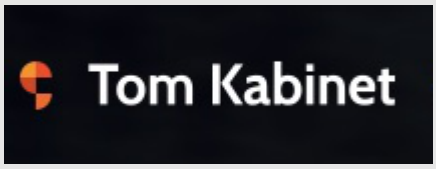
Court of Justice EU, 19 December 2019, NUV v Tom Kabinet



COPYRIGHT

The supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public':

- **from the explanatory memorandum of the Directive follows that the intention was that any communication to the public of a work, other than the distribution of physical copies of the work, should be covered not by the concept of 'distribution to the public', but by that of 'communication to the public'**

Usedsoft judgment - in which the CJEU held that exhaustion does not extend only to copies of computer programs on a physical medium - does not apply to e-books:

- **an e-book is not a computer program**

Therefore it is not appropriate to apply the specific provisions of Directive 2009/24.

- **unlike the Software Directive 2009, the EU legislature did not desire assimilation of tangible and intangible copies of works protected for the purposes of the relevant provisions of the Copyright in Information Society Directive.**
- **the sale of a computer program on a material medium and the sale of a computer program by downloading from the internet are similar from an economic point of view. However, the supply of a book on a material medium and the supply of an e-book cannot be considered equivalent from an economic and functional point of view.**

As the Advocate General noted in point 89 of his Opinion, dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel secondhand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment.

- **the fact that an e-book may form part of an e-book so as to enable it to be read cannot result in the application of software provisions**

Even if an e-book were to be considered complex matter (see, to that effect, judgment of 23 January 2014, **Nintendo and Others**, C-355/12, EU:C:2014:25, paragraph 23), comprising both a protected work and a computer program eligible for protection under Directive 2009/24, it would have to be concluded that such a program is only incidental in relation to the work contained in such a book. As the Advocate General noted in point 67 of his Opinion, an e-book is protected because of its content, which must therefore be considered to be the essential element of it, and the fact that a computer program may form part of an e-book so as to enable it to be read cannot therefore result in the application of those specific provisions.

Subject to verification by rechtbank Den Haag (District Court, The Hague, Netherlands) must the making available of an e-book by Tom Kabinet be regarded as being communicated to a public:

- **there is "communication" because the works are available to anyone who is registered and that these persons are being able to access the site from a place and at a time individually chosen by him or her**

irrespective of whether that person avails himself or herself of that opportunity by actually retrieving the e-book from that website.

- **there is a "public" because the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial**

In that regard, the Court has previously had occasion to clarify, first, that the concept of 'public' involves a certain de minimis threshold, which excludes from that concept a group of persons concerned that is too small, and, second, that in order to determine that number, the cumulative effect of making a protected work available, by downloading, to potential recipients should be taken into consideration. Account should therefore be taken, in particular, of the number of persons able to access the work at the same time, but also of how many of them may access it in succession (see, to that effect, judgment of 14 June 2017, **Stichting Brein**, C-610/15, EU:C:2017:456, paragraph 41 and the case-law cited).
In the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user (see, by analogy, judgment of 10 November 2016, Vereniging Openbare Bibliotheken, C-174/15, EU:C:2016:856), it must be concluded that the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public, within the meaning of Article 3(1) of Directive 2001/29.

- **there is a "new public" because a communication is made to a public that was not already taken into account by the copyright holders**

Last, the Court has held that, in order to be categorised as a communication to the public, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a

new public, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public (judgment of 14 June 2017, **Stichting Brein**, C-610/15, EU:C:2017:456, paragraph 28 and the case-law cited).
In the present case, since the making available of an e-book is, as NUV and GAU have noted, generally accompanied by a user licence authorising the user who has downloaded the e-book concerned only to read that e-book from his or her own equipment, it must be held that a communication such as that effected by Tom Kabinet is made to a public that was not already taken into account by the copyright holders and, therefore, to a new public within the meaning of the caselaw cited in the preceding paragraph of the present judgment.

