United Kingdom case-law) describes the reproduction right in graphic terms: ‘What is worth copying is, prima facie, worth protecting [by copyright]’.

19 – The objective of a high level of protection is apparent in particular from recital 9 in the preamble to Directive 2001/29, which provides that ‘[a]ny harmoni-

sation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation’; this objective also follows indirectly from recitals 4 and 10. Recital 4 provides that ‘[a] harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation’; recital 10 in the preamble to the Directive provides that authors must ‘receive an appropriate reward for the use of their work’ and that ‘[a]dequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward’. The requirement of a high level of protection which allows them to receive an appropriate reward for the use of their work is confirmed by the case-law: see in that respect SGAE, *op. cit.* (footnote 17), paragraph 36.

20 – The reproduction in part of an image can also be given as an example. If the image represents a figure on a white background, it cannot be determined on the basis of the photograph (that is, the reproduction), part of which is a white background, which image it is. If however there is in the photograph a part of a figure and it is clear that it is an exact reproduction of that image, there is reproduction in part. I will also give a more extreme example: if in the extracts from newspaper articles produced by Infopaq there was only one word, for example ‘and’ or only the name of a given company, it would not be possible to state which newspaper article that extract came from and in that case there would not be reproduction in part.

21 – I note as a comparison, concerning problems in determining the length of quotations, that in the context of commentaries on Article 10(1) of the Berne Convention for the Protection of Literary and Artistic Works (of 9 September 1886, completed at Paris on 4 May 1896, amended at Berlin on 13 November 1908, completed at Berne on 20 March 1914, amended at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, at Paris on 24 July 1971, and amended on 28 September 1979), which authorises quotations, the question of an upper permissible limit in respect of quotations was excluded and it has been stated that it would be difficult to apply a quantitative limitation on length. See for example Ricketson, S., Ginsburg, J.C., *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*, Vol. I, Oxford University Press, New York 2005, p. 788, section 13.42; Ricketson, S., *The Berne Convention for the protection of literary and artistic works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College; Kluwer, London 1987, p. 493, section 9.23.

22 – For poems and well-known quotations, a few words suffice to constitute reproduction. Thus for example the quotation ‘Et tu, Brute?’ contains only three words, but there can be no doubt that this is a reproduction in part of the words of the play ‘Julius Caesar’ by William Shakespeare. If on the contrary as an example three words are taken from an extract from a newspaper article mentioned by the national court (see point 15 of

this Opinion) – ‘sale of a telecommunications group’ – it is very difficult to state with certainty that it is a specific reproduction in part from a given newspaper article.

23 – See point 14 of this Opinion.

24 – See point 25 of this Opinion.

25 – Explanatory memorandum to the proposal for a European Parliament and Council Directive on the harmonisation of copyright and certain related rights in the information society, COM(97) 628 final, p. 29, paragraph 3.

26 – Examples of acts of reproduction which must be excluded under Article 5(1) are also cited in the report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, SEC(2007) 1556, p. 3: reproductions on internet routers, reproductions created during browsing, in RAM (Random Access Memory) memory or in cache memory.

27 – See, to that effect, for example Lehmann, M., *op. cit.* (footnote 13), pp. 523–524.

28 – Hugenholtz, P.B., ‘Caching and Copyright: The Right of Temporary Copying’, *European Intellectual Property Review*, No 10/2000, p. 482 – he defines ‘caching’ as the ‘automatic creation of temporary digital copies of data ... in order to make the data more readily available for subsequent use’.

29 – Kritharas, T., *op. cit.* (footnote 18), p. 34, states that Directive 2001/29, by virtue of Article 5(1), excludes the creation of ‘cache’ copies from the reproduction right. See, for example, Hugenholtz, P. B., *op. cit.* (footnote 28), p. 482 et seq., who, from the point of view of the protection of copyright, analyses different types of prememorisation (caching).

