

Court of Justice EU, 16 November 2016, Soulier and Doko



#### COPYRIGHT LAW

French legislation which authorizes an approved collecting society to reproduce and commercially exploit out-of-print books and gives authors the right to oppose only under certain circumstances is in breach of Directive 2001/29.

• Having regard to all of the foregoing considerations, the answer to the question is that Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of ‘out-of-print’ books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down.

41 Concerning national legislation such as that at issue in the main proceedings, it must be stated that it gives an approved society the right to authorise the digital exploitation of out-of-print books, while allowing the authors of those books to oppose that practice in advance, within a time limit of six months after their registration in a database established to that effect.

42 Exercise of the right of opposition established by such legislation for the benefit of all the holders of rights in the books concerned, and in particular the authors, thus has the effect of prohibiting the use of those works, whereas the lack of opposition of a given

author within the prescribed period can be construed, with regard to Article 2(a) and Article 3(1) of Directive 2001/29, as the expression of his implicit consent to that use.

[...]

49 Consequently, it must be considered that, when the author of a work decides, in the context of the implementation of legislation such as that at issue in the main proceedings, to put an end to the future exploitation of that work in a digital format, that right must be capable of being exercised without having to depend, in certain cases, on the concurrent will of persons other than those to whom that author had given prior authorisation to proceed with such a digital exploitation and, thus, on the agreement of the publisher holding only the rights of exploitation of that work in a printed format.

50 Secondly, it follows from Article 5(2) of the Berne Convention, which is binding on the Union for the reasons set out in paragraph 32 of the present judgment, that the enjoyment and the exercise of the rights of reproduction and communication to the public given to authors by that convention and corresponding to those laid down in Article 2(a) and 3(1) of Directive 2001/29 may not be subject to any formality.

51 It follows, in particular, that, in the context of legislation such as that at issue in the main proceedings, the author of a work must be able to put an end to the exercise, by a third party, of rights of exploitation in digital format that he holds on that work, and in so doing prohibit him from any future use in such a format, without having to submit beforehand, in certain circumstances, to a formality consisting of proving that other persons are not, otherwise, holders of other rights in that work, such as those concerning its exploitation in printed format.

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#### Court of Justice EU, 16 November 2016

(L. Bay Larsen, M. Vilaras, J. Malenovský (Rapporteur), M. Safjan and D. Šváby)

JUDGMENT OF THE COURT (Third Chamber)

16 November 2016 (\*)

(Reference for a preliminary ruling — Intellectual and industrial property rights — Directive 2001/29/EC — Copyright and related rights — Articles 2 and 3 — Rights of reproduction and communication to the public — Scope — ‘Out-of-print’ books which are not or no longer published — National legislation giving a collecting society rights to exploit out-of-print books for commercial purposes — Legal presumption of the authors’ consent — Lack of a mechanism ensuring authors are actually and individually informed)

In Case C-301/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (Council of State, France), made by decision of 6 May 2015, received at the Court on 19 June 2015, in the proceedings

Marc Soulier,

Sara Doko

v

Premier ministre,  
 Ministre de la Culture et de la Communication,  
 intervening parties:  
 Société française des intérêts des auteurs de l'écrit (SOFIA),  
 Joëlle Wintrebert and Others,  
 THE COURT (Third Chamber),  
 composed of L. Bay Larsen, President of the Chamber,  
 M. Vilaras, J. Malenovský (Rapporteur), M. Safjan and  
 D. Šváby, Judges,  
 Advocate General: M. Wathelet,  
 Registrar: V. Tourrès, Administrator,  
 having regard to the written procedure and further to  
 the hearing on 11 May 2016,  
 after considering the observations submitted on behalf  
 of:  
 – Mr Soulier and Ms Doke, by F. Macrez, avocat,  
 – the Société française des intérêts des auteurs de l'écrit  
 (SOFIA), by C. Caron and C. Fouquet, avocats,  
 – the French Government, by D. Colas and D. Segoin,  
 acting as Agents,  
 – the Czech Government, by M. Smolek and D.  
 Hadroušek and by S. Šindelková, acting as Agents,  
 – the German Government, by T. Henze and M.  
 Hellmann and by D. Kuon, acting as Agents,  
 – the Italian Government, by G. Palmieri, acting as  
 Agent, and by S. Fiorentino, avvocato dello Stato,  
 – the Polish Government, by B. Majczyna, M.  
 Drwięcki and M. Nowak, acting as Agents,  
 – the European Commission, by J. Hottiaux and J.  
 Samnadda and by T. Scharf, acting as Agents,  
 after hearing [the Opinion of the Advocate General](#) at  
 the sitting on 7 July 2016,  
 gives the following

### Judgment

1 The request for a preliminary ruling concerns the interpretation of Articles 2 and 5 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).

2 This request was made in the course of proceedings between, on the one hand, Mr Marc Soulier and Ms Sara Doke and, on the other, the Premier Ministre (Prime Minister of France) and the Ministre de la Culture et de la Communication (French Minister for Culture and Communication) concerning the legality of décret n° 2013-182, du 27 février 2013, portant application des articles L. 134-1 à L. 134-9 du code de la propriété intellectuelle et relatif à l'exploitation numérique des livres indisponibles du XXème siècle (Decree No 2013-182 of 27 February 2013, implementing Articles L. 134-1 to L. 134-9 of the French Intellectual Property Code and relating to the digital exploitation of out-of-print 20th century books) (JORF No 51 of 1 March 2013, p. 3835).

### Legal context

#### International law

#### Berne Convention

3 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'), states, inter alia, in paragraphs 1 and 6 thereof:

*'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, ...*

...

*6. The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.'*

4 According to Article 3(1) and (3) of the Berne Convention:

*'1. The protection of this Convention shall apply to:*

*(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;*

...

*3. The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. ...'*

5 Article 5 of that Convention provides, inter alia, in paragraphs 1 and 2 thereof:

*'1. Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*

*2. The enjoyment and the exercise of those rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.'*

6 Article 9 of that Convention provides, inter alia, in paragraph 1 thereof:

*'Authors of literary and artistic works protected under this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.'*

7 Article 11a of that Convention provides, inter alia, in paragraph 1 thereof:

*'Authors of literary and artistic works shall enjoy the exclusive right of authorising:*

...

*2° any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;*

...

#### WIPO Copyright Treaty

8 On 20 December 1996 the World Intellectual Property Organisation (WIPO) adopted in Geneva the WIPO Copyright Treaty ('the WIPO Copyright Treaty'), which was approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

9 Article 1(4) of the WIPO Copyright Treaty, entitled 'Relation to the Berne Convention', provides: 'Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.'

#### EU law

10 Recitals 9, 15 and 32 of Directive 2001/29 state:

*'(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.*

...

*(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the "digital agenda" and improve the means to fight piracy worldwide. [The European Union] and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the [Union] and the Member States is under way. This Directive also serves to implement a number of the new international obligations.*

...

*(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.'*

11 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;*

...

12 Article 3 of Directive 2001/29, headed 'Right of communication to the public of works and right of

making available to the public other subject matter', provides:

*'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.'*

13 Article 5 of that directive, entitled 'Exceptions and limitations', states, inter alia, in paragraphs 2 and 3 thereof, that the Member States may, in the cases listed therein, provide for various exceptions and limitations to the reproduction right and the right of communication to the public provided for in Articles 2 and 3 of that directive.

#### French law

14 The Loi No 2012-287, du 1er mars 2012, relative à l'exploitation numérique des livres indisponibles du XXème siècle (Law No 2012-287 of 1 March 2012 on the digital exploitation of out-of-print 20th century books) (JORF No 53 of 2 March 2012, p. 3986) added to Title III of Book One of the first part of the Intellectual Property Code, which deals with the exploitation of rights related to copyright, a Chapter IV, entitled 'Special provisions relating to the digital exploitation of out-of-print books', comprising Articles L. 134-1 to L. 134-9 of that code. Some of those articles were subsequently amended or repealed by the Loi No 2015-195, du 20 février 2015, portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel (Law No 2015-195 of 20 February 2015 containing various provisions implementing EU law in the fields of literary and artistic property and cultural heritage) (JORF No 45 of 22 February 2015, p. 3294).

