Court of Justice EU, 11 September 2014, Darmstadt v Eugen Ulmer

COPYRIGHT

The concept 'purchase of licensing terms' in Article 5(3)(n) Copyright Directive includes

- **that the concept of 'purchase or licensing terms' provided for in Article 5(3)(n) of Directive 2001/29 must be understood as requiring that the rightholder and an establishment, such as a publicly accessible library, referred to in that provision must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work.**

32 In addition, if the mere act of offering to conclude a licensing agreement were sufficient to rule out the application of Article 5(3)(n) of Directive 2001/29, such an interpretation would be liable to negate much of the substance of the limitation provided for in that provision, or indeed its effectiveness, since, were it to be accepted, the limitation would apply, as Ulmer has maintained, only to those increasingly rare works of which an electronic version, primarily in the form of an e-book, is not yet offered on the market.

Digitisation of a work constitutes an act of reproduction of the work

- **The first point to be noted is 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.**

Making a work available to the public, by terminals installed within a library according to Article 5(3)(n) is an act of communication

- **It follows that, in circumstances such as those of the case in the main proceedings, where an establishment, such as a publicly accessible library, which falls within Article 5(3)(n) of Directive 2001/29, gives access to a work contained in its collection to a 'public', namely all of the individual members of the public using the dedicated terminals installed on its premises for the purpose of research or private study, that must be considered to be 'making [that work] available' and, therefore, an 'act of communication' for the purposes of Article 3(1) of that directive (see, to that effect, judgment in Svensson and Others, EU:C:2014:76, paragraph 20).**

When it is necessary to make works available via dedicated terminals, the copyright directive does not stand in the way of member states granting libraries accessory rights to digitalize works.

- **Having regard to the foregoing considerations, the answer to the second question is that Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)(c) of that directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.**

Printing of a digital work on paper or saving it on a portable USB drive can be considered a reproduction.

- **It is undisputed that acts such as the printing out of a work on paper or its storage on a USB stick, even if made possible by the specific features of the dedicated terminals on which that work can be consulted, are not acts of 'communication', within the meaning of Article 3 of Directive 2001/29, but rather of 'reproduction', within the meaning of Article 2 of that directive.**

53 What is involved is the creation of a new analogue or digital copy of the work that an establishment makes available to users by means of dedicated terminals.

Printing of works on paper as well as saving works on portable USB drives do not fall under article 5(3)(n); they are permitted under article 5(2)(a) and (b) when all conditions have been fulfilled, such as reasonable payment.

- **Having regard to the foregoing considerations, the answer to the third question is that Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it does not extend to acts such as the printing out of works on paper or their storage on a USB stick, carried out by users from dedicated terminals installed in publicly accessible libraries covered by that provision. However, such acts may, if appropriate, be authorised under national legislation transposing the exceptions or limitations provided for in Article 5(2)(a) or (b) of that directive provided that, in each individual case, the conditions laid down by those provisions are met.**

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Court of Justice EU, 11 September 2014
(L. Bay Larsen, M. Safjan, J. Malenovský, A. Prechal (rapporteur) en K. Jürimäe)
JUDGMENT OF THE COURT (Fourth Chamber)
11 September 2014 (*)
(Reference for a preliminary ruling — Directive 2001/29/EC — Copyright and related rights — Exceptions and limitations — Article 5(3)(n) — Use for the purpose of research or private study of works and other subject-matter — Book made available to individual members of the public by dedicated terminals in publicly accessible libraries — Meaning of

work not subject to 'purchase or licensing terms' — Right of the library to digitise a work contained in its collection in order to make it available to users by dedicated terminals — Making the work available by dedicated terminals which permit it to be printed out on paper or to be stored on a USB stick)

In Case C‑117/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 20 September 2012, received at the Court on 14 March 2013, in the proceedings

Technische Universität Darmstadt

v

Eugen Ulmer KG,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan, J. Malenovský, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 February 2014,

after considering the observations submitted on behalf of:

– Technische Universität Darmstadt, by N. Rauer and D. Ettig, Rechtsanwälte,

– Eugen Ulmer KG, by U. Karpenstein and G. Schulze, Rechtsanwälte,

– the German Government, by T. Henze, J. Kemper and K. Petersen, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and A. Collabolletta, avvocati dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finnish Government, by H. Leppo, acting as Agent,

– the European Commission, by F. Bulst and J. Samnadda, acting as Agents,

after hearing the **Opinion of the Advocate General at the sitting on 5 June 2014**

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(3)(n) 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 The request was made in proceedings between the Technical University of Darmstadt (Technische Universität Darmstadt, 'TU Darmstadt') and Eugen Ulmer KG ('Ulmer'), concerning TU Darmstadt's making available to the public, by terminals installed within a library, of a book contained in its collection, the user rights to which are held by Ulmer.

Legal context

European Union law

3 Recitals 31, 34, 36, 40, 44, 45 and 51 in the preamble to Directive 2001/29 are worded as follows:

'(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. …

…

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

…

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

…

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. … Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

…

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. …

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

…

(51) … Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. …'

4 Article 2 of that directive, 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;

…'

5 Article 3 of the same directive, entitled 'Right of communication to the public of works and right of

making available to the public other subject-matter', provides in paragraph 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.'

6 Article 5 of the same directive, entitled 'Exceptions and limitations', provides in paragraph 2:

'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

…'

7 Article 5(3) of that directive provides:

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

…

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

…'

8 According to Article 5(5) of the same directive:

'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.'