30 – This point is also confirmed by the explanatory memorandum to the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society, COM(97) 628 final, p. 29, paragraph 3, from which it is apparent that the exception in Article 5(1) concerns the Internet as well as acts of reproduction not taking place on the Internet. Thus, for example, Plaza Penadés, J., ‘Propiedad intelectual y sociedad de la información (la Directiva comunitaria 2001/29/CE)’, in de Paula Blasco Gascó, F. (ed.), *Contratación y nuevas tecnologías*, Consejo General del Poder Judicial, Madrid 2005, p. 147.

31 – RAM memory (Random Access Memory) functions in such a way that the data are temporarily stored there to enable the functioning of the computer; when the user switches off the computer the data stored in the RAM are deleted. See, to that effect, Kritharas, T., *op. cit.* (footnote 18), p. 22; Westkamp, G., ‘Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law’, *George Washington International Law Review*, No 5/2004, p. 1057, note 2.

32 – See point 101 et seq. of this Opinion.

33 – This information is given by the national court in paragraph 2 of the order for reference describing the process for the production of extracts from newspaper articles.

34 – See the study ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, Institute for Information Law, University of Amsterdam, Netherlands, 2007, available at: http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf, p. 23, which considers lasting reproduction to mean a ‘tangible permanent copy’, and temporary reproduction to mean a ‘non-visible temporary copy’.

35 – See point 101 et seq. of this Opinion.

36 – The national court uses the term ‘temporary act of reproduction’; as in point 71 of this Opinion I have already pointed out that it is not clear whether the storing of an extract consisting of 11 words is a temporary act of reproduction, in considering the questions referred I will use the expression ‘act of reproduction’.

37 – To this effect see also the study ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, *op. cit.* (footnote 34), p. 32, which states that the term ‘transient’ in Article 5(1) of Directive 2001/29 concerns a ‘very short lifetime’.

38 – This is also clear from the usual meanings of ‘transient’ and ‘temporary’ in various languages. In English the term ‘temporary’ means ‘lasting for only a limited period of time’ while the term ‘transient’ means ‘quickly passing away’; see the *Oxford Dictionary of English*, 2nd edition, Oxford University Press, Oxford 2005. Similarly in German the term ‘vorübergehend’ (temporary) is defined as of a ‘certain period of time; temporary’, while ‘flüchtig’ (transient) is (at point 3 of the definition of ‘transient’) defined as ‘quickly passing away, which does not last long’; see *Duden – Deutsches Universalwörterbuch*, 6th edition, Mannheim 2006. In French the term ‘provisoire’ (temporary) means ‘only lasting for a limited time, while waiting for something definitive’, while ‘transitoire’ (transient) means ‘which does not last’; see *Nouveau Larousse Encyclopédique*, Vol. 2, Larousse, Paris 2003. In Italian the term ‘temporaneo’ (temporary) means ‘which lasts for a limited period of time’, while ‘transitorio’ (transient) means ‘which lasts briefly’; see *Dizionario Italiano Sabatini Coletti*, Giunti, Florence 1997. It is however the case that there are nuances which must ultimately be drawn from the context to arrive at the meaning in individual cases.

39 – See the study ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, *op. cit.* (footnote 34), p. 32.

40 – *Ibid.*

41 – Legal commentators point out that it is not absolutely clear what that means. See for example Hart, M.,

'The Copyright in the Information Society Directive: An Overview', *European Intellectual Property Review*, No 2/2002, p. 59. Mayer, H.-P., 'Richtlinie 2001/29/EG zur Harmonisierung bestimmter Aspekte des Urheberrechts und der verwandten Schutzrechte in der Informationsgesellschaft', *Europäische Zeitschrift für Wirtschaftsrecht*, No 11/2002, p. 327, who describes that condition as 'problematic'.

42 – This dilemma in the interpretation of the condition that the temporary act of reproduction must be an integral and essential part of a technological process is raised for example in the study 'Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society', *op. cit.* (footnote 34), p. 33. See also Spindler, G., 'Europäisches Urheberrecht in der Informationsgesellschaft', *Gewerblicher Rechtsschutz und Urheberrecht*, No 2/2002, p. 111.