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Court of Justice EU, 19 December 2019
(K. Lenaerts, R. Silva de Lapuerta, A. Arabadjiev, A. Prechal, M. Vilaras, P.G. Xuereb, L.S. Rossi, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, C. Lycourgos and N. Piçarra)
JUDGMENT OF THE COURT (Grand Chamber)
19 December 2019 (*)
(Reference for a preliminary ruling — Harmonisation of certain aspects of copyright and related rights
in the information society — Directive 2001/29/EC — Article 3(1) — Right of communication to the
public — Making available — Article 4 — Distribution right — Exhaustion — Electronic books
(e-books) — Virtual market for e-books)
In Case C-263/18,
REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Den Haag (District Court, The Hague, Netherlands), made by decision of 28 March 2018, received at the Court on 16 April 2018, in the proceedings Nederlands Uitgeversverbond,
Groep Algemene Uitgevers
v
Tom Kabinet Internet BV,
Tom Kabinet Holding BV,
Tom Kabinet Uitgeverij BV,
THE COURT (Grand Chamber),
composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, C. Lycourgos and N. Piçarra, Judges,
Advocate General: M. Szpunar,
Registrar: M. Ferreira, Principal Administrator,
having regard to the written procedure and further to the hearing on 2 April 2019, after considering the observations submitted on behalf of:
– Nederlands Uitgeversverbond and Groep Algemene Uitgevers, by C.A. Alberdingk Thijm,
C.F.M. de Vries and S.C. van Velze, advocaten,
– Tom Kabinet Internet BV, Tom Kabinet Holding BV and Tom Kabinet Uitgeverij BV, by
T.C.J.A. van Engelen and G.C. Leander, advocaten,
– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
– the Danish Government, by P. Ngo, M.S. Wolff and J. Nymann-Lindegren, acting as Agents,
– the German Government, by M. Hellmann, U. Bartl, J. Möller and T. Henze, acting as Agents,
– the Spanish Government, by A. Rubio González and M.A. Sampol Pucurull, acting as Agents,
– the French Government, by D. Colas and D. Segoin, acting as Agents,
– the Italian Government, by G. Palmieri, acting as Agent, and by F. De Luca, avvocato dello Stato,
– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and T. Rendas, acting as Agents,
– the United Kingdom Government, by S. Brandon and Z. Lavery, acting as Agents, and by N. Saunders QC,
– the European Commission, by J. Samnadda, A. Nijenhuis and F. Wilman, acting as Agents,
after hearing **the Opinion of the Advocate General** at the sitting on 10 September 2019, gives the following
Judgment
1 This request for a preliminary ruling concerns the interpretation of Article 2, Article 4(1) and (2) and Article 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 The request has been made in proceedings between, on the one hand, Nederlands Uitgeversverbond (*'NUV'*) and Groep Algemene Uitgevers (*'GAU'*) and, on the other, Tom Kabinet Internet BV (*'Tom Kabinet'*), Tom Kabinet Holding BV and Tom Kabinet Uitgeverij BV concerning the provision of an online service consisting in a virtual market for e-books.
Legal context
International law
3 The World Intellectual Property Organisation (WIPO) adopted the WIPO Copyright Treaty (*'the WCT'*) in Geneva on 20 December 1996, a treaty which was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6) and which entered into force with respect to the European Union on 14 March 2010 (OJ 2010 L 32, p. 1).
4 Article 6 of the WCT, entitled *'Right of distribution'*, provides in paragraph 1:
'Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.'
5 Article 8 of the WCT, entitled *'Right of communication to the public'*, provides:
'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right

of authorising 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 these works from a place and at a time individually chosen by them.'

6 Agreed statements concerning the WCT (*'the Agreed Statements'*) were adopted by the Diplomatic Conference on 20 December 1996.

7 The Agreed Statements concerning Articles 6 and 7 of the WCT are worded as follows:

'As used in these Articles, the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.'

European Union law

Directive 2001/29

8 Recitals 2, 4, 5, 9, 10, 15, 23 to 25, 28 and 29 of Directive 2001/29 state:

'(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content. …

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

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

…

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

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

…

(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. … This Directive also serves to implement a number of the new international obligations.

…

(23) 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. This right should not cover any other acts.