15 Articles L. 134-1 to L. 134-9 of the Intellectual Property Code, as drafted following those two laws, read as follows:

#### **'Article L. 134-1**

*For the purposes of this Chapter, an out-of-print book means a book published in France before 1 January 2001 which is no longer commercially distributed by a publisher and is not currently published in print or in a digital format.*

#### **Article L. 134-2**

*A public database indexing out-of-print books shall be created and made openly available, free of charge, through an online, public communication service. The Bibliothèque nationale de France (National Library of France) shall be responsible for implementing and updating it and for recording the information provided for in Articles L. 134-4, L. 134-5 and L. 134-6.*

...

#### **Article L. 134-3**

*I. When a book has been registered in the database referred to in Article L. 134-2 for more than six months, the right to authorise its reproduction and performance in digital format shall be exercised by a collecting society governed by Title II of Book III of*

this Part and approved for that purpose by the Minister responsible for culture.

With the exception of the case provided for in the third subparagraph of Article L. 134-5, the reproduction and performance of the book in digital format shall be authorised, in return for remuneration, on a non-exclusive basis and for a renewable period of five years.

II. Approved societies shall have standing to bring legal proceedings with a view to protecting the rights that they administer.

III. The approval provided for in I shall be issued having regard to:

...

2° equal representation of authors and publishers among the members and within the executive bodies;

...

5° the fairness of the rules governing the distribution of collected income among successors in title, whether or not they are parties to the publishing contract. The amount of the sums received by the author or authors of the book may not be less than the amount of the sums received by the publisher;

6° the evidentiary measures which the society intends to apply in order to identify and locate rightholders, for the purposes of distributing the collected income;

...

#### **Article L. 134-4**

I. The author of an out-of-print book or a publisher with the right to reproduce printed copies of that book may oppose the exercise by an approved collecting society of the right of authorisation referred to in the first subparagraph of Article L. 134-3(I). Notification of that opposition shall be submitted in writing to the body referred to in the first subparagraph of Article L. 134-2 no later than six months after the book in question has been registered in the database referred to in the same subparagraph.

...

#### **Article L. 134-5**

If, upon expiration of the period laid down in Article L. 134-4(I), the author or publisher has not given notice of opposition, the collecting society shall offer authorisation to reproduce and perform an out-of-print book in digital format to the publisher having the right to reproduce that book in print.

...

The exploitation authorisation referred to in the first subparagraph shall be issued by the collecting society on an exclusive basis for a 10-year period which is tacitly renewable.

...

If the offer referred to in the first subparagraph is not accepted ..., the reproduction and performance of the book in digital format shall be authorised by the collecting society as provided for in the second subparagraph of Article L. 134-3(I).

...

#### **Article L. 134-6**

The author and publisher having the right of reproduction in print of an out-of-print book shall at

any time jointly notify the collecting society referred to in Article L. 134-3 of their decision to withdraw the latter's right to authorise the reproduction and performance of that book in digital format.

The author of an out-of-print book may decide at any time to withdraw from the collecting society referred to in Article L. 134-3 the right to authorise the reproduction and performance of a book in digital format if he provides evidence that he alone holds the rights laid down in L. 134-3. He shall notify it of his decision.

...

#### **Article L. 134-7**

The detailed rules for the application of this Chapter, in particular the arrangements for access to the database provided for in Article L. 134-2, the nature and format of the data collected and the most appropriate publicity measures to ensure that successors in title are as well informed as possible, the conditions for issuing and withdrawing the approval of collecting societies provided for in Article L. 134-3, shall be laid down in a decree of the Conseil d'État (Council of State).

#### **Article L. 134-9**

By derogation from the provisions in the first three subparagraphs of Article L. 321-9, income collected through the exploitation of out-of-print books which it has not been possible to distribute because the recipients could not be identified or located before expiry of the period provided for in the last subparagraph of L. 321-1 shall be used by the approved societies referred to in Article L. 134-3 for initiatives to support creative activities, initiatives to develop writers and initiatives by libraries to promote reading amongst the public.

...

16 The detailed rules for the application of Articles L. 134-1 to L. 134-9 of the Intellectual Property Code were subsequently laid down, pursuant to Article L. 134-7 of that code, by Decree No 2013-182, which inserted, inter alia, Article R. 134-11 into that code, which provides:

*'The publicity measures referred to in Article L. 134-7 shall include an information campaign initiated by the Minister responsible for culture, in conjunction with the collecting societies and the professional organisations in the book sector.*

*That campaign shall include the presentation of the framework for an online public communication service, an online mailing operation, the publication of flyers in the national press and the distribution of banners on news websites.*

*It shall begin on the date laid down in the first subparagraph of Article R. 134-1 and shall continue for a period of six months.'*

#### **The dispute in the main proceedings and the question referred for a preliminary ruling**

17 Within the meaning of the Intellectual Property Code, an 'out-of-print book' means a book published in France before 1 January 2001 which is no longer commercially distributed by a publisher and is not

currently published in print or in digital form. Articles L. 134-1 to L. 134-9 of that code established a legal framework intended to make those books accessible once again by organising their commercial exploitation in digital form. The detailed rules for the application of those provisions were laid down by Decree No 2013-182.

18 By application registered on 2 May 2013, Mr Soulier and Ms Doke, who are both authors of literary works, requested the Conseil d'État (Council of State, France) to annul Decree No 2013-182.

19 In support of their claim, they submit, in particular, that Articles L. 134-1 to L. 134-9 of the Intellectual Property Code establish an exception or a limitation to the exclusive reproduction right laid down in Article 2(a) of Directive 2001/29 and that that exception or limitation is not included among those listed exhaustively in Article 5 thereof.

20 The Syndicat des écrivains de langue française (SELF), the Autour des auteurs association and 35 natural persons subsequently intervened in the proceedings in support of the claim brought by Mr Soulier and Ms Doke.

21 In their respective defences, the Prime Minister and the Minister for Culture and Communication both contested that the claim should be dismissed.

22 SOFIA subsequently intervened in the proceedings, also seeking to have those claims dismissed. SOFIA presents itself as a society made up equally of authors and publishers, mandated to manage the right to authorise the reproduction and representation of out-of-print books in digital form, the public lending right and the remuneration for digital private copying in the field of writing.

23 After dismissing all the pleas of Mr Soulier and Ms Doke that rested on legal bases other than Articles 2 and 5 of Directive 2001/29, the referring court started the examination of the pleas relating to those articles by holding, immediately, that the treatment of that aspect of the case depends on the interpretation to be given of those articles.

24 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

*'Do [Articles 2 and 5] of Directive 2001/29 preclude legislation, such as that [established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code], that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of "out-of-print books", while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down?'*

#### **The question referred for a preliminary ruling**

##### **Preliminary observations**

25 It is common ground, on the one hand, that the national legislation at issue in the main proceedings concerns not only the right to authorise the reproduction of out-of-print books in digital form, within the meaning of Article 2(a) of Directive

2001/29, but also the right to authorise the representation under that form and that such a representation constitutes a 'communication to the public' within the meaning of Article 3(1) of that directive.

26 On the other hand, that legislation does not fall within the scope of any of the exceptions and limitations that the Member States have the option of placing, on the basis of Article 5 of Directive 2001/29, on the rights of reproduction and communication to the public laid down in Article 2(a) and Article 3(1) of that directive. The list of exceptions and limitations authorised by that directive is exhaustive in nature, as is apparent from recital 32 thereof.

27 It therefore follows that Article 5 of Directive 2001/29 appears to be irrelevant for the purposes of the main proceedings.

28 In those circumstances, it must be considered that, by its question, the referring court asks, in essence, whether Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public, in digital form, of out-of-print books, while allowing the authors of those books or their successors in title to oppose or put an end to that practice on the conditions that that legislation lays down.

##### **The Court's reply**

29 Article 2(a) and Article 3(1) of Directive 2001/29 provide, respectively, that the Member States are to grant authors the exclusive right to authorise or prohibit direct or indirect reproduction of their works by any means and in any form and the exclusive right to authorise or prohibit any communication to the public of their works.

30 In that regard, it must be observed, first of all, that the protection conferred by those provisions on authors must be given a broad interpretation (judgments of [16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraph 43](#), and of [1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 96](#)).

31 Therefore, that protection must be understood, in particular, as not being limited to the enjoyment of the rights guaranteed by Article 2(a) and Article 3(1) of Directive 2001/29, but as also extending to the exercise of those rights.