German law

9 Paragraph 52b of the German Law on copyright (Urheberrechtsgesetz, 'UrhG') of 9 September 1965 (BGBl. I, p. 1273), in the version applicable at the date of the facts in the main proceedings, is worded as follows:

'Reproduction of works at electronic reading points in public libraries, museums and archives

So far as there are no contractual provisions to the contrary, it shall be permissible to make published works available from the holdings of publicly accessible libraries, museums or archives, which neither directly nor indirectly serve economic or commercial purposes, exclusively on the premises of the relevant establishment at electronic reading points dedicated to the purpose of research and for private study. The number of copies of a work made available at electronic reading points shall not, in principle, be higher than the number held by the establishment. Equitable remuneration shall be paid in consideration of their being made available. The claim may be asserted only by a collecting society.'

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

10 TU Darmstadt operates a regional and academic library in which it installed electronic reading points that allow the public to consult works contained in the collection of that library.

11 Since January or February 2009, those works have included the textbook of Schulze W., *Einführung in die neuere Geschichte* ('the textbook at issue'), published by Ulmer, a scientific publishing house established in Stuttgart (Germany).

12 TU Darmstadt did not take up Ulmer's offer of 29 January 2009 of an opportunity to purchase and use the textbooks it publishes as electronic books ('e-books'), including the textbook at issue.

13 TU Darmstadt digitised that textbook so as to make it available to users on electronic reading points installed in its library. Those points did not allow for a greater number of copies of that work to be consulted at any one time than the number owned by the library. Users of the reading points could print out the work on paper or store it on a USB stick, in part or in full, and take it out of the library in that form.

14 In an action brought by Ulmer, the Landgericht (Regional Court) Frankfurt am Main held, by judgment of 6 March 2011, that the rightholder and establishment must have reached prior agreement on the digital use of the work concerned for Paragraph 52b of the UrhG not to apply. That court also rejected Ulmer's application seeking to prohibit TU Darmstadt from digitising the textbook at issue or having it digitised. However, it granted that company's request to prohibit users of the TU Darmstadt library from being able, at electronic reading points installed therein, to print out that work and/or store it on a USB stick and/or take such reproductions out of the library.

15 Hearing an appeal by TU Darmstadt on a point of law, the Bundesgerichtshof (Federal Court of Justice) considers, in the first place, that the question arises whether works and other protected objects are 'subject to purchase or licensing terms', within the meaning of Article 5(3)(n) of Directive 2001/29, where the rightholder offers to conclude with an establishment referred to in that provision appropriately worded licensing agreements in respect of those works or whether a different interpretation of that provision must be adopted, in terms of which only cases where the

owner and the establishment have entered into an agreement on that matter are covered.

16 That court takes the view that, unlike the German language version of the provision, the English and French language versions are consistent with the first of the above interpretations. That interpretation could also be justified on the basis of the purpose and general scheme of Directive 2001/29. However, if only the entering into an agreement would allow for the application of that provision to be ruled out, it would be open to the establishment to refuse an appropriate offer from the rightholder so as to benefit from the limiting provision in question, which would also mean that the owner would not receive appropriate remuneration, which nevertheless is one of the objectives of that directive.

17 In the second place, the referring court is uncertain whether Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it allows Member States to confer on the establishments referred to in that provision the right to digitise the works contained in their collections to the extent that the communication or making available of those works on their terminals requires such reproduction. The referring court takes the view that Member States should have an ancillary competence in order to provide for such an exception to the reproduction right referred to in Article 2 of that directive or such a limitation of that right; otherwise the effectiveness of Article 5(3)(n) would not be guaranteed. That competence could, in any event, be inferred from Article 5(2)(c) of the directive.

18 In the third place, the referring court takes the view that the dispute in the main proceedings raises the question whether, pursuant to Article 5(3)(n) of Directive 2001/29, Member States may provide for a limiting provision permitting the users of an establishment referred to in that provision to print out on paper or store on a USB stick, in part or in full, the works reproduced or made available by the establishment on its terminals.

19 In that regard, that court considers, first of all, that while those printouts, stored copies or downloads, being related to the reproduction of a work, are not, in principle, covered by the limitation provided for in Article 5(3)(n) of Directive 2001/29, they could nevertheless be permitted, as an extension of the communication or of the making available of a work by the establishment in question, under another limitation, in particular, pursuant to the so-called 'private copying' exception provided for in Article 5(2)(b) of that directive.

20 Next, the court finds that the objective referred to in Article 5(3)(n) of Directive 2001/29, which entails permitting the efficient use, for the purpose of research or private study, of texts communicated or made available on the terminals of an establishment such as a library, is consistent with an interpretation of that provision to the effect that the printing out on paper of a work from a terminal should be permitted, whereas storage on a USB stick should not be.

21 Lastly, the referring court considers that such an interpretation of Article 5(3)(n) of Directive 2001/29 would also ensure that the scope of the limitation provided for in that provision respects the threefold condition provided for in Article 5(5) of that directive. In its view, storage of a work on a USB stick encroaches upon the rights of the author of that work more than printing it out on paper.

22 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a work subject to purchase or licensing terms, within the meaning of Article 5(3)(n) of Directive 2001/29, where the rightholder offers to conclude with the establishments referred to therein licensing agreements for the use of that work on appropriate terms?

(2) Does Article 5(3)(n) of Directive 2001/29 entitle the Member States to confer on those establishments the right to digitise the works contained in their collections, if that is necessary in order to make those works available on terminals?