(24) The right to make available to the public subject matter referred to in Article 3(2) should be understood as covering all acts of making available such subject matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

…

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in [Council] Directive 92/100/EEC [of 19 November 1992 on rental

right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61)]. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.
(29) The question of exhaustion does not arise in the case of services and online services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorisation where the copyright or related right so provides.'

9 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:
…'

10 Article 3 of Directive 2001/29, entitled *'Right of communication to the public of works and right of making available to the public other subject matter'*, provides, in paragraphs 1 and 3:

'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.'

11 Article 4 of Directive 2001/29, entitled *'Distribution right'*, reads as follows:

'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.'

12 Article 5 of Directive 2001/29, entitled *'Exceptions and limitations'*, states, in paragraph 1:

'Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.'

Directive 2009/24/EC

13 Article 4 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16), entitled *'Restricted acts'*, provides:

'1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:
…
(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.
2. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.'

Netherlands law

14 According to Article 1 of the Auteurswet (Law on copyright) of 23 September 1912, in the version applicable to the dispute in the main proceedings (*'the Law on copyright'*):

'Copyright is the exclusive right of the author of a literary, scientific or artistic work or those entitled under him to publish that work and to reproduce it, subject to the restrictions laid down by law.'

15 Article 12(1) of the Law on copyright provides:

'Publication of a literary, scientific or artistic work means:
1°. the publication of a reproduction of the whole or a part of the work;
…'

16 Article 12b of the Law on copyright reads as follows:

'If a copy of a literary, scientific or artistic work has been put into circulation by transfer of ownership for the first time in one of the Member States of the European Union or in a State Party to the Agreement on the European Economic Area by or with the consent of its author or a person entitled under him, the putting into circulation of that copy in another fashion, apart from by rental or loan, shall not constitute a breach of copyright.'

17 Article 13 of that law provides:

'Reproduction of a literary, scientific or artistic work means the translation, musical arrangement, cinematographic adaptation or dramatisation and generally any partial or total adaptation or reproduction in a modified form, which cannot be regarded as a new, original work.'

18 Article 13a of the Law on copyright states:

'The reproduction of a literary, scientific or artistic work does not include temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable
(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use and which have no independent economic value.'

19 Article 16b(1) of the Law on copyright provides:

'Reproduction shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work if it is restricted to a few copies intended exclusively for personal practice, study or use by the natural person who, without any direct or indirect commercial objective, made the reproduction or caused it to be made exclusively for his own benefit.'

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

20 NUV and GAU, associations whose purpose it is to defend the interests of Netherlands publishers, were mandated by several publishers to ensure that the copyright granted to them by copyright holders by means of exclusive licences is protected and observed.

21 Tom Kabinet Holding is the sole shareholder of Tom Kabinet Uitgeverij, a publisher of books, e-books and databases, and also of Tom Kabinet. Tom Kabinet operates a website on which, on 24 June 2014, it launched an online service consisting in a virtual market for *'second-hand'* e-books.

22 On 1 July 2014, NUV and GAU brought an action under the Law on copyright against Tom Kabinet, Tom Kabinet Holding and Tom Kabinet Uitgeverij before the urgent applications judge at the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) in respect of that online service. The rechtbank Amsterdam (District Court, Amsterdam) dismissed their application on the ground that, according to that court, there was no prima facie breach of copyright.

23 NUV and GAU appealed against that decision before the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam, Netherlands), which, by judgment of 20 January 2015, upheld the decision but prohibited Tom Kabinet from offering an online service that allowed the sale of unlawfully downloaded e-books.

No appeal on a point of law was lodged against that judgment.

24 From 8 June 2015 onwards, Tom Kabinet modified the services offered up to that point and replaced them with the *'Tom Leesclub'* (Tom reading club, *'the reading club'*), within which Tom Kabinet is an e-book trader. In return for payment of a sum of money, the reading club offers its members *'secondhand'* e-books which have been either purchased by Tom Kabinet or donated to Tom Kabinet free of charge by members of the club. In the latter case, those members must provide the download link in respect of the book in question and declare that they have not kept a copy of the book. Tom Kabinet then uploads the e-book from the retailer's website and places its own digital watermark on it, which serves as confirmation that it is a legally acquired copy.