32 Such an interpretation is supported by the Berne Convention, Articles 1 to 21 of which the European Union is required to comply with under Article 1(4) of the WIPO Copyright Treaty, to which the European Union is a party and which Directive 2001/29 is intended, in particular, to implement, as stated in recital 15 thereof. It is apparent from Article 5(2) of that convention that the protection which it guarantees to authors extends both to the enjoyment and to the exercise of the rights of reproduction and communication to the public referred to in Article 9(1)

and Article 11a(1) thereof, which correspond to those protected by Directive 2001/29.

33 Next, it is important to emphasise that the rights guaranteed to authors by Article 2(a) and Article 3(1) of Directive 2001/29 are preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its author (concerning the right of reproduction, see, to that effect, [judgments of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraphs 57 and 74](#), and of [4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162](#), and, concerning the right of communication to the public, see, to that effect, judgments of 15 March 2012, SCF Consorzio Fonografici, C-135/10, EU:C:2012:140, paragraph 75, and of [13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraph 15](#)).

34 It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work (see, to that effect, [judgment of 27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paragraphs 24 and 25](#)).

35 Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.

36 Thus, in a case in which it was questioned about the concept of a 'new public', the Court held that, in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (see, to that effect, judgment of [13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraphs 25 to 28 and 31](#)).

37 However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author's prior consent.

38 In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.

39 Failing any actual prior information relating to that future use, the author is unable to adopt a position on it and, therefore, to prohibit it, if necessary, so that the

very existence of his implicit consent appears purely hypothetical in that regard.

40 Consequently, without guarantees ensuring that authors are actually informed as to the envisaged use of their works and the means at their disposal to prohibit it, it is de facto impossible for them to adopt any position whatsoever as to such use.

41 Concerning national legislation such as that at issue in the main proceedings, it must be stated that it gives an approved society the right to authorise the digital exploitation of out-of-print books, while allowing the authors of those books to oppose that practice in advance, within a time limit of six months after their registration in a database established to that effect.

42 Exercise of the right of opposition established by such legislation for the benefit of all the holders of rights in the books concerned, and in particular the authors, thus has the effect of prohibiting the use of those works, whereas the lack of opposition of a given author within the prescribed period can be construed, with regard to Article 2(a) and Article 3(1) of Directive 2001/29, as the expression of his implicit consent to that use.

43 It does not follow from the decision to refer that that legislation offers a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use.

44 This is all the more true considering that such legislation is aimed at books which, while having been published and commercially distributed in the past, are so no longer. That particular context precludes the conclusion that it can reasonably be presumed that, without opposition on their part, every author of these 'forgotten' books is, however, in favour of the 'resurrection' of their works, in view of their commercial use in a digital format.

45 Admittedly, Directive 2001/29 does not preclude national legislation, such as that at issue in the main proceedings, from pursuing an objective such as the digital exploitation of out-of-print books in the cultural interest of consumers and of society as a whole. However, the pursuit of that objective and of that interest cannot justify a derogation not provided for by the EU legislature to the protection that authors are ensured by that directive.

46 Lastly, it must be stated that legislation such as that at issue in the main proceedings enables, in particular, authors to put an end to the commercial exploitation of their works in digital format, either by mutual agreement with the publishers of those works in printed format or alone, on condition, however, in that second case, that they provide evidence that they alone hold the rights in their works.

47 In that regard, it is important to point out, first, that it follows from the exclusive nature of the rights of

reproduction and communication to the public laid down in Article 2(a) and Article 3(1) of Directive 2001/29 that the authors are the only persons to whom that directive gives, by way of original grant, the right to exploit their works (see, to that effect, [judgment of 9 February 2012, Luksan, C-277/10, EU:C:2012:65, paragraph 53](#)).

48 It follows that, if Directive 2001/29 does not prohibit Member States from granting certain rights or certain benefits to third parties, such as publishers, it is provided that those rights and benefits do not harm the rights which that directive gives exclusively to authors (see, to that effect, [judgment of 12 November 2015, Hewlett-Packard Belgium, C-572/13, EU:C:2015:750, paragraphs 47 to 49](#)).

49 Consequently, it must be considered that, when the author of a work decides, in the context of the implementation of legislation such as that at issue in the main proceedings, to put an end to the future exploitation of that work in a digital format, that right must be capable of being exercised without having to depend, in certain cases, on the concurrent will of persons other than those to whom that author had given prior authorisation to proceed with such a digital exploitation and, thus, on the agreement of the publisher holding only the rights of exploitation of that work in a printed format.

50 Secondly, it follows from Article 5(2) of the Berne Convention, which is binding on the Union for the reasons set out in paragraph 32 of the present judgment, that the enjoyment and the exercise of the rights of reproduction and communication to the public given to authors by that convention and corresponding to those laid down in Article 2(a) and 3(1) of Directive 2001/29 may not be subject to any formality.

51 It follows, in particular, that, in the context of legislation such as that at issue in the main proceedings, the author of a work must be able to put an end to the exercise, by a third party, of rights of exploitation in digital format that he holds on that work, and in so doing prohibit him from any future use in such a format, without having to submit beforehand, in certain circumstances, to a formality consisting of proving that other persons are not, otherwise, holders of other rights in that work, such as those concerning its exploitation in printed format.

52 Having regard to all of the foregoing considerations, the answer to the question is that Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of ‘out-of-print’ books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down.

**Costs**

53 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 (Third Chamber) hereby rules:**

Article 2(a) and Article 3(1) 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 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of ‘out-of-print’ books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down.

[Signatures]

**OPINION OF ADVOCATE GENERAL  
WATHELET**

delivered on 7 July 2016 (1)

Case C-301/15

Marc Soulier,

Sara Doke

v

Ministre de la Culture et de la Communication,  
Premier ministre

(Request for a preliminary ruling from the Conseil d’État (Council of State, France))

(Reference for a preliminary ruling — Directive 2001/29/EC — Copyright and related rights — Exclusive right of reproduction — Article 2 — Right of communication to the public — Article 3 — Exceptions and limitations — Article 5 — National legislation giving a collecting society rights to exploit out-of-print books for commercial purposes — Right of opposition enjoyed by authors or their successors in title)

**I – Introduction**

1. This request for a preliminary ruling, lodged on 19 June 2015 at the Court Registry by the Conseil d’État (Council of State, France), concerns the interpretation of Articles 2 to 5 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)

2. This request was made in the course of proceedings between, on the one hand, Mr Marc Soulier and Ms Sara Doke and, on the other, the Ministre de la Culture et de la Communication (the French Minister for Culture and Communication) and the Premier Ministre (Prime Minister of France) concerning the legality of Decree No 2013-182 of 27 February 2013,

implementing Articles L. 134-1 to L. 134-9 of the code de la propriété intellectuelle (French Intellectual Property Code) and relating to the digital exploitation of out-of-print 20th century books (3) ('the decree at issue').

## II – Legal context

### A – EU law

3. Article 2 of Directive 2001/29, entitled 'Reproduction right' reads as follows:

*'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;*

...

4. Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter' provides, inter alia, as follows in paragraphs 1 and 3 thereof:

*'1. 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.*

...

3. *The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'*

5. Article 4 of that directive, entitled 'Distribution right', provides:

*'1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.*

*2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'*

6. Article 5 of that directive, entitled 'Exceptions and limitations', states, inter alia, in paragraph 2 thereof, that Member States may, in the cases listed therein, provide for various exceptions and limitations to the reproduction right provided for in Article 2.

7. That article also provides, in paragraph 3 thereof, that Member States may, in the cases listed therein, provide for various exceptions and limitations to the rights of reproduction and communication provided for in Articles 2 and 3.

8. Furthermore, Article 5(5) provides as follows:

*'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.'*

### B – French law

### The Law on out-of-print books

9. Loi n° 2012-287, du 1er mars 2012, relative à l'exploitation numérique des livres indisponibles du XXème siècle (Law No 2012-287 of 1 March 2012 on the digital exploitation of out-of-print 20th century books, 'the Law on out-of-print books') (JORF No 53 of 2 March 2012, p. 3986) added to Title III of Book One of the first part of the Intellectual Property Code, which deals with the exploitation of rights related to copyright, a Chapter IV, entitled 'Special provisions relating to the digital exploitation of out-of-print books', comprising Articles L. 134-1 to L. 134-9 of that code. Some of those articles were subsequently amended or repealed by loi No 2015-195, du 20 février 2015, portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel (Law No 2015-195 of 20 February 2015 containing various provisions implementing EU law in the fields of literary and artistic property and cultural heritage) (JORF No 45 of 22 February 2015, p. 3294).