(3) May the rights which the Member States lay down pursuant to Article 5(3)(n) of Directive 2001/29 go so far as to enable users of the terminals to print out on paper or store on a USB stick the works made available there?'

Consideration of the questions referred for a preliminary ruling

The first question

23 By its first question, the referring court is essentially asking whether a work is subject to 'purchase or licensing terms', within the meaning of Article 5(3)(n) of Directive 2001/29, where the rightholder has offered to conclude with an establishment referred to in that provision, such as a publicly accessible library, on appropriately worded terms a licensing agreement in respect of that work.

24 All of the interested parties that have presented written observations, with the exception of Ulmer, propose that the first question be answered in the negative and essentially support an interpretation to the effect that the concept of 'purchase or licensing terms', mentioned in Article 5(3)(n) of Directive 2001/29, must be understood to mean that the rightholder and establishment concerned must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use the work.

25 Ulmer argues that the mere fact that the rightholder offers to conclude a licensing agreement with a publicly accessible library is sufficient for ruling out the application of Article 5(3)(n) of Directive 2001/29, provided always that such offer is 'appropriate'.

26 In that regard, first of all, a comparison of the language versions of Article 5(3)(n) of Directive 2001/29, particularly the English, French, German and Spanish versions — which use the words 'terms', 'conditions', 'Regelung' and 'condiciones', respectively — shows that, in that provision, the EU legislature used the concepts 'terms' or 'provisions',

which refer to contractual terms actually agreed as opposed to mere contractual offers.
27 Next, it should be recalled that the limitation under Article 5(3)(n) of Directive 2001/29 aims to promote the public interest in promoting research and private study, through the dissemination of knowledge, which constitutes, moreover, the core mission of publicly accessible libraries.
28 The interpretation favoured by Ulmer implies that the rightholder could, by means of a unilateral and essentially discretionary action, deny the establishment concerned the right to benefit from that limitation and thereby prevent it from realising its core mission and promoting the public interest.
29 Moreover, recital 40 in the preamble to Directive 2001/29 states that specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.
30 As noted by the Advocate General in points 21 and 22 of his Opinion, recitals 45 and 51 in the preamble to Directive 2001/29 confirm (including in their German version) that, in the context, inter alia, of the exceptions and limitations listed in Article 5(3) of Directive 2001/29, it is *existing* contractual relations and the conclusion and implementation of *existing* contractual agreements that are at issue, and not mere prospects of contracts or licences.
31 Furthermore, the interpretation proposed by Ulmer is difficult to reconcile with the aim pursued by Article 5(3)(n) of Directive 2001/29, which is to maintain a fair balance between the rights and interests of rightholders, on the one hand, and, on the other hand, users of protected works who wish to communicate them to the public for the purpose of research or private study undertaken by individual members of the public.
32 In addition, if the mere act of offering to conclude a licensing agreement were sufficient to rule out the application of Article 5(3)(n) of Directive 2001/29, such an interpretation would be liable to negate much of the substance of the limitation provided for in that provision, or indeed its effectiveness, since, were it to be accepted, the limitation would apply, as Ulmer has maintained, only to those increasingly rare works of which an electronic version, primarily in the form of an e-book, is not yet offered on the market.
33 Lastly, the interpretation to the effect that there must be contractual terms actually agreed also cannot be ruled out — contrary to what is maintained by Ulmer — by reason of the fact that it would conflict with the threefold condition provided for in Article 5(5) of Directive 2001/29.
34 In that regard, it is sufficient to state that the limitation provided for in Article 5(3)(n) of Directive 2001/29 is accompanied by a number of restrictions that guarantee — even though the application of that provision is ruled out only in the event that contractual terms have actually been concluded — the continuing applicability of such a limitation in special cases which do not conflict with a normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the rightholder.
35 In the light of the foregoing considerations, the answer to the first question is that the concept of 'purchase or licensing terms' provided for in Article 5(3)(n) of Directive 2001/29 must be understood as requiring that the rightholder and an establishment, such as a publicly accessible library, referred to in that provision must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work.

The second question

36 By its second question, the referring court is essentially asking whether Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it precludes Member States from granting to publicly accessible libraries covered by that provision the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.
37 The first point to be noted is 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.
38 The question therefore arises whether Article 5(3)(n) of Directive 2001/29 permits Member States to grant that reproduction right to publicly accessible libraries, since, under Article 2 of that directive, it is the authors that have the exclusive right to authorise or prohibit the reproduction of their works.
39 In that regard, it should first be stated that, according to the first sentence of Article 5(3) of Directive 2001/29, the exceptions and limitations set out in that paragraph relate to the rights provided for in Articles 2 and 3 of that directive and thus both the exclusive reproduction right enjoyed by the rightholder and the right of communication to the public of works.
40 However, Article 5(3)(n) of the directive limits the use of works, within the meaning of that provision, to the 'communication or making available' of those works and thus to acts which fall under the sole exclusive right of communication to the public of works referred to in Article 3 of that directive.
41 Next, it should be recalled that for there to be an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29, it is sufficient, in particular, that those works are made available to a public in such a way that the persons forming that public may access them, irrespective of whether they avail themselves of that opportunity (judgment in **Svensson and Others, C‑466/12, EU:C:2014:76**, paragraph 19).
42 It follows that, in circumstances such as those of the case in the main proceedings, where an establishment, such as a publicly accessible library, which falls within Article 5(3)(n) of Directive 2001/29, gives access to a work contained in its collection to a 'public', namely all of the individual members of the public using the dedicated terminals installed on its premises for the purpose of research or private study, that must be

considered to be 'making [that work] available' and, therefore, an 'act of communication' for the purposes of Article 3(1) of that directive (see, to that effect, judgment in **Svensson and Others**, EU:C:2014:76, paragraph 20).