25 Initially, e-books available through the reading club could be purchased for a fixed price of EUR 1.75 per e-book. Once payment had been made, the member could download the e-book from Tom Kabinet's website and subsequently resell it to Tom Kabinet. Membership of the reading club was subject to payment by members of a monthly subscription of EUR 3.99. Any e-book provided free of charge by a member resulted in that member being entitled to a discount of EUR 0.99 on the following month's subscription.

26 Since 18 November 2015, payment of a monthly subscription has ceased to be a requirement of membership of the reading club. On the one hand, the price of every e-book is now set at EUR 2. On the other hand, the members of the reading club also need *'credits'* in order to be able to acquire an e-book through the reading club; credits can be obtained by providing the club with an e-book, either for consideration or free of charge. Such credits can also be purchased when making an order.

27 NUV and GAU applied to the rechtbank Den Haag (District Court, The Hague, Netherlands) for an injunction prohibiting Tom Kabinet, Tom Kabinet Holding and Tom Kabinet Uitgeverij, on pain of a periodic penalty payment, from infringing the copyright of NUV's and GAU's affiliates by the making available or the reproduction of e-books. In particular, in their view Tom Kabinet is, in the context of the reading club, making an unauthorised communication of e-books to the public.

28 In an interim judgment of 12 July 2017, the referring court found that the e-books at issue were to be classified as works, within the meaning of Directive 2001/29, and that Tom Kabinet's offer, in circumstances such as those at issue in the main proceedings, did not constitute a communication to the public of those works, within the meaning of Article 3(1) of that directive.

29 The referring court observes, however, that the answers to the questions as to whether the making available remotely by the downloading, for payment, of an e-book for use for an unlimited period may constitute an act of distribution for the purposes of Article 4(1) of Directive 2001/29, and as to whether the right of distribution may thus be exhausted, within the meaning of Article 4(2) of that directive, are unclear. It also wonders whether the copyright holder may, in the event of a resale, object, on the basis of Article 2 of that directive, to the acts of reproduction necessary for the lawful transmission between subsequent purchasers of the copy for which the distribution right is, if such be the case, exhausted. Nor is the answer to be given to that question apparent from the case-law of the Court of Justice, according to the referring court.

30 In those circumstances, the rechtbank Den Haag (District Court, The Hague) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 4(1) of [Directive 2001/29] to be interpreted as meaning that "any form of distribution to the public by sale or otherwise of the original of their works or copies thereof" as referred to therein includes the making available remotely by downloading, for use for an unlimited period, of e-books (being digital copies of books protected by copyright) at a price by means of which the copyright holder receives remuneration equivalent to the economic value of the work belonging to him?

(2) If question 1 is to be answered in the affirmative, is the distribution right with regard to the original or copies of a work as referred to in Article 4(2) of [Directive 2001/29] exhausted in the European Union, when the first sale or other transfer of that material, which includes the making available remotely by downloading, for use for an unlimited period, of e-books (being digital copies of books protected by copyright) at a price by means of which the copyright holder receives remuneration equivalent to the economic value of the work belonging to him, takes place in the European Union through the rightholder or with his consent?
(3) Is Article 2 of [Directive 2001/29] to be interpreted as meaning that a transfer between successive acquirers of a lawfully acquired copy in respect of which the distribution right has been exhausted constitutes consent to the acts of reproduction referred to therein, in so far as those acts of reproduction are necessary for the lawful use of that copy and, if so, which conditions apply?
(4) Is Article 5 of [Directive 2001/29] to be interpreted as meaning that the copyright holder may no longer oppose the acts of reproduction necessary for a transfer between successive acquirers of the lawfully acquired copy in respect of which the distribution right has been exhausted and, if so, which conditions apply?'

Consideration of the questions referred

The first question

31 It should be noted as a preliminary point that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide on the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgment of 13 September 2016, Rendón Marín, C-165/14, EU:C:2016:675, paragraph 33 and the case-law cited).

32 To that end, the Court can extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 13 September 2016, Rendón Marín, C-165/14, EU:C:2016:675, paragraph 34 and the case-law cited).