10. Articles L. 134-1 to L. 134-9 of the Intellectual Property Code, as drafted following those two laws, read as follows:

#### **Article L. 134-1**

*For the purposes of this Chapter, an out-of-print book means a book published in France before 1 January 2001 which is no longer being commercially distributed by a publisher and which is not currently published in print or in a digital format.*

#### **Article L. 134-2**

*A public database indexing out-of-print books shall be created and made openly available, free of charge, through an online, public communication service. The National Library of France (Bibliothèque nationale de France) shall be responsible for implementing and updating it and for recording the information provided for in Articles L. 134-4, L. 134-5 and L. 134-6.*

...

#### **Article L. 134-3**

*I. When a book has been registered in the database referred to in Article L. 134-2 for more than six months, the right to authorise its reproduction and performance in digital format shall be exercised by a collecting society governed by Title II of Book III of this Part and approved for that purpose by the Minister responsible for culture.*

*With the exception of the case provided for in the third subparagraph of Article L. 134-5, the reproduction and performance of the book in digital format shall be authorised, in return for remuneration, on a non-exclusive basis and for a renewable period of five years*

*II. Approved societies shall have standing to bring legal proceedings with a view to protecting the rights which they administer.*

*III. The approval provided for in I shall be issued having regard to:*

...

*2° the equal representation of authors and publishers among the members and within the executive bodies;*

...



5° the fairness of the rules governing the distribution of collected income among successors in title, whether or not they are parties to the publishing contract. The author or authors of the book must not receive a lower amount than the publisher.

6° the evidentiary measures which the society intends to apply in order to identify and locate rightholders, for the purposes of distributing the collected income.

...

**Article L. 134-4**

I. The author of an out-of-print book or a publisher with the right to reproduce printed copies of that book may oppose the exercise by an approved collecting society of the right of authorisation referred to in the first subparagraph of Article L. 134-3(I). Notification of that opposition shall be submitted in writing to the body referred to in the first subparagraph of Article L. 134-2 no later than six months after the book in question has been registered in the database referred to in the same subparagraph.

Notice of that opposition shall be recorded in the database referred to in Article L. 134-2.

After expiry of the period referred to in the first subparagraph of paragraph I of this Article, the author of an out-of-print book may oppose the exercise of the right to reproduce or perform that book if he considers that the reproduction or performance of that book is liable to adversely affect his good name or reputation. That right is to be exercised without compensation.

II. A publisher which has given notice of its opposition as provided for in the first subparagraph of paragraph I of this Article shall be required to exploit the out-of-print book in question within two years following that notification. The publisher must provide, by any means, evidence of effective exploitation of the book to the collecting society approved pursuant to Article L. 134-3. If the book is not exploited within the prescribed period, the notice of opposition shall be deleted from the database referred to in Article L. 134-2 and the right to authorise its reproduction and performance in digital format shall be exercised as provided for in the second subparagraph of Article L. 134-3(I).

...

**Article L. 134-5**

If, upon expiration of the period laid down in Article L. 134-4(I), the author or publisher has not given notice of opposition, the collecting society shall offer authorisation to reproduce and perform an out-of-print book in digital format to the publisher having the right to reproduce that book in print.

...

The exploitation authorisation referred to in the first subparagraph shall be issued by the collecting society on an exclusive basis for a 10-year period which is tacitly renewable.

...

In the absence of an opposition from the author providing, by any means, evidence that that publisher does not have the right to reproduce the book in print format, a publisher which has notified its acceptance decision shall be required to exploit the out-of-print

book in question within three years following that notification. He must provide, by any means, evidence to that society that the book is being effectively exploited.

If the offer referred to in the first subparagraph is not accepted or the book is not exploited within the period prescribed in the fifth subparagraph of this Article, the reproduction and performance of the book in digital format shall be authorised by the collecting society as provided for in the second subparagraph of Article L. 134-3(I).

...

**Article L. 134-6**

The author and publisher having the right of reproduction in print of an out-of-print book shall at any time jointly notify the collecting society referred to in Article L. 134-3 of their decision to withdraw the latter's right to authorise the reproduction and performance of that book in digital format.

The author of an out-of-print book may decide at any time to withdraw from the collecting society referred to in Article L. 134-3 the right to authorise the reproduction and performance of a book in digital format if he provides evidence that he alone holds the rights laid down in L. 134-3. He shall notify it of his decision.

...

A publisher which has given notice of its decision as provided for in the first subparagraph shall be required to exploit the book in question within 18 months following that notification. It must, by any means, provide to the collecting society evidence of the effective exploitation of the book.

The society shall notify the decisions referred to in the first two subparagraphs of this Article to all users to whom it has granted authorisation to exploit the book in question. Where the exploitation of a book commences prior to the notification, successors in title cannot oppose its continued exploitation during the remaining period of the authorisation referred to in the second subparagraph of Article L. 134-3(I) or in the third subparagraph of Article L. 134-5, for a maximum of five years and on a non-exclusive basis.

**Article L. 134-7**

The detailed rules for the application of this Chapter, in particular the arrangements for access to the database provided for in Article L. 134-2, the nature and format of the data collected and the most appropriate publicity measures to ensure that successors in title are as well informed as possible, the conditions for issuing and withdrawing the approval of collecting societies provided for in Article L. 134-3, shall be laid down in a decree of the Conseil d'État.

**Article L. 134-9**

By derogation from the provisions in the first three subparagraphs of Article L. 321-9, income collected through the exploitation of out-of-print books which it has not been possible to distribute because the recipients could not be identified or located before expiry of the period provided for in the last subparagraph of L. 321-1 shall be used by the

*approved societies referred to in Article L. 134-3 for initiatives to support creative activities, initiatives to develop writers and initiatives by libraries to promote reading amongst the public.*

...'

11. The detailed rules for the application of Articles L. 134-1 to L. 134-9 of the Intellectual Property Code were laid down in the contested decree.

### **III – The main proceedings and the question referred**

12. The applicants in the main proceedings brought an application, lodged at the secretariat of the judicial section of the Conseil d'État on 2 May 2013, seeking the annulment for misuse of powers of the decree at issue. They submit, in particular, that the Law on out-of-print books, which that decree applies, is not compatible with the limitations and exceptions to the right to authorise the reproduction of a copyright work which are exhaustively set out in Directive 2001/29.

13. The Syndicat des écrivains de langue française (SELF), the Autour des auteurs association and 35 natural persons subsequently intervened in the proceedings in support of the form of order sought by the applicants in the main proceedings.

14. The defendants in the main proceedings contended that the application should be dismissed, submitting, in particular, that the decree at issue does not undermine the objectives of Directive 2001/29 since it does not establish an exception or limitation to the exclusive right of reproduction of a work within the meaning of that directive.

15. The Société française des intérêts des auteurs de l'écrit ('SOFIA') subsequently intervened in the proceedings, also seeking to have the application dismissed. That society had been authorised to exercise digital rights with respect to 'out-of-print' 20th century books by order of the Minister for Culture and Communication of 21 March 2013 (JORF No 76 of 30 March 2013, p. 5420).

16. By decision of 19 December 2013, the referring court referred a priority question on constitutionality to the Conseil constitutionnel (France) concerning the decree at issue. By decision of 28 February 2014, the latter held that Articles L. 134-1 to L. 134-9 of the Intellectual Property Code are consistent with the French Constitution, on the grounds, first, that the scheme of collective management of digital reproduction and performance rights for out-of-print books established thereby does not entail deprivation of property and, secondly, that the framework of conditions within which authors enjoy those rights did not constitute a disproportionate interference with it, in the light of the public interest objective pursued by the legislature.

17. According to the Conseil d'État, in order to ensure that better use is made of a written heritage which has become inaccessible for want of commercial distribution to the public, the decree at issue established a legal framework intended to encourage the digital exploitation of works reproduced in books published in France before 1 January 2001 which are no longer

commercially distributed by a publisher and are not published in print or digital format. It notes that, in that case, the right to authorise the reproduction or performance of those books in digital format is exercised, six months after their registration in a publicly accessible database for which the National Library of France is responsible, by collecting societies approved to do so by the Minister responsible for culture.