43 Such a right of communication of works enjoyed by establishments such as publicly accessible libraries covered by Article 5(3)(n) of Directive 2001/29, within the limits of the conditions provided for by that provision, would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question.

44 Those establishments are recognised as having such a right pursuant to Article 5(2)(c) of Directive 2001/29, provided that 'specific acts of reproduction' are involved.

45 That condition of specificity must be understood as meaning that, as a general rule, the establishments in question may not digitise their entire collections.

46 However, that condition is, in principle, observed where the digitisation of some of the works of a collection is necessary for the purpose of the '*use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals*', as provided in Article 5(3)(n) of Directive 2001/29.

47 Furthermore, the scope of that ancillary right of digitisation must be determined by interpreting Article 5(2)(c) of Directive 2001/29 in the light of Article 5(5) of that directive, under which that limitation is applicable only in certain special cases which do not prejudice the normal exploitation of the work or other protected object or cause unjustified harm to the legitimate interests of the rightholder, the latter provision, however, not being intended to extend the scope of the exceptions and limitations provided for in Article 5(2) of the directive (see, to that effect, judgments in **Infopaq International, C‑5/08, EU:C:2009:465,** paragraph 58, and ACI Adam and Others, C‑435/12, EU:C:2014:254, paragraph 26).

48 In the present case, it must be stated that the applicable national legislation takes due account of the conditions provided for in Article 5(5) of the directive, since it follows, first, from Article 52b of the UrhG, that the digitisation of works by publicly accessible libraries cannot have the result of the number of copies of each work made available to users by dedicated terminals being greater than that which those libraries have acquired in analogue format. Secondly, although, by virtue of that provision of national law, the digitisation of the work is not, as such, coupled with an obligation to provide compensation, the subsequent making available of that work in digital format, on dedicated terminals, gives rise to a duty to make payment of adequate remuneration.

49 Having regard to the foregoing considerations, the answer to the second question is that Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)(c) of that directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.

The third question

50 By its third question, the referring court is essentially asking whether Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it precludes Member States from granting to publicly accessible libraries covered by that provision the right to make works available to users by dedicated terminals which permit the printing out of those works on paper or their storage on a USB stick.

51 As is clear from paragraphs 40 and 42 of the present judgment, the limitation laid down in Article 5(3)(n) of Directive 2001/29 covers, in principle, only certain acts of communication normally falling under the exclusive right of the author provided for in Article 3 of that directive, namely those by which the establishments in question make a work available to individual members of the public, for the purpose of research or private study, by dedicated terminals installed on their premises.

52 It is undisputed that acts such as the printing out of a work on paper or its storage on a USB stick, even if made possible by the specific features of the dedicated terminals on which that work can be consulted, are not acts of 'communication', within the meaning of Article 3 of Directive 2001/29, but rather of 'reproduction', within the meaning of Article 2 of that directive.

53 What is involved is the creation of a new analogue or digital copy of the work that an establishment makes available to users by means of dedicated terminals.

54 Such acts of reproduction, unlike some operations involving the digitisation of a work, also cannot be permitted under an ancillary right stemming from the combined provisions of Articles 5(2)(c) and 5(3)(n) of Directive 2001/29, since they are not necessary for the purpose of making the work available to the users of that work, by dedicated terminals, in accordance with the conditions laid down by those provisions. Moreover, since those acts are carried out not by the establishments referred to in Article 5(3)(n) of Directive 2001/29, but rather by the users of the dedicated terminals installed within those establishments, they cannot be authorised under that provision.

55 By contrast, such acts of reproduction on analogue or digital media may, if appropriate, be authorised under the national legislation transposing the exceptions or limitations provided for in Article 5(2)(a) or (b) of Directive 2001/29 since, in each individual case, the conditions laid down by those provisions, in particular as regards the fair compensation which the rightholder must receive, are met.

56 Furthermore, such acts of reproduction must observe the conditions set out in Article 5(5) of Directive 2001/29. Consequently, the extent of the texts

reproduced may not, in particular, unreasonably prejudice the legitimate interests of the rightholder.

57 Having regard to the foregoing considerations, the answer to the third question is that Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it does not extend to acts such as the printing out of works on paper or their storage on a USB stick, carried out by users from dedicated terminals installed in publicly accessible libraries covered by that provision. However, such acts may, if appropriate, be authorised under national legislation transposing the exceptions or limitations provided for in Article 5(2)(a) or (b) of that directive provided that, in each individual case, the conditions laid down by those provisions are met.

Costs

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

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

1. The concept of 'purchase or licensing terms' provided for in Article 5(3)(n) 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 understood as requiring that the rightholder and an establishment, such as a publicly accessible library, referred to in that provision must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work.

2. Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)(c) of that directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.

3. Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it does not extend to acts such as the printing out of works on paper or their storage on a USB stick, carried out by users from dedicated terminals installed in publicly accessible libraries covered by that provision. However, such acts may, if appropriate, be authorised under national legislation transposing the exceptions or limitations provided for in Article 5(2)(a) or (b) of that directive provided that, in each individual case, the conditions laid down by those provisions are met.

* Language of the case: German.