33 In the present case, although by its first question the referring court is asking the Court of Justice, in essence, whether the expression *'any form of distribution to the public by sale or otherwise [of the original of authors'* works or of copies thereof]', in Article 4(1) of Directive 2001/29, covers *'the making available remotely by downloading, for use for an unlimited period, of e-books […] at a price'*,
it is apparent from the grounds of the order for reference that the question arises as to whether, in the dispute that is pending before that court, the supply by downloading, for permanent use, of an e-book constitutes an act of distribution for the purposes of Article 4(1) of that directive, or whether such supply is covered by the concept of *'communication to the public'* within the meaning of Article 3(1) of that directive. The crux of that question in the dispute in the main proceedings is whether such supply is subject to the rule on exhaustion of the distribution right provided for in Article 4(2) of that directive or whether, on the contrary, it falls outside such a rule, as expressly provided for in Article 3(3) of the directive in the case of the right of communication to the public.

34 In the light of these considerations, the first question put by the referring court must be reformulated to the effect that the referring court thereby asks, in essence, whether the supply by downloading, for permanent use, of an e-book is covered by the concept of *'communication to the public'* within the meaning of Article 3(1) of Directive 2001/29, or by that of *'distribution to the public'*, as referred to in Article 4(1) of that directive.

35 As is apparent from Article 3(1) of Directive 2001/29, authors have 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.

36 Article 4(1) of that directive, on the other hand, provides that authors have, 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, that right being, under Article 4(2) of that directive, exhausted where the first sale or other transfer of ownership in the European Union of the original or of a copy of the work is made by the rightholder or with his or her consent.

37 It cannot be determined, either on the basis of those provisions or of any other provision of Directive 2001/29, having regard to the wording alone, whether the supply by downloading, for permanent use, of an e-book constitutes a communication to the public, in particular a making available to the public of a work in such a way that members of the public may access it from a place and at a time individually chosen by them, or an act of distribution for the purposes of that directive.

38 According to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (see, to that effect, **judgments of 20 December 2017, Acacia and D'Amato, C-397/16 and C-435/16, EU:C:2017:992**, paragraph 31, and of 10 December 2018, Wightman and Others, C-621/18, EU:C:2018:999, paragraph 47 and the case-law cited).
EU legislation must, moreover, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (**judgments of 7 December 2006, SGAE, C-306/05,**

EU:C:2006:764, paragraph 35; of 13 May 2015, Dimensione Direct Sales and Labianca, C-516/13, EU:C:2015:315, paragraph 23; and of 19 December 2018, Syed, C-572/17, EU:C:2018:1033, paragraph 20 and the caselaw cited).

39 In the first place, it must be noted that, as is apparent from recital 15 of Directive 2001/29, the directive serves, inter alia, to implement a number of the European Union's obligations under the WCT. It follows that the concepts of *'communication to the public'* and *'distribution to the public'* referred to in Article 3(1) and in Article 4(1) of that directive must, so far as possible, be interpreted in accordance with the definitions contained, respectively, in Article 8 and in Article 6(1) of the WCT (see, to that effect, judgments of 17 April 2008, Peek & Cloppenburg, C-456/06, EU:C:2008:232, paragraph 31, and of 19 December 2018, Syed, C-572/17, EU:C:2018:1033, paragraph 21 and the caselaw cited).

40 Article 6(1) of the WCT defines the right of distribution as the exclusive right of authors to authorise the making available to the public of the original and copies of their works through sale or other transfer of ownership. It is apparent from the wording of the Agreed Statements concerning Articles 6 and 7 of the WCT that *'the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects'*, and therefore that Article 6(1) cannot cover the distribution of intangible works such as e-books.

41 The explanatory memorandum in the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997 (COM(97) 628 final, *'the proposal for the directive'*), which led to Directive 2001/29, is in line with that statement. It is noted there that the words *'including the making available to the public of [authors"*] works in such a way that members of the public may access these works from a place and at a time individually chosen by them', which appear in Article 8 of the WCT and were essentially reproduced in Article 3(1) of Directive 2001/29, reflect the proposal that had been made in that respect by the European Community and its Member States during the negotiations, and concern *'interactive activities'*.