43 – Such as Spindler, G., *op. cit.* (footnote 42), p. 111; and the study 'Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society', *op. cit.* (footnote 34), p. 33.

44 – The explanatory memorandum to the proposal mentions 'certain acts of reproduction which are dictated by technology'; Explanatory memorandum to the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society, COM(97) 628 final, p. 29.

45 – This footnote only concerns the Slovenian version of this Opinion.

46 – Communication of the work to the public, making available to the public or distribution of the work.

47 – Concerning the fact that the condition of lawful use concerns lawful use on the basis of Article 5(2) and (3) of Directive 2001/29, see, for example, Waelde, C., MacQueen, H., 'The Scope of Copyright', *Electronic Journal of Comparative Law*, No 3/2006, p. 63; see also the study 'Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society', *op. cit.* (footnote 34), p. 34, which states that the condition of lawful use of Article 5(1) concerns legal norms outside Article 5(1).

48 – See point 111 of this Opinion.

49 – It is stated, for example, in the study 'Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society', *op. cit.* (footnote 34), p. 34: the reproduction of a work in the RAM memory which occurs at the same time as the making of a private use copy in accordance with (a national implementation of) Article 5(2)(b) of Directive 2001/29 may be exempted from the reproduction right since the use it enables – the making of a private use copy – is lawful.

50 – Article 5(2) of Directive 2001/29 provides for exceptions and limitations to the reproduction right provided for in Article 2 of the Directive, while Article 5(3) provides for exceptions and limitations to the reproduction right provided for in Article 2 and to the right of communication of works to the public and the right of making available to the public the subject-matter of related rights provided for in Article 3 of that Directive.

51 – Recital 32 in the preamble to Directive 2001/29 provides that the 'Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right'.

52 – It should be added in connection with that article that it was included in Directive 2001/29 following the model of Article 10bis of the Berne Convention for the Protection of Literary and Artistic Works, *op. cit.* (footnote 21). More precisely, the first exception provided for in Article 5(3)(c) was included in Directive 2001/29 following the model of Article 10bis(1) of the Berne Convention, while the second exception provided for in Article 5(3)(c) was included in Directive 2001/29 following the model of Article 10bis(2) of the Berne Convention.

53 – The other exceptions cannot be relevant in the present case. I note in particular, in connection with the exception provided for in Article 5(3)(d), which authorises 'quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose', that in the present case the extracts from newspaper articles could certainly have characteristics of quotations, but not quotations for purposes such as criticism or review. Those quotations are not in fact used for criticisms or reviews of the newspaper articles in question but are on the contrary used for the production of summaries of the newspaper articles.

54 – See, for example, Berger, C., 'Elektronische Pressespiegel und Informationsrichtlinie. Zur Vereinbarkeit einer Anpassung des § 49 UrhG an die Pressespiegel-Entscheidung des BGH mit der Informationsrichtlinie', *Computer und Recht*, No 5/2004, p. 363; Glas, V., *Die urheberrechtliche Zulässigkeit elektronischer Pressespiegel. Zugleich ein Beitrag zur Harmonisierung der Schranken des Urheberrechts in den Mitgliedstaaten der EU*, Mohr Siebeck, Tübingen 2008, p. 131. It is also apparent from legal commentary on the interpretation of Article 10bis(1) of the Berne Convention on the model of which the first exception provided for in Article 5(3) was included in Directive 2001/29, that newspapers and magazines generally fall within that exception: see for example Ricketson, S., *op. cit.* (footnote 21), p. 501, section 9.30, and p. 503, section 9.32. Legal commentators also state that Article 10bis(1) of the Berne Convention does not in principle prevent extension to online editions of newspapers and

magazines: see on that subject Ricketson, S., Ginsburg, J.C., op. cit. (footnote 21), p. 801, paragraph 4.

55 – The right of communication of works to the public and the right of making works available to the public are provided for in Article 3(1) of Directive 2001/29, which provides that ‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them’.

56 – Directive 2001/29 describes communication to the public in recital 23 in the preamble, from which it is apparent that it covers ‘all communication to the public not present at the place where the communication originates’ and includes ‘any such transmission or retransmission of a work to the public by wire or wireless means, including broadcastings’. This would include for example public performance, broadcasting, and transmission via cable or satellite of works.