OPINION OF ADVOCATE GENERAL JÄÄSKINEN

delivered on 5 June 2014 (1)

Case C‑117/13

Technische Universität Darmstadt

v

Eugen Ulmer KG

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Reference for a preliminary ruling — Directive 2001/29/EC — Copyright and related rights — Exceptions and limitations — Article 5(3)(n) — Use for the purpose of research or private study of works and other subject-matter — Book made available to individual members of the public by dedicated terminals in a publicly accessible library — Concept of a work which is not subject to 'purchase or licensing terms' — Right of the library to digitise a work which is contained in its collection in order to make it available by dedicated terminals — Making the work available by dedicated terminals enabling it to be printed out on paper or stored on a USB stick)

I – Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 5(3)(n) 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. The dispute in the main proceedings is between the Technische Universität Darmstadt ('TU Darmstadt') and a publisher, Eugen Ulmer KG, and stems from the fact that TU Darmstadt made available to the public, by terminals installed on the premises of a library, a scientific book which is contained in that library's collection, the user rights to which are held by Eugen Ulmer KG.

3. The questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice) concern a publicly accessible library and relate to the interpretation of the concept of a 'work subject to purchase or licensing terms', the digitisation of works held by libraries and the question whether users may not only view (read) digitised works, but also print them out on paper and save them on a USB stick.

4. The main proceedings are a test case. TU Darmstadt is supported by Deutscher Bibliotheksverband e.V. (German Library Association) and by the latter's European counterpart, the European Bureau of Library, Information and Documentation Associations (Eblida). Eugen Ulmer KG is supported by the Börsenverein des deutschen Buchhandels (German Publishers and Booksellers Association). This demonstrates the importance of the present case for libraries, authors and publishers, in particular scientific publishers. (3)

II – Legislative framework

A – EU law

5. Recitals 31, 34, 36, 40 and 44 in the preamble to Directive 2001/29 read as follows:

'(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the

light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

...

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives

... .

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

...

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. ... Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

...

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter'.

6. Article 2 of Directive 2001/29, entitled 'Reproduction right', requires, under point (a), that *'Member States shall provide for the exclusive right to authorise or prohibit' reproduction, inter alia 'for authors, of their works'*.

7. 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' requires, in paragraph 1 thereof, inter alia that '*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works*'.

8. Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', provides in paragraph 2:

'*Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:*

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

...'

9. Article 5(3) of that directive stipulates:

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

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

...'

10. Under Article 5(5) of that directive:

'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 – German law

11. Article 52b of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz) of 9 September 1965, (4) in the version applicable at the time of the main proceedings ('the UrhG'), is worded as follows:

'Reproduction of works at electronic reading points in public libraries, museums and archives

So far as there are no contractual provisions to the contrary, it shall be permissible to make available published works from the holdings of publicly accessible libraries, museums or archives which neither directly nor indirectly serve economic or commercial purposes, exclusively on the premises of the relevant establishment at dedicated electronic reading points for the purpose of research and private

study. The number of copies of a work made available at electronic reading points shall not, in principle, be higher than the number held by the establishment. Equitable remuneration shall be paid in consideration of their being made available. The right in question may be asserted only by a collecting society.'

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

12. TU Darmstadt operates a publicly accessible library. It set up on its premises electronic reading points at which it makes available certain works from its library holdings. As from January or February 2009 they included the textbook 'Einführung in die neuere Geschichte' [Introduction to Modern History] by Winfried Schulze, published by Eugen Ulmer KG.

13. TU Darmstadt had digitised the book to make it available at the electronic reading points. (5) At the reading points it was not possible simultaneously to bring up more copies of the work than existed in the library's holdings. Users of the reading points could print out the work on paper or store it on a USB stick in part or in full and take it from the library in that form.

14. TU Darmstadt did not take up Eugen Ulmer KG's offer of 29 January 2009 of an opportunity to purchase and use as electronic books (e-books) the textbooks which it published. The parties dispute whether the offer had been made to the defendant in the main proceedings at the time it digitised the textbook at issue.

15. After the matter had been referred to it by Eugen Ulmer KG, the Landgericht (Regional Court) Frankfurt am Main held, by a judgment of 6 March 2011, that the rightholder and the establishment must have reached prior agreement on the digital use of the work for the application of Article 52b of the UrhG to be ruled out. The Landgericht also dismissed the application by Eugen Ulmer KG seeking to prohibit TU Darmstadt from digitising the contested textbook or having it digitised. It did, however, grant its application seeking a prohibition on users of the library at TU Darmstadt being able, at electronic reading points set up in the library, to print out that work and/or to store it on a USB stick and/or to take such reproductions from the library's premises.

16. After the TU Darmstadt had brought an appeal on a point of law before it, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a work subject to purchase or licensing terms within the meaning of Article 5(3)(n) of Directive 2001/29 where the rightholder offers to conclude with the establishments referred to therein licensing agreements for the use of that work on appropriate terms?

2. Does Article 5(3)(n) of Directive 2001/29 entitle the Member States to confer on establishments the right to digitise the works contained in their collections, if that is necessary in order to make those works available on terminals?

3. May the rights which the Member States lay down pursuant to Article 5(3)(n) of Directive 2001/29 go so far as to enable users of the terminals to print out on paper or store on a USB stick the works made available there?'

17. Written observations have been submitted by TU Darmstadt, by Eugen Ulmer KG, by the German, Italian, Polish and Finnish Governments and by the European Commission, which were all represented at the hearing on 26 February 2014, except for the Polish and Finnish Governments.