42 In the second place, the European Commission also stated in the explanatory memorandum in the proposal for the directive that that proposal *'[gave] an opportunity to provide for a coherent level playing field for the electronic and tangible distribution of protected material and to draw a clear line between them'*.

43 In that context, the Commission noted that interactive on-demand transmission was a new form of exploitation of intellectual property, in relation to which the Member States were of the view that it should be covered by the right to control communication to the public, while stating that it was generally accepted that the distribution right, which applies exclusively to the distribution of physical copies, does not cover such transmission.

44 Still in that explanatory memorandum, the Commission added that the expression *'communication to the public'* of a work covers acts of interactive on-demand transmission, thereby confirming that the right of communication to the public is also pertinent when several unrelated persons, who are members of the public, may have individual access, from different places and at different times, to a work which is on a publicly accessible website, while making clear that that right covers any communication *'other than the distribution of physical copies'*, since physical copies which can be put into circulation as tangible objects are covered by the distribution right.

45 It thus follows from that explanatory memorandum that the intention underlying the proposal for the directive was that any communication to the public of a work, other than the distribution of physical copies of the work, should be covered not by the concept of *'distribution to the public'*, referred to in Article 4(1) of Directive 2001/29, but by that of *'communication to the public'* within the meaning of Article 3(1) of that directive.

46 In the third place, it should be noted that that interpretation is supported by the aim of that directive, as set out in the preamble thereto, and by the context of Article 3(1) and Article 4(1) of that directive.

47 It is clear from recitals 2 and 5 of Directive 2001/29 that that directive seeks to create a general and flexible framework at EU level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of exploiting protected works (judgment of 24 November 2011, Circul Globus București, C-283/10, EU:C:2011:772, paragraph 38).

48 It is, moreover, apparent from recitals 4, 9 and 10 of that directive that its principal objective is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including when a communication to the public takes place (see, to that effect, judgment of 19 November 2015, SBS Belgium, C-325/14, EU:C:2015:764, paragraph 14 and the caselaw cited).

49 In order to achieve that objective, *'communication to the public'* should, as is underlined by recital 23 of Directive 2001/29, be understood in a broad sense covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting (see, to that effect, judgments of 7 December 2006, SGAE, C-306/05, EU:C:2006:764, paragraph 36, and of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraph 17 and the case-law cited).

50 Recital 25 of that directive adds that rightholders recognised by that directive should have an exclusive right to make their works available to the public by way of interactive on-demand transmissions, such

transmissions being characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

51 Furthermore, recitals 28 and 29 of Directive 2001/29, relating to the distribution right, state, respectively, that that right includes the exclusive right to control *'distribution of the work incorporated in a tangible article'* and that the question of exhaustion of the right does not arise in the case of services and online services in particular, it being made clear that, unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

52 In the fourth place, an interpretation of the distribution right referred to in Article 4(1) of Directive 2001/29 as applying only to the distribution of works incorporated in a material medium follows equally from Article 4(2) of that directive, as interpreted by the Court in relation to exhaustion of that right, the Court having ruled that the EU legislature, by using the terms *'tangible article'* and *'that object'* in recital 28 of that directive, wished to give authors control over the initial marketing in the European Union of each tangible object incorporating their intellectual creation (**judgment of 22 January 2015, Art & Allposters International, C-419/13, EU:C:2015:27**, paragraph 37).

53 Admittedly, as the referring court notes, the Court of Justice has ruled, in relation to the exhaustion of the right of distribution of copies of computer programs mentioned in Article 4(2) of Directive 2009/24, that it does not appear from that provision that exhaustion is limited to copies of computer programs on a material medium, but that, on the contrary, that provision, by referring without further specification to the *'sale ... of a copy of a program'*, makes no distinction according to the tangible or intangible form of the copy in question (**judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407**, paragraph 55).

54 However, as the referring court correctly points out and as the Advocate General noted in point 67 of his Opinion, an e-book is not a computer program, and it is not appropriate therefore to apply the specific provisions of Directive 2009/24.