57 – Making available to the public is described in the recital 24 in the preamble to the Directive, from which it is apparent that this covers ‘all acts of making available ... to members of the public not present at the place where the act of making available originates’. It is apparent from legal commentary concerning the WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), which are transposed into Community law by Directive 2001/29, that making available to the public means making available to the public via information systems thanks to which a given work may be obtained; see Ficsor, M., *The Law of Copyright and the Internet. The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford University Press, New York 2002, p. 183, section 4.56. See also Reinbothe, J., von Lewinski, S., *The WIPO Treaties 1996. The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty. Commentary and Legal Analysis*, Butterworths, London 2002, p. 109, paragraph 20.

58 – Sending by email is definitely not transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

59 – Sending individual customers extracts from newspaper articles by email cannot in my opinion be considered as making available to the public. As is apparent from Article 3(2) of Directive 2001/29, the condition for the existence of making available to the public is that members of the public have access at a place and time chosen by them. That condition is however not fulfilled in the case of sending by email because this is specific correspondence with given clients in the context of which those clients do not themselves have access to the reproductions in part of newspaper articles, nor do they chose the time at which they have access to them. Legal commentators also state that transmission of a work by email does not fall under making available to the public. See, for example, von Lewinski, S., ‘Die Multimedia-Richtlinie – Der EG-Richtlinienvorschlag zum Urheberrecht in der In-

formationsgesellschaft’, *MultiMedia und Recht*, No 3/1998, p. 116; Spindler, G., op. cit. (footnote 42), p. 108.

60 – Glas, V., op. cit. (footnote 54), p. 144. Such an interpretation is also confirmed by Article 10bis(2) of the Berne Convention, on the model of which this exception was included in Directive 2001/29 and which provides: ‘It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public’ (emphasis added). See Ricketson, S., Ginsburg, J.C., op. cit. (footnote 21), p. 802 (section 13.54), p. 805 (section 13.55).

61 – Legal commentators state that this condition is not found either in international treaties or in national copyright law. See, to that effect, Westkamp, G., op. cit. (footnote 31), p. 1101. See also the study ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, op. cit. (footnote 34), p. 35.

62 – Explanatory memorandum to the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society, COM(97) 628 final, p. 37.

63 – What is essential here is whether the act of reproduction has independent economic significance for the person who carries out the act of reproduction or for the copyright holder.

64 – See the study ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, op. cit. (footnote 34), p. 35, which also argues in this manner and states that – if Article 5(1) of Directive 2001/29 is to have real meaning – independent economic significance cannot be interpreted solely in terms of the interests of rightholders.

65 – Prim. Corbet, J., ‘De ontwerp-richtlijn van 10 december 1997 over het auteursrecht en de naburige rechten in de Informatiemaatschappij’, *Informatierecht/AMI*, No 5/1998, p. 96, who considers that caching has economic significance because it increases the speed of transmission of data, for which reason services which involve transmission of data are more attractive to customers. However, Corbet refers only to economic significance and not independent economic significance. See also Hugenholtz, P.B., Koelman, K., *Digital Intellectual Property Practice Economic Report*, Institute for Information Law (IViR), p. 24, footnote 36, report available at: www.ivir.nl/publications/hugenholtz/PBH-DIPPER.doc.

66 – Legal commentators also state that reproduction which constitutes an actual economic activity in its own

right would have independent economic significance. See to that effect Hugenholtz, P.B., op. cit. (footnote 28), p. 488; Westkamp, G., op. cit. (footnote 31), p. 1098; Hugenholtz, P.B., Koelman, K., op. cit. (footnote 65) p. 24.

67 – This reasoning applies to the storing of newspaper articles if the national court finds that a temporary act of reproduction is involved; if not, the storing of extracts cannot be justified on the basis of Article 5(1) of Directive 2001/29.

68 – See the reasoning of Westkamp, G., op. cit. (footnote 31), p. 1101, who states that it is always necessary to assess the economic significance of temporary acts of reproduction in relation to the most lasting final act of reproduction.