18. The Conseil d'État states that the author of an out-of-print book or a publisher with the right to reproduce that work in print may raise an objection to the exercise of that right no later than six months after the book has been registered in the database. Moreover, according to the Conseil d'État, even after that period has expired, the author of an out-of-print book may, at any time, object to the exercise of the reproduction or performance right if he considers that the reproduction or performance of the book may adversely affect his good name or reputation. The Conseil d'État adds that the author of an out-of-print book may, furthermore, decide at any time to withdraw from the collecting society the right to authorise the reproduction and performance of the book in digital format as provided for in Article L. 134-6 of the Intellectual Property Code.

19. Having dismissed all the pleas of the applicants in the main proceedings which rested on legal bases other than Articles 2 and 5 of Directive 2001/29, the referring court considered that the response to the plea of the applicants in the main proceedings relating to those provisions depended on whether those provisions of Directive 2001/29 preclude legislation, such as that established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code, that gives approved collecting societies the right to authorise the reproduction and the performance in digital form of 'out-of-print books', while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down.

20. In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

*'Do [Articles 2 and 5] of Directive 2001/29 ... preclude legislation, such as that [established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code], that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of "out-of-print books", while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down?'*

### **IV – The procedure before the Court**

21. Written observations on the question referred for a preliminary ruling were submitted by Mr Soulier and Ms Doke, SOFIA, the French, German, Italian and Polish Governments and the Commission. SOFIA, the French, Czech and Polish Governments and the Commission presented oral argument at the hearing on 11 May 2016.

22. Mr Soulier and Ms Doke, along with the Commission, submit that the question referred for a preliminary ruling must be answered in the affirmative, while SOFIA and the French, German, and Polish Governments take the view that it should be answered in the negative. For its part, the Italian Government proposes that it be answered in the negative, subject to checks to be conducted by the referring court. The Italian Government proposes that the referring court be requested specifically to check that the legislation at issue does not constitute a disproportionate interference with the rights of authors, by examining, in particular, the provisions relating to the prior notice to be given to them, their rights of opposition and withdrawal and the arrangements for remunerating them.

#### V – Analysis

##### A – The scope of the question referred for a preliminary ruling

23. By its request for a preliminary ruling, the referring court asks the Court whether national legislation that gives approved collecting societies the right to authorise, (4) in return for remuneration, (5) the reproduction and performance (6) in digital format of ‘out-of-print’ books is compatible with Article 2(a) (7) of Directive 2001/29, which establishes an exclusive right of reproduction for authors, and with Article 5 of that directive, which allows Member States to provide for exceptions or limitations to that right. (8)

24. Notwithstanding the referring court’s reference solely to Articles 2 and 5 of Directive 2001/29, I consider, like the applicants in the main proceedings, the German Government and the Commission, that national legislation such as that at issue in the main proceedings — which allows, in certain circumstances, the digital exploitation of ‘out-of-print’ books by an approved collecting society — must be examined in the light not only of Article 2(a) of Directive 2001/29, (9) but also of Article 3(1) of that directive, which provides authors with the exclusive right to authorise or prohibit any communication of their works to the public.

25. The exploitation of a digital version of a book in such a way that the public may access it involves making it available to the public and constitutes, in my view, communication to the public of a work within the meaning of Article 3(1) of Directive 2001/29. (10)

26. It follows that, within the meaning of Article 2(a) and Article 3(1) of Directive 2001/29, the digital exploitation of copyright books constitutes ‘reproduction’ and ‘communication to the public’ of a work, which require individual and separate authorisation by the author, (11) unless those acts are covered by an exception or a limitation provided for in Article 5 of that directive. (12)

##### B – Article 5 of Directive 2001/29

27. Before expressing my view on the interpretation of Article 2(a) and Article 3(1) of Directive 2001/29, I would, from the outset, point out that I consider to be irrelevant Article 5 of that directive and the system of exceptions and limitations to the exclusive rights laid down in Articles 2 to 4 which Article 5 establishes.

28. Legislation such as that at issue in the case in the main proceedings is not included (13) in the detailed and exhaustive (14) list of exceptions and limitations in Article 5 of Directive 2001/29. (15)

29. Furthermore, there are strict boundaries placed on that system of exceptions and limitation by Article 5(5) of Directive 2001/29, which provides that they ‘are 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’. (16) Consequently, in order for an exception laid down in Article 5 of that directive to be relied upon the exception or limitation to the reproduction right or right of communication to the public must also fulfil the conditions set out in Article 5(5) of that directive. (17)

30. Finally, contrary to SOFIA’s observations, neither Article 5 of Directive 2001/29 nor indeed any other provision of that directive allows Member States to extend the scope of such exceptions or limitations. (18)

31. Such an initiative would be a matter exclusively for the EU legislature. Like the Commission, I take the view that, if the Member States were able to establish derogations from copyright other than those provided for at European level, it would undermine the legal certainty concerning copyright.

##### C – Scope of the exclusive rights to authorise or prohibit the reproduction of works and their communication to the public, conferred by Article 2(a) and Article 3(1) of Directive 2001/29

32. Since none of the limitations or exceptions to which Article 5 of Directive 2001/29 refers is conceivable here, it remains for me to examine the scope of the exclusive rights conferred by Articles 2 and 3 of that directive in order to compare it with the legislation which is the subject of the request for a preliminary ruling.

##### 1. Preliminary observations

33. The need for uniform application of EU law and the principle of equality require that where provisions of EU 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 Articles 2 and 3 of Directive 2001/29, they must normally be given an autonomous and uniform interpretation throughout the European Union. (19)

34. According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. (20) In this case, the principal objective of Directive 2001/29 is to establish a high level (21) of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of reproduction or communication to the public. (22)

35. Under Article 2(a) and Article 3(1) of Directive 2001/29, authors enjoy exclusive rights to authorise or prohibit the reproduction of their works or their communication to the public. (23)

36. The Court has ruled that the exclusive rights at issue are preventive in nature and allow the author to intervene between possible users of his work and the reproduction (or communication to the public) (24) which such users might contemplate making, in order to prohibit such use.

37. Consequently, under Article 2(a) and Article 3(1) of Directive 2001/29, the author enjoys an exclusive right to decide whether and, where applicable, when and how he will authorise or prohibit the reproduction of his work or its communication to the public.

## **2. The author's exclusive rights and national legislation such as that at issue in the main proceedings**

### **a) The express and prior consent of the author**

38. In my view, Article 2(a) and Article 3(1) of Directive 2001/29 require the prior express consent (25) of the author for any reproduction or communication to the public of his work, including in digital format. That consent (26) constitutes an essential prerogative of authors.

39. In the absence of any derogating EU legislation, (27) the author's express and prior consent for the reproduction or communication to the public of his work cannot be eliminated, assumed or limited by substituting it with tacit consent (28) or a presumed transfer which the author must oppose within a fixed time limit and in accordance with conditions laid down by national law. It follows that national legislation like the decree at issue, which replaces the author's express and prior consent with tacit consent or a presumption of consent, deprives the author of an essential element of his intellectual property rights.

### **b) Do the possibility of opposition and withdrawal and the right to remuneration change the scope of the exclusive rights at issue?**

40. The fact that, under the national legislation at issue in the case in the main proceedings, authors are, subject to certain conditions, afforded opportunities to oppose (29) the exercise by SOFIA of the right to authorise the reproduction and communication to the public of their work in digital format (30) or to withdraw (31) from SOFIA the right to authorise the reproduction of a book or its communication to the public in digital format in no way alters that finding. (32)

41. Furthermore, the fact that the author receives remuneration or compensation, under the national legislation, (33) for the reproduction of his work or its communication to the public does not alter the fact that his exclusive rights will have been infringed.

42. The exclusive rights provided for in Article 2(a) and Article 3(1) of Directive 2001/29 include the right to receive an appropriate reward for the use of works but are not limited to that right alone. In that respect, the Court has already held that the copyright referred to in Article 2(a) and Article 3(1) of Directive 2001/29 must be distinguished from, for example, the right to remuneration (34) of performers and producers of phonograms provided for in Article 8(2) of Directive 2006/115.

### **c) Does the absence of commercial distribution of the work to the public affect the content of the exclusive rights at issue?**

43. The fact that an author is not fully exploiting his work, for example in the event that it is not being commercially distributed to the public, (35) does not alter his exclusive rights to authorise or prohibit the reproduction of his work or its communication to the public.