IV – Analysis

A – The question whether a work is subject to purchase or licensing terms where the rightholder offers to conclude with the establishments licensing agreements for the use of works on appropriate terms

18. By its first question, the referring court essentially wishes to know whether a work is subject to 'purchase or licensing terms' within the meaning of Article 5(3)(n) of Directive 2001/29 where the rightholder offers to conclude licensing agreements for the use of that work on appropriate terms with the libraries, educational establishments museums or archives covered by that provision.

19. All the parties which submitted written observations except for Eugen Ulmer KG propose that this first question be answered in the negative.

20. The question therefore arises whether the mere offer of an appropriate licensing agreement means that the works concerned are 'subject to purchase or licensing terms' and an exception under Article 5(3)(n) of Directive 2001/29 is excluded or, if that is not the case, the rightholder and the establishment must be required to enter into a relevant agreement. According to the referring court, the answer to this question is not clear from the case-law of the Court of Justice.

21. As TU Darmstadt rightly points out, some light is shed on the relationship between exploitation rights, on the one hand, and limitation rules, on the other, by a reading of recitals 45 and 51 in the preamble to Directive 2001/29. Those recitals state, inter alia, that *'[t]he exceptions and limitations ... should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law' and that 'Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive'*. (6)

22. These two recitals plainly refer, in their German version, to existing contractual relations and the conclusion and implementation of existing contractual agreements, and not mere prospects of licences. The different language versions of those recitals also corroborate this view. (7)

23. The fact that voluntary agreements should be promoted does not therefore have any bearing on the requirement of the actual conclusion of such

agreements for the purposes of the provision in question.

24. Neither a schematic nor a teleological interpretation leads to a different conclusion. On the basis of a schematic interpretation, the scope of an exception relating to an author's exclusive right must be interpreted strictly. (8) However, in the present case it is necessary to interpret the condition governing the application of an exception which defines the works to which the exception may be applicable. The balance sought by Article 5(5) of Directive 2001/29 is achieved either where the author and the user agree on the purchase or licensing terms or where the beneficiary of the exception complies with the restrictive conditions laid down by the national legislature when it transposes that directive. (9) With this in mind, being satisfied with a simple offer by the copyright holder would allow the application of that exception to be made subject to unilateral decisions, which would therefore deprive the exception of its effectiveness for the establishments concerned. A teleological interpretation also requires, in view of the general interest objective pursued by the Union legislature, namely to promote learning and culture, that the user is able to rely on that exception.

25. I therefore propose that the Court answer the first question to the effect that Article 5(3)(n) of Directive 2001/29 must be interpreted as meaning that a work is not subject to purchase or licensing terms where the rightholder offers to conclude licensing agreements for the use of that work on appropriate terms with the establishments referred to therein.

B – The possibility for the Member States to confer on establishments the right to digitise the works contained in their collections if that is necessary in order to make those works available on dedicated terminals

26. By its second question, the referring court is seeking to ascertain whether Article 5(3)(n) of Directive 2001/29 entitles the Member States to confer on establishments the right to digitise the works contained in their collections if that is necessary in order to make them available to the public on dedicated terminals.

27. The referring court considers that this appears to be the case, but adds that if a corresponding power of the Member States does not already follow as an ancillary competence from that provision, it could be derived from Article 5(2)(c) of Directive 2001/29.

28. All the parties which submitted written observations except for Eugen Ulmer KG take the view that Article 5(3)(n) of Directive 2001/29 entitles the Member States to confer on establishments the right to digitise the works contained in their collections in so far as that is necessary in order to make those works available on dedicated terminals.

29. Article 5(3)(n) of Directive 2001/29 applies in the case of '*use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections*'.

30. According to the first sentence of Article 5(3), the exceptions and limitations laid down in that paragraph concern the exclusive reproduction right and the exclusive right of communication to the public of works. In fact, some of the exceptions and limitations laid down in Article 5(3) of Directive 2001/29 refer to the exclusive reproduction right and the exclusive right of communication expressly (for example point (c)) or, at the very least, implicitly (point (b)), whilst others refer to just one right (point (d)).

31. Article 5(3)(n) of Directive 2001/29 mentions communication and making available. These two concepts appear in Article 3 of that directive, and more specifically in each of its three paragraphs. There is no express reference to the reproduction right in Article 5(3)(n) of Directive 2001/29. I therefore conclude that the specific exception referred to in Article 5(3)(n) of Directive 2001/29 is primarily an exception to the exclusive right of communication under Article 3.

32. As the Court has held, 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. It is thus apparent from that provision that the concept of communication to the public includes two cumulative criteria, namely, an '*act of communication*' of a work and the communication of that work to a '*public*'. For there to be an '*act of communication*', it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity. (10)

33. Accordingly, in circumstances such as those in the main proceedings, the provision of access to the public, consisting in users of dedicated terminals on the premises of public libraries and other establishments mentioned in Article 5(2)(c) of Directive 2001/29, to protected works must be regarded as '*making available*' and therefore an '*act of communication*' for the purposes of Article 3(1) of Directive 2001/29. (11)

34. However, along the same lines, the wording of Article 5(3)(n) of Directive 2001/29 in my view also covers reproduction which is incidental to communication, in this case in the form of the production of a digital copy of a work for the purpose of communicating it or making it available by dedicated terminals. Nevertheless, this does not constitute a transient or incidental act of reproduction forming an integral and essential part of a technological process within the meaning of Article 5(1) of Directive 2001/29, which would not be covered by the author's exclusive right relating to the reproduction of the work. (12)

35. The necessary right to acts of reproduction can also be derived from another provision, namely Article 5(2)(c) of Directive 2001/29. That provision applies '*in respect of specific acts of reproduction made by publicly accessible libraries, educational*

establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage'.