55 In that regard, first, as the Court expressly stated in paragraphs 51 and 56 of the **judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407)**, Directive 2009/24, which concerns specifically the protection of computer programs, constitutes a lex specialis in relation to Directive 2001/29. The relevant provisions of Directive 2009/24 make abundantly clear the intention of the EU legislature to assimilate, for the purposes of the protection laid down by that directive, tangible and intangible copies of computer programs, so that the exhaustion of the distribution right under Article 4(2) of Directive 2009/24 concerns all such copies (see, to that effect, **judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407**, paragraphs 58 and 59).

56 Such assimilation of tangible and intangible copies of works protected for the purposes of the relevant provisions of Directive 2001/29 was not, however, desired by the EU legislature when it adopted that directive. As has been recalled in paragraph 42 of the present judgment, it is apparent from the travaux préparatoires for that directive that a clear distinction was sought between the electronic and tangible distribution of protected material.

57 Second, the Court noted in paragraph 61 of the **judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407)** that, from an economic point of view, the sale of a computer program on a material medium and the sale of a computer program by downloading from the internet are similar, since the online transmission method is the functional equivalent of the supply of a material medium.

Accordingly, interpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment justifies the two methods of transmission being treated in a similar manner.

58 The supply of a book on a material medium and the supply of an e-book cannot, however, be considered equivalent from an economic and functional point of view. As the **Advocate General noted in point 89 of his Opinion**, dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel secondhand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment.

59 Even if an e-book were to be considered complex matter (see, to that effect, **judgment of 23 January 2014, Nintendo and Others, C-355/12, EU:C:2014:25**, paragraph 23), comprising both a protected work and a computer program eligible for protection under Directive 2009/24, it would have to be concluded that such a program is only incidental in relation to the work contained in such a book. As the Advocate General noted in point 67 of his Opinion, an e-book is protected because of its content, which must therefore be considered to be the essential element of it, and the fact that a computer program may form part of an e-book so as to enable it to be read cannot therefore result in the application of those specific provisions.

60 The referring court also states that the supply of an e-book, in circumstances such as those of the main proceedings, does not satisfy the conditions set by the Court for classification as a communication to the public, within the meaning of Article 3(1) of Directive 2001/29. In particular, the referring court notes that, if there is no communication of the actual content of the protected work in the offer of sale of the e-book on the reading club platform, there can be no question of an act of communication. Moreover, there would be no public, the e-book being made available only to a single member of the reading club.

61 In that regard, it is clear from Article 3(1) of Directive 2001/29 that the concept of *'communication to the public'* involves two cumulative criteria, namely an act of communication of a work and the communication of that work to a public (**judgment of 14 June 2017, Stichting Brein, C-610/15, EU:C:2017:456**, paragraph 24 and the case-law cited).

62 As regards, in the first place, the question whether the supply of an e-book, such as that at issue in the main proceedings, constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29, it must be noted, as is recalled in paragraph 49 of the present judgment, that *'communication to the public'* within the meaning of that provision covers any transmission or retransmission of a work to the public not present at the place where the communication originates, by wire or wireless means.

63 In addition, as regards the concept of *'making available to the public'* within the meaning of that same provision, which forms part of the wider concept of *'communication to the public'*, the Court has held that, in order to be classified as an act of making available to the public, an act must meet, cumulatively, both conditions set out in the provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them (see, to that effect, judgment of 26 March 2015, C More Entertainment, C-279/13, EU:C:2015:199, paragraphs 24 and 25), irrespective of whether the persons comprising that public avail themselves of that opportunity (see, to that effect, **judgment of 14 June 2017, Stichting Brein, C-610/15, EU:C:2017:456**, paragraph 31 and the case-law cited).

64 As regards, specifically, the making available to the public of a work or a protected article in such a way that members of the public may access it from a place and at a time individually chosen by them, it is apparent from the explanatory memorandum in the proposal for the directive that *'the critical act is the "making available of the work to the public", thus the offering [of] a work on a publicly accessible site, which precedes the stage of its actual "on-demand transmission"'*, and that *'it is not relevant whether any person actually has retrieved it or not'*.