44. In that regard, the Italian Government submits that 'according to the traditional model of property rights, which developed on the basis of land ownership, it has always been accepted that the law [could] provide for (in addition to specific limitations to that right which require the owner to accept [certain] third-party acts affecting his capacity to enjoy his property for reasons of overriding public interest) situations in which the property right is extinguished on the ground of non-use, if third parties are making productive and therefore socially useful use of the property. Although an owner also has the right, inter alia, not to use his property, and consequently the right to property is not subject to a limitation period, there has always been acknowledgement of the benefit of favouring — over an owner who takes no interest in his property and therefore excludes it from the production cycle — a third party who, though having no legal title, actually makes use of the property and enables it to develop its economic potential'.

45. On the basis of the texts applicable here, that argument cannot be accepted in this case.

46. Directive 2001/29 does not provide for any penalty or consequence in the event of non-exercise or limited exercise by the author of his exclusive rights as laid down in Article 2(a) and Article 3(1) of that directive. Consequently, the exclusive rights at issue remain unaffected (36) even if they are not being 'used' by the rightholder.

47. Furthermore, this interpretation is borne out by Directive 2012/28.

48. That directive is concerned with certain uses of 'orphan' works, that is to say works which are protected by copyright and for which no rightholder is identified or, if identified, is not located. It was adopted because 'in the case of orphan works, it is not possible to obtain such prior consent to the carrying-out of acts of reproduction or of making available to the public'. (37)

49. In that regard, Article 6(1) of Directive 2012/28 provides that Member States are to provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29 to ensure that the organisations referred to in Article 1(1) (38) of Directive 2001/29 are permitted to reproduce orphan works (39) contained in their collections, inter alia for the purposes of digitisation and to make them available to the public.

50. The exception or limitation to Articles 2 and 3 of Directive 2001/29 provided for in Article 6(1) of Directive 2012/28 is therefore very limited.

51. Furthermore, Article 6(2) of Directive 2012/28 provides that ‘the organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 ... only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public’. (40)

52. I take the view that it would be paradoxical if, pursuant to Directive 2012/28, the requirements imposed on the reproduction and communication to the public of an orphan work were far more stringent than those applicable to the same acts of exploitation in respect of ‘out-of-print’ books under national legislation such as that at issue in the main proceedings. (41)

53. In contrast to Directive 2012/28, which requires a diligent search for the rightholders to be conducted in good faith prior to the exploitation of a work, the national legislation at issue does not require an individual approach to be made to the author. In accordance with Article L. 134-3 of the Intellectual Property Code, once a book has been registered in the database referred to in Article L. 134-2, the author has six months to oppose the exercise by SOFIA of the right to authorise the reproduction in digital format of his work or its communication to the public in that form. Furthermore, whilst Article 6(2) of Directive 2012/28 expressly precludes any exploitation of an orphan work for commercial purposes, the national legislation at issue in the main proceedings is concerned with the commercial exploitation of ‘out-of-print’ books.

**d) The management arrangements provided for in the national legislation at issue**

54. SOFIA (42) and the French, (43) German and Polish Governments submit that the legislation at issue in the main proceedings does not affect the protection of copyright and simply constitutes an arrangement for managing certain rights and that Article 2(a) and Article 3(1) of Directive 2001/29 do not preclude Member States from establishing copyright management arrangements.

55. To my mind, such a view of copyright runs counter to Article (2)(a) and Article 3(1) of Directive 2001/29. (44) In providing for the author’s exclusive right to authorise or prohibit the reproduction and communication to the public of his works, those provisions also concern the way in which those rights are exercised by the author.

56. While it is true that Directive 2001/29 neither harmonises nor prejudices the arrangements concerning the management of copyright which exist in Member States, (45) the EU legislature, in providing that authors enjoy, in principle, exclusive rights to authorise or prohibit the reproduction of their work and its

communication to the public, exercised its competence in the field of intellectual property.

57. In those circumstances, the Member States can no longer adopt management arrangements which compromise EU legislation, (46) even if this is done with the intention of furthering a public interest objective. (47) Before management of the rights of reproduction and communication to the public can be taken into consideration, the holder of those exclusive rights must have authorised a management organisation to manage his rights.

58. For the sake of completeness, I am of the view that confirmation of the foregoing is to be found in Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, (48) which lays down ‘requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations’, (49) even though that directive is not applicable *ratione temporis* to the case at issue in the main proceedings.

59. Article 5(2) of Directive 2014/26 provides that ‘rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder’. (50) Legislation such as that at issue in the main proceedings would not be consistent with that article.

60. Moreover, it is clear from Article 5(7) of Directive 2014/26 that a copyright holder must give ‘consent specifically for each right or category of rights or type of works and other subject matter which he authorises the collective management organisation to manage’. That article adds that ‘any such consent shall be evidenced in documentary form’.

61. Consent therefore remains the cornerstone of the author’s exercise of his exclusive rights.

**e) Influence of the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 (51)**

62. SOFIA and the French, German and Polish Governments note, lastly, that the background to the legislation at issue in the main proceedings is work carried out at EU level, the results of which were recorded in a memorandum of understanding on key principles on the digitisation and making available of out-of-commerce works, signed by associations of libraries, journalists, publishers, authors and artists on 20 September 2011, and witnessed by the Commission, (52) by representatives of European libraries, authors, publishers and collecting societies (‘the MoU’). The MoU, to which Directive 2012/28 expressly refers, (53) provides for the possibility of large-scale digitisation of out-of-commerce books in order to make them

accessible to the public. It would also allow for the consent of authors to the collective management of their exploitation rights to be presumed provided, first, that all efforts have been made to inform them of this and, secondly, that their interests are protected by means of opt-out or withdrawal mechanisms.

63. Recital 4 of Directive 2012/28 provides ‘this Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called out-of-commerce works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the [MoU]. ... This Directive is without prejudice to [the MoU], which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context’.

(54)

64. In my view, that MoU is not a legally binding document which could limit the scope of the exclusive rights provided for in Article 2(a) and Article 3(1) of Directive 2001/29 and contains only an invitation to the Commission and Member States to ensure the legal certainty of voluntary agreements (55) concluded between users, rightholders and collective rights management organisations. There is no question of ‘voluntary agreements’ in the national legislation at issue.

#### VI – Conclusion

65. While not denying that giving new life to forgotten books, if necessary using new technologies, is a legitimate objective, I propose that the Court, in the light of the objectives of Directive 2001/29, the clear wording of Article 2(a) and Article 3(1) thereof, the absence of derogation from the principle of express and prior consent and the absence of contrary provisions of EU law, answer the question referred for a preliminary ruling by the Conseil d’État (France) as follows:

Article 2(a) and Article 3(1) 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 preclude legislation, such as that established by Articles L. 134-1 to L. 134-9 of the Intellectual Property Code, which gives approved collecting societies the right to authorise the reproduction and the performance in digital form of ‘out-of-print books’, even if it allows the authors of those books, or their successors in title, to oppose or put an end to that practice, on certain conditions that it lays down.

before the Court that the loi relative aux livres indisponibles (Law on out-of-print books) is concerned with books published in France between 1 January 1900 to 31 December 2000.

4 – According to the French Government, the right to authorise the reproduction and communication to the public of a work is exercised by SOFIA under a statutory mandate which may be revoked. It observes that, after six months, the author retains ‘at all times the right to withdraw from the collective management scheme as provided for by the law’. See paragraph 8 of the French Government’s observations.

5 – See Article L. 134-3 of the Intellectual Property Code.

6 – Article L. 122-1 of the Intellectual Property Code provides that ‘the right of exploitation belonging to the author shall comprise the right of performance and the right of reproduction’. Article L. 122-2 of the Intellectual Property Code provides that ‘performance shall consist of the communication of the work to the public by any process whatsoever’. See, by analogy, Article 3 of Directive 2001/29.

7 – Article 2(a) of Directive 2001/29 covers authors’ works, including literary works such as books. In that regard, I note that books are the only works covered by the decree at issue.

8 – Judgment of 12 September 2006 in *Laserdisken* (C-479/04, EU:C:2006:549, paragraph 25).

9 – In the judgment of 11 September 2014 in *Eugen Ulmer* (C-117/13, EU:C:2014:2196, paragraph 37), the Court ruled that ‘the digitisation of a work, which essentially involves the conversion of the work from an analogue format into a digital one, constitutes an act of reproduction of the work’ and consequently falls within the scope of the exclusive right provided for in Article 2(a) of Directive 2001/29.