69 – As regards storing of extracts from newspaper articles, this analysis applies if the national court finds that this is a temporary act of reproduction; if not, the storing of extracts cannot be justified on the basis of Article 5(1) of Directive 2001/29.

70 – I would like to clarify in connection with Article 5(5) of Directive 2001/29 that that provision lays down additional conditions for the application of the exceptions and limitations to the reproduction right, to the right of communication to the public, to the right of making available to the public and to the right of distribution of the work or subject-matter of related rights. As is apparent from its wording, Article 5 of Directive 2001/29 concerns the ‘exceptions and limitations provided for in paragraphs 1, 2, 3 and 4’; those paragraphs govern the exceptions and limitations to the reproduction right (paragraphs 2 and 3), to the right of communication to the public and of making available to the public (paragraph 3) and to the distribution right (paragraph 4).

71 – See, for example, Hart, M., op. cit. (footnote 41), p. 61; Kritharas, T., op. cit. (footnote 18), p. 30; Lehmann, M., op. cit. (footnote 13), p. 526.

72 – Berne Convention for the Protection of Literary and Artistic Works, op. cit. (footnote 21). The Community is not a party to the Berne Convention, but it modelled certain provisions of Directive 2001/29 on that convention. See the list of parties to the Berne Convention at: www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15.

73 – The European Community is a party to the World Intellectual Property Organization Copyright Treaty; see the list of parties at: www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16.

74 – Agreement on Trade-Related Aspects of Intellectual Property Rights. The Community is a contracting party to the TRIPS Agreement; the power to conclude that treaty is shared between the Community and the Member States; see the Opinion of the Court of Justice of 15 November 1994 (Opinion 1/94 [1994] ECR I-5267, point 3).

75 – Recital 44 provides moreover that the exceptions and limitations ‘may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter’. That recital therefore refers explicitly to two of the conditions laid down by Article 5(5) of Directive 2001/29.

76 – Such a particular objective could, for example, be the reproduction of a work for educational purposes, for the benefit of invalids or for public security. See, concerning the particular exceptions in those areas, Article 5(3)(a), (b) and (e) of Directive 2001/29. See Ricketson, S., Ginsburg, J.C., op. cit. (footnote 21), p. 764, section 13.12; Reinbothe, J., von Lewinski, S., op. cit. (footnote 57), p. 124, paragraph 15.

77 – I note in that respect that the exception provided for in Article 5(3)(c) of Directive 2001/29 does not explicitly state that informing the public about current events cannot have a commercial purpose; in that respect, the exception provided for in Article 5(3)(c) of Directive 2001/29 differs for example from the exceptions provided for in paragraph (2)(b) and (c) of that Article, which expressly prohibits reproductions for private use, or which are made by publicly accessible libraries or establishments, with a commercial purpose.

78 – See to that effect Ficsor, M., op. cit. (footnote 57), p. 516, section C10.03.

79 – Reinbothe, J., von Lewinski, S., op. cit. (footnote 57), p. 125, paragraph 18, state that in the context of this condition the relevant market for exploitation of the work which a given exception could affect must be defined. In that context he puts forward the example (paragraph 19) that the sale of photocopied textbooks would affect the market for school books and could not therefore be justified on the basis of the exception which authorises reproduction for educational purposes.

80 – It is appropriate to undertake this analysis irrespective of the fact that – as stated by the national court and the two parties to the main proceedings – the drawing up of summaries is permissible under Danish law. I note as an example that reading photocopied books is not prohibited, but that does not justify photocopying of a book without restriction.

81 – Ficsor, M., op. cit. (footnote 57), p. 516, section C10.03.

82 – Reinbothe, J., von Lewinski, S., op. cit. (footnote 57), pp. 126-127, paragraph 22.

83 – This analysis applies to the storing of extracts from newspaper articles if the national court finds that this is a temporary act of reproduction; if not the storing of extracts cannot be justified on the basis of Article 5(1) of Directive 2001/29.