36. The expression *'specific acts of reproduction'* calls for two observations to be made.

37. I consider that in this context it covers, among other things, measures to protect the originals of still protected works which are old, fragile or rare. Nevertheless, it also covers reproduction which is made necessary with a view to *'use by communication or making available, for the purpose of research or private study … by dedicated terminals'*, as provided for in Article 5(3)(n) of Directive 2001/29. This may be the case, for example, with works to be viewed by a large number of students in their studies, copying of which would be likely to cause disproportionate wear.

38. However, in respect of *'specific acts of reproduction'*, neither Article 5(2)(c) of Directive 2001/29 nor Article 5(3)(n) of that directive, interpreted in the light of the general rule laid down in paragraph 5 of that article, (13) permit the general digitisation of a collection, and the object *'specific acts of reproduction'* is thus limited to individual *'works and other subject-matter'*. In my view, the requirement that the limitations under paragraph 5 of that article be proportionate means that the possibility of using dedicated terminals should not be exploited in order to avoid buying a sufficient number of physical copies of the work by, for example, establishing a rule such as that provided for in Article 52b of the UrhG, under which the number of copies of a work made available at electronic reading points may be no higher than the number held by the establishment.

39. Where a digital copy of a protected work does not exist for the purposes of the application of Article 5(3)(n) of Directive 2001/29, it is therefore possible to make a copy subject to the conditions laid down in Article 5(2)(c) of Directive 2001/29. The subsequent communication of that copy of the work is itself subject to the conditions set out in Article 5(3)(n) of Directive 2001/29.

40. I therefore propose that the Court rule that Article 5(3)(n) of Directive 2001/29, interpreted in the light of Article 5(2)(c) of that directive, does not preclude the Member States conferring on the establishments referred to in that provision the right to digitise the works contained in their collections, if that is necessary in order to make them available to the public on dedicated terminals.

C – The possibility for the Member States to enable users of the dedicated terminals to print out on paper or store on a USB stick the works made available there

41. By its third question, the referring court is seeking to ascertain whether the rights which the Member States lay down pursuant to Article 5(3)(n) of Directive 2001/29 may go so far as to enable users of dedicated terminals to print out on paper or to download onto a USB stick in part or in full the works made available there.

42. The referring court suggests that the first part should be answered in the affirmative and that the second part of that question be answered in the negative. TU Darmstadt proposes that both parts of the question be answered in the affirmative, whilst the Italian and Finnish Governments propose that the first part be answered in the affirmative and the second part in the negative. Conversely, Eugen Ulmer KG and the Commission propose that both parts of the question be answered in the negative. The German Government takes the view that the question is not governed by Article 5(3)(n) of Directive 2001/29, but by Article 5(2)(a) to (c) of that directive, whilst the Polish Government sets out some considerations but does not propose a specific answer.

43. In examining the two situations mentioned in the question asked by the referring court, relating to the possibility for users of dedicated terminals to print out on paper or to download onto a USB stick in part or in full the works made available there, regard must be had to the concept of the right of communication. According to the Court's case-law, a broad interpretation should be given to the concept of communication within the meaning of Article 3 of Directive 2001/29, (14) whilst any exception to that right is interpreted strictly. (15)

44. As I have just noted in connection with the second question, Article 5(3)(n) of Directive 2001/29 primarily sets out an exception to the exclusive right of communication provided for in Article 3 of that directive.

45. In the context of Article 5(3)(n) of Directive 2001/29, the limitation to the right of communication consists in the use, without the authorisation of the author, of works on dedicated terminals by making them available to members of the public in such a way that the user can access them in the establishment as he likes.

46. It must be ascertained whether such communication also covers saving on a USB stick and printing out on paper. I would note at the outset that the two situations envisaged are not acts of communication but acts of reproduction. In the case of a USB stick, there is the creation of a copy of the digital work and, in the case of a paper copy, a copy of the work on a physical medium.

47. With regard, first, to saving on a USB stick, the interaction between a terminal and a USB stick involves the creation, on the USB stick, of a new digital copy of the digital copy made by the library. It is here that the notion of dedicated terminals comes into play. Nevertheless, Directive 2001/29 does not specify the meaning of that expression.

48. In my view, the use of a protected work — such as a literary, phonographic or cinematographic work — on dedicated terminals involves an act of perception (16) by immediate reading, listening or viewing, which must, moreover, occur on the premises of the library. Thus, the notion of dedicated terminal refers to the equipment provided for that purpose, and not to a specific technical solution. (17)

49. Against this background, I consider that the concept of communication excludes from the scope of the exception in question the possibility of saving the work on a USB stick, as it does not constitute communication by the public library or other establishment within the meaning of the Court's case-law, but the creation of a private digital copy by the user. Furthermore, such reproduction is not necessary to preserve the effectiveness of the exception in question, even though it might be helpful to the user. Such a copy may, moreover, be re-copied and distributed online. The exception envisaged for dedicated terminals does not cover the act by which the library makes its digital copy accessible to the user so that he can create a further copy and store it on a USB stick.

50. The analysis of printing out on paper should follow the same logic. In my view, a process which culminates in a (partial) copy of a work goes beyond the exceptions and limitations laid down in Article 5(3)(n) of Directive 2001/29.