10 – The concept of ‘communication to the public’ in Article 3(1) of Directive 2001/29 must be understood in a broad sense, as expressly stated in recital 23 of that directive, according to which: ‘This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.’ See judgment of 7 March 2013 in *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 20 and the case-law cited). The concept of ‘communication’ refers to any transmission of the protected works, irrespective of the technical means or process used (judgment of 4 October 2011 in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 193)). In the judgment of 13 February 2014 in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 19), the Court ruled that ‘as is apparent from Article 3(1) of Directive 2001/29, for there to be an “act of communication”, it is sufficient, in particular, that a work is made available to a public

1 Original language: French.

2 – OJ 2001 L 167, p. 10.

3 – JORF [Journal officiel de la République française] of 1 March 2013, p. 3835. It is clear from the case file

in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity'. The term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (judgment of 7 March 2013 in *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 32)).

11 – See, to that effect, judgment of 7 March 2013 in *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 24). In paragraph 39 of that judgment, the Court took the view that, in the event of the transmission of works included in a terrestrial broadcast and the making available of those works over the internet, 'each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public'. Emphasis added. In paragraph 15 of the judgment of 13 February 2014 in *Svensson and Others* (C-466/12, EU:C:2014:76), the Court ruled that 'it follows from Article 3(1) of Directive 2001/29 that every act of communication of a work to the public has to be authorised by the copyright holder'.

12 – See, by analogy, judgment of 27 February 2014 in *OSA* (C-351/12, EU:C:2014:110, paragraph 36).

13 – The applicants in the main proceedings, the French, German and Italian Governments, *SOFIA* (in the alternative) and the Commission submit that national legislation such as the decree at issue does not constitute an exception or limitation within the meaning of Article 5 of Directive 2001/29. The German Government considers that 'there is a fundamental difference between such legislation and an exception or limitation within the meaning of Article 5 of Directive 2001/29'. According to the French Government, 'were the Court to consider that the French rules regarding out-of-print books fall within the scope of Directive 2001/29 ... those rules do not constitute an exception or limitation within the meaning of Article 5 of that directive'. *SOFIA* proposes (in the further alternative) that Directive 2001/29 should be interpreted as meaning that the exceptions set out in Article 5 thereof are not exhaustive in nature and therefore that that directive does not preclude a Member State from adopting, as in this case, legislation establishing an additional exception to the exclusive right of reproduction guaranteed in Article 2 of that directive. According to the Italian Government 'the legislation at issue seems ... to refer to conditions and justifications which differ from those provided for in Article 5 of [Directive 2001/29]'. It submits that the law at issue 'can be seen as a kind of mandatory licence, albeit with an opt-out scheme, which is not comparable to any of the situations provided for by the EU legislature and, it would appear, is completely without precedent internationally'.

14 – As stated in recital 32 of Directive 2001/29 'this Directive provides for an exhaustive enumeration of

exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate'. In other words, Directive 2001/29 does not contain a general exception based on abstract criteria like the fair use exception provided for in Section 107 of the Copyright Law of the United States (17 U.S. Code § 107). While the latter provision sets out an indicative and therefore non-exhaustive list of exceptions, it nevertheless provides that the use made of a work in any particular case must be a fair use, which involves examining and striking a balance between four factors, namely, first, the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; secondly, the nature of the copyrighted work; thirdly, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and, fourthly, the effect of the use upon the potential market for or value of the copyrighted work.

15 – The purpose of Article 5 was, in particular, to enable Member States to exercise their powers *inter alia* in the fields of education and teaching and to safeguard 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. See, in that regard, judgment of 12 September 2006 in *Laserdisken* (C-479/04, EU:C:2006:549, paragraph 78). Recital 14 of Directive 2001/29 states that 'this Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching'. See, by analogy, judgment of 12 November 2015 in *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:750, paragraph 54).

16 – Judgment of 12 September 2006 in *Laserdisken* (C-479/04, EU:C:2006:549, paragraph 79). Emphasis added.

17 – See, to that effect, judgment of 4 October 2011 in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 181). In the case which gave rise to the judgment of 10 April 2014 in *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 25 and 26), the Court ruled that Article 5(5) of Directive 2001/29 does not provide for exceptions or limitations that the Member States may establish in respect of the rights referred to but merely states the scope of the exceptions and limitations provided for in the preceding paragraphs of that provision. Consequently, Article 5(5) of Directive 2001/29 is not intended to extend the scope of the different exceptions and limitations provided for in the preceding paragraphs of that provision.

18 – Moreover, since the different exceptions and limitations provided for in Article 5 of Directive 2001/29 derogate from the rights provided for in Articles 2 to 4 of that directive, they must be interpreted strictly. See, to that effect, judgment of 10 April 2014 in *ACI Adam and Others* (C-435/12,

EU:C:2014:254, paragraphs 22 and 23). In the case which gave rise to the judgment of 27 February 2014 in OSA (C-351/12, EU:C:2014:110), the Court strictly interpreted the scope of those exceptions and limitations to the various exclusive rights and refused to apply them by analogy. In paragraphs 38 and 40 of that judgment, the Court ruled that Article 5(2)(e) of Directive 2001/29 only forms the basis for an exception or limitation to the reproduction right, provided for in Article 2 of that directive, and cannot therefore form the basis for an exception or limitation to the exclusive right to authorise or prohibit any communication to the public of their works, provided for in Article 3(1) of that directive.

19 – See, to that effect, judgments of 16 July 2009 in Infopaq International (C-5/08, EU:C:2009:465, paragraph 27), concerning Article 2 of Directive 2001/29, and 7 December 2006 SGAE (C-306/05, EU:C:2006:764, paragraph 31), concerning Article 3 of that directive.

20 – See, to that effect, judgment of 7 December 2006 in SGAE (C-306/05, EU:C:2006:764, paragraph 34).

21 – According to recital 9 of Directive 2001/29 ‘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’. The purpose of that directive is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright. See, to that effect, judgment of 29 January 2008 in Promusicae (C-275/06, EU:C:2008:54, paragraph 57).

22 – See, to that effect, judgment of 7 December 2006 in SGAE (C-306/05, EU:C:2006:764, paragraph 36).

23 – I take the view, in accordance with SOFIA’s observations, that those provisions define the content of the rights in question and specify the holders of those rights. See, to that effect, recital 21 of Directive 2001/29 which states that ‘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’. Emphasis added.

24 – See, to that effect, judgments of 15 March 2012 in SCF (C-135/10, EU:C:2012:140, paragraph 75) and 27 February 2014 OSA (C-351/12, EU:C:2014:110, paragraph 36), which concern the exclusive right provided for in Article 3(1) of Directive 2001/29. In my view, the same legal analysis applies to the exclusive right provided for in Article 2(a) of Directive 2001/29.

25 – See, by analogy, Article 4 of Directive 2001/29. In the case which gave rise to the judgment of 12 September 2006 in Laserdisken (C-479/04, EU:C:2006:549), the Court ruled that ‘Article 4(1) of Directive 2001/29 enshrines the exclusive right for authors, in respect of the original of their works or of copies thereof, to authorise or prohibit any form of distribution to the public by sale or otherwise’

(paragraph 19). In paragraph 20 of the same judgment, the Court added that ‘Article 4(2) contains the rule pertaining to exhaustion of that right. According to that provision, the distribution right is not to be exhausted in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent’. Emphasis added.

26 – See, also, recital 6 of Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ 2012 L 299, p. 5) which provides that ‘the rightholders’ exclusive rights of reproduction of their works and other protected subject matter and of making them available to the public, as harmonised under Directive 2001/29 ..., necessitate the prior consent of rightholders to the digitisation and the making available to the public of a work or other protected subject matter’.

27 – See, in particular, Article 3(4) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28) which expressly provides that ‘when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right’. See, however, my foregoing analysis of Article 5 of Directive 2001/29. See, also, the provisions of Directive 2012/28.

28 – According to the Italian Government, the Law on out-of-print books introduces ‘a mechanism of presumed consent’. According to the Commission, the national legislation at issue in the main proceedings does not make ‘the digitisation of an out-of-print book conditional upon the prior express approval of its author or require the collecting society to obtain such approval from the authors affected by the reproduction or communication to the public of their works in digitised form’.

29 – See, to that effect, Article L. 134-4 of the Intellectual Property Code. An author may oppose the exploitation of a work in the six months following the registration of the book in question in the specified database. After that period has expired and following exploitation of his work by SOFIA, the author may again oppose exploitation if he considers that the reproduction or performance of that book is liable to damage his good name or reputation. According to the applicants in the main proceedings ‘such a situation is highly improbable, if not fanciful: the commercialisation of a digital copy of a book cannot constitute such injury, unless an extremely poor quality of digitisation is envisaged (though this would relate to the author’s moral rights, namely that concerning respect for the work).’ At the hearing, the French Government submitted that it was sufficient for the author to plead, without any other proof, injury to his good name or reputation.



30 – Furthermore, I take the view that such an opposition procedure is analogous to a ‘formality’ prohibited under Article 5(2) of the Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), signed at Berne on 9 September 1886, as amended on 28 September 1979 (‘the Berne Convention’). The national legislation at issue makes the continued enjoyment and exercise of the exclusive rights at issue and relating to ‘out-of-print’ books contingent upon and subject to the lodging of an opposition by the author within a period of six months. It should also be observed that the European Union, which is not a party to the Berne Convention, is nevertheless obliged, under Article 1(4) of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996, to which it is a party, which forms part of its legal order and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention. Consequently, the European Union is required to comply *inter alia* with Article 5(2) of the Berne Convention. See, to that effect, judgment of 9 February 2012 in *Luksan* (C-277/10, EU:C:2012:65, paragraph 59 and the case-law cited).

31 – See Article L. 134-6 of the Intellectual Property Code. In the question referred for a preliminary ruling, the Conseil d’État, for its part, uses the expression ‘put an end [to]’. Moreover, it is apparent, subject to verification by the referring court, that the author’s option of withdrawal is conditional on proof that he is the sole holder of the rights of reproduction and of communication to the public in digital format. Article L. 134-6 of the Intellectual Property Code provides that ‘the author and publisher having the right of reproduction in print of an out-of-print book shall at any time jointly notify the collecting society referred to in Article L. 134-3 of their decision to withdraw the latter’s right to authorise the reproduction and performance of that book in digital format’. Emphasis added. According to the applicants in the main proceedings, that proof ‘is consequently in no way discretionary but rather is a case of *probatio diabolica*. In reality, it effectively requires the author to provide evidence of a negative fact which is impossible to prove, consisting in showing that he has not transferred the rights in question’. At the hearing, the French Government submitted that a sworn declaration from the author to the effect that he is the sole holder of the rights of reproduction and of communication to the public in digital format is sufficient, placing the onus on a third party and in particular a publisher, to furnish evidence to the contrary. According to that government, ‘it would be unreasonable to consider that there is a limitation of copyright in the case of any collective copyright management scheme which does not require express and individual authorisation by the authors concerned but which is based on the exercise of rights by the collecting society concerned under a statutory mandate which can be revoked at any time’.

32 – It is also clear from Article L. 134-6 of the Intellectual Property Code, subject to verification by

the referring court, that successors in title cannot oppose the continued exploitation of a book when exploitation began before notification of the decision withdrawing SOFIA’s right to authorise the reproduction and performance of that book in digital format ‘during the remaining period of the authorisation referred to in the second subparagraph of Article L. 134-3(I) or in the third subparagraph of Article L. 134-5, for a maximum of five years in total and on a non-exclusive basis’.

33 – See, to that effect, Article L. 134-3(III)(5) of the Intellectual Property Code which provides for the remuneration associated with the digital exploitation of ‘out-of-print’ books to be shared between authors and publishers. The applicants in the main proceedings note that no transfer of digital exploitation rights took place before the 1990s. They assert that ‘digital exploitation rights belong, without any doubt, wholly and solely to authors, who, in the absence of express transfer, cannot have transferred them to the publisher at any time. Consequently, in prescribing, as it does, equal representation (of authors and publishers) within the bodies of collecting societies, the law [on out-of-copyright books] requires authors to exercise their exclusive rights collectively and to share the prerogatives of copyright (choosing the beneficiaries and the conditions governing an authorisation for exploitation) on an equal footing with third parties without any legal right.’ I take the view that, if the digital exploitation rights belong wholly to the authors alone, in the absence of transfer to a third party, such as a publisher, the system of sharing the remuneration associated with the digital exploitation of ‘out-of-print’ books between authors and editors also undermines the author’s exclusive rights provided for in Article 2(a) and Article 3(1) of Directive 2001/29. See, by analogy, judgment of 12 November 2015 in *Hewlett-Packard Belgium* (C-572/13, EU:C:2015:750, paragraphs 47 and 48).

34 – See, to that effect, judgment of 27 February 2014 in *OSA* (C-351/12, EU:C:2014:110, paragraph 35).

35 – See, to that effect, Article L. 134-1 of the Intellectual Property Code.

36 – See, a contrario, Article 10(1) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25) and Article 15(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) which provide for the possibility of imposing sanctions for non-use of a trade mark, unless there are proper reasons. For example, Article 12(1) of Directive 2008/95 provides that ‘a trade mark shall be liable to revocation if, within a continuous period of five years, it has not been put to genuine use in the Member State in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use’. See, also, Article 51 of Regulation No 207/2009.

37 – Emphasis added. See recital 7 of Directive 2012/28.

38 – According to Article 1(1) of Directive 2012/28, ‘this Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions’.

39 – For a work to be regarded as an orphan work, a diligent search for the rightholders must have been carried out in good faith in respect of the work. Article 3(1) of Directive 2012/28 provides that ‘for the purposes of establishing whether a work ... is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work ... The diligent search shall be carried out prior to the use of the work’.

40 – Emphasis added.

41 – I note also that, at the hearing, SOFIA stated that it has exclusive control of significant resources for locating authors in order to remunerate them for the reproduction and communication to the public of their works in digital format. When asked why it did not use those resources to identify authors before authorising the reproduction and communication to the public of their works and to obtain their express and prior permission, SOFIA answered that it would be too difficult to obtain the individual agreement of the authors concerned.

42 – According to SOFIA, the national legislation at issue is concerned not with the content of the reproduction right and the acts which that prerogative covers but with the exercise of the reproduction right on the basis of a statutory mandate.

43 – According to the French Government, the decree at issue does not govern the content of the copyright at issue but simply governs the exercise of those rights, in certain circumstances, by collecting societies approved by the minister responsible for culture. It contends that the exercise by a collecting society of rights of reproduction and communication to the public does not entail any transfer of property rights but constitutes simply an arrangement for the collective management of rights.

44 – I concur with the view put forward by the Commission in its observations that ‘the French legislation which provides that, in certain circumstances, those rights in respect of out-of-print books are to be exercised by an approved society and not by the author directly contravenes the applicable provisions of Directive 2001/29’. Emphasis added.

45 – See recital 18 of Directive 2001/29, which states that ‘this Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences’.

46 – See, by analogy, judgment of 9 February 2012 in *Luksan* (C-277/10, EU:C:2012:65, paragraph 64). However, provided that the requirement of express and prior consent is observed, Member States have the power to define the arrangements for that consent, by

requiring, for example, that the transfer of copyright exploitation rights must be in writing. See, to that effect, recital 30 of Directive 2001/29, which provides that ‘the rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright’.

47 – The French Government notes that the Law on out-of-print books ‘concerns the preservation and making available to the public of out-of-print works, in accordance with arrangements which ensure that authors receive remuneration and therefore that copyright is observed’. According to the German Government, the national legislation at issue is in the interests of rightholders as well as in the public interest. SOFIA states that ‘in so far as legislation such as that at issue in the main proceedings falls within the scope of Article 2 of Directive 2001/29 and constitutes an exception or limitation which is not permitted by Article 5 thereof, it is nevertheless appropriate to determine whether such legislation can be justified by a public interest objective of establishing a fair balance between, on the one hand, the right to intellectual property protected by Article 17(2) of the [Charter of Fundamental Rights of the European Union] and, on the other, the freedom of information guaranteed by Article 11(1) of that Charter’.

48 – OJ 2014 L 84, p. 72.

49 – See Article 1 of Directive 2014/26.

50 – Emphasis added.

51 – The memorandum of understanding is available, in English only, on the Commission’s website at the following address: [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

52 – The signatures of the associations in question are followed by the words ‘as witnessed by: Michel Barnier, Commissioner for International Market and Services’.

53 – See recital 4 of Directive 2012/28.

54 – Emphasis added.

55 – Emphasis added.