51. I conclude that Article 5(3)(n) of Directive 2001/29 does not cover either saving on a USB stick or printing out on paper.

52. However, for the sake of completeness, and with regard to printing out, I would also make the following points.

53. The modern technical process of photocopying is largely based on the digitisation of the original and the printing of a copy. (18)

54. Under Article 5(2)(a) and (b) of Directive 2001/29, making photocopies of works within the library may be accepted under certain conditions. Current photocopiers digitise the original and print out on paper an analogue copy of the original work, which amounts to a physical reproduction of the original following digitisation.

55. The Court held in VG Wort and Others that *'the wording of Article 5(2)(a) of Directive 2001/29 refers not only to photographic technique but also to "some other process having similar effects", namely any other means allowing for a similar result to that obtained by a photographic technique to be achieved, that is to say the analogue representation of a protected work or other subject-matter'*. (19)

56. The Court added that *'[a]s long as that result is ensured, the number of operations or the nature of the technique or techniques used during the reproduction process at issue does not matter, on condition, however, that the various elements or non-autonomous stages of that single process act or are carried out under the control of the same person and are all intended to reproduce the protected work or other subject-matter on paper or a similar medium'*. (20)

57. On the basis of that approach, it is possible to print out pages from an already digitised work. This situation goes beyond the provisions of Article 5(3)(n) of Directive 2001/29, but may be covered by Article 5(2)(a), (b), and/or (c) of Directive 2001/29. Just as a user of a library may, within the limits laid down by national legislation, photocopy pages of physical works contained in the collection and a library may permit him to do so, the user may print out pages from a digital copy and the library may permit him to do so. Unlike a digital copy saved on a USB stick, where a library or other establishment referred to in Article 5(3)(n) of Directive 2001/29 permits the printing out of digitised works, this does not create a new situation compared with the situation where there is no dedicated terminal. The danger of large-scale unlawful distribution, which is present in the case of digital copies, does not exist either.

58. In the light of the foregoing, I propose that the third question be answered to the effect that the rights which the Member States lay down pursuant to Article 5(3)(n) of Directive 2001/29 do not enable users of dedicated terminals to print out on paper or store on a USB stick the works made available there.

V – Conclusions

59. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesgerichtshof as follows:

1. Article 5(3)(n) 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 meaning that a work is not subject to purchase or licensing terms where the rightholder offers to conclude licensing agreements for the use of that work on appropriate terms with the establishments referred to therein.

2. Article 5(3)(n) of Directive 2001/29, interpreted in the light of Article 5(2)(c) of that directive, does not preclude the Member States conferring on the establishments referred to in that provision the right to digitise the works contained in their collections, if that is necessary in order to make them available to the public on dedicated terminals.

3. The rights which the Member States lay down pursuant to Article 5(3)(n) of Directive 2001/29 do not enable users of dedicated terminals to print out on paper or store on a USB stick the works made available there.

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1 – Original language: French.

2 – OJ 2001 L 167, p. 10.

3 – It should be noted that the digitisation of works held by libraries has also been a source of controversy in the context of the Google Book Search project. See United States District Court, Southern District of New York, judgment of 14 November 2013 in The Authors Guild et al. vs. Google Inc. (05 CIV 8136), and the Green paper entitled *'Copyright in the Knowledge Economy'*, COM(2008) 466 final, p. 8.

4 – BGBl. I, p. 1273.

5 – In its written observations, TU Darmstadt states, without being challenged on this point by Eugen Ulmer KG, that the digital files of the different chapters of that book were simple graphics files in which modern word processing functions (full-text search, cut/paste, etc.) are not available.

6 – Emphasis added.

7 – See, for example, the English and French versions.

8 – See judgment in ACI Adam and Others (C‑435/12, EU:C:2014:254, paragraphs 22 and 23 and the case-law cited).

9 – With regard to the Member States' capacity to specify the purport of limitations and exceptions in respect of the exclusive rights of authors, see judgment in VG Wort and Others (C‑457/11 to C‑460/11, EU:C:2013:426, paragraphs 52 and 53).

10 – Judgment in Svensson and Others (C‑466/12, EU:C:2014:76, paragraphs 15 to 19).

11 – See, to this effect, judgments in Svensson and Others (EU:C:2014:76, paragraph 18), and OSA (C‑351/12, EU:C:2014:110, paragraph 25).

12 – Judgment in Infopaq International (C‑5/08, EU:C:2009:465, paragraph 60).

13 – Judgment in ACI Adam and Others (EU:C:2014:254, paragraph 25).

14 – Judgments in Svensson and Others (EU:C:2014:76, paragraph 19), and OSA (EU:C:2014:110, paragraph 23).

15 – See, to that effect, judgment in Infopaq International (EU:C:2009:465, paragraph 56 and the case-law cited).

16 – Judgment in VG Wort and Others (EU:C:2013:426, paragraph 67).

17 – I cannot therefore see any obstacle to, for example, a PC or a laptop being used as a *'dedicated terminal'*. However, the notion of *'dedicated terminal'* may require that certain technical capabilities of the equipment are not available to users in establishments.

18 – See the Opinion of Advocate General Sharpston in VG Wort and Others (C‑457/11 to C‑460/11, EU:C:2013:34, point 75 et seq.), in which she conducted a detailed analysis of reproduction involving a chain of devices.

19 – Judgment in VG Wort and Others (EU:C:2013:426, paragraph 68).

20 – Judgment in VG Wort and Others (EU:C:2013:426, paragraph 70).