65 In the present case, it is common ground that Tom Kabinet makes the works concerned available to anyone who is registered with the reading club's website, that person being able to access the site from a place and at a time individually chosen by him or her. Accordingly, the supply of such a service must be considered to be the communication of a work within the meaning of Article 3(1) of Directive 2001/29, irrespective of whether that person avails himself or herself of that opportunity by actually retrieving the e-book from that website.

66 In the second place, in order to be categorised as a *'communication to the public'* within the meaning of that provision, the protected works must in fact be communicated to the public (see, to that effect, **judgment of 14 June 2017, Stichting Brein**, C-610/15, EU:C:2017:456, paragraph 40 and the case-law cited), that communication being directed at an indeterminate number of potential recipients (**judgment of 7 December 2006, SGAE, C-306/05, EU:C:2006:764**, paragraph 37 and the case-law cited).

67 It is also apparent from the explanatory memorandum in the proposal for the directive, first, as is recalled in paragraph 44 of the present judgment, that the right of communication to the public is also pertinent when several unrelated persons (members of the public) may have individual access, from different places and at different times, to a work which is on a publicly available website and, second, that the public consists of individual members of the public.

68 In that regard, the Court has previously had occasion to clarify, first, that the concept of *'public'* involves a certain de minimis threshold, which excludes from that concept a group of persons concerned that is too small, and, second, that in order to determine that number, the cumulative effect of making a protected work available, by downloading, to potential recipients should be taken into consideration. Account should therefore be taken, in particular, of the number of persons able to access the work at the same time, but also of how many of them may access it in succession (see, to that effect, **judgment of 14 June 2017, Stichting Brein, C-610/15, EU:C:2017:456**, paragraph 41 and the case-law cited).

69 In the present case, having regard to the fact, noted in paragraph 65 of the present judgment, that any interested person can become a member of the reading club, and to the fact that there is no technical measure on that club's platform ensuring that (i) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user (see, by analogy, judgment of 10 November 2016, Vereniging Openbare Bibliotheken, C-174/15, EU:C:2016:856), it must be concluded that the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public, within the meaning of Article 3(1) of Directive 2001/29.

70 Last, the Court has held that, in order to be categorised as a communication to the public, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a new public, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public (**judgment of 14 June 2017, Stichting Brein, C-610/15, EU:C:2017:456**, paragraph 28 and the case-law cited).

71 In the present case, since the making available of an e-book is, as NUV and GAU have noted, generally accompanied by a user licence authorising the user who has downloaded the e-book concerned only to read that e-book from his or her own equipment, it must be held that a communication such as that effected by Tom Kabinet is made to a public that was not already taken into account by the copyright holders and, therefore, to

a new public within the meaning of the caselaw cited in the preceding paragraph of the present judgment.

72 In the light of all the foregoing considerations, the answer to the first question is that the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of *'communication to the public'* and, more specifically, by that of *'making available to the public of [authors'] works in such a way that members of the public may access them from a place and at a time individually chosen by them'*, within the meaning of Article 3(1) of Directive 2001/29.

The second, third and fourth questions

73 In view of the answer given to the first question, there is no need to answer the second, third and fourth questions.

Costs

74 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 (Grand Chamber) hereby rules:

The supply to the public by downloading, for permanent use, of an e-book is covered by the concept of *'communication to the public'* and, more specifically, by that of *'making available to the public of [authors'] works in such a way that members of the public may access them from a place and at a time individually chosen by them'*, within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

[Signatures]

* Language of the case: Dutch.

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 September 2019 (1)
Case C-263/18
Nederlands Uitgeversverbond,
Groep Algemene Uitgevers
v
Tom Kabinet Internet BV,
Tom Kabinet Holding BV,
Tom Kabinet Uitgeverij BV
(Request for a preliminary ruling from the Rechtbank Den Haag (District Court, The Hague, Netherlands))
(Directive 2001/29/EC — Information society — Harmonisation of certain aspects of copyright and related rights — Electronic books (*'e-books'*) — Virtual market for *'second-hand'* e-books — Article 2 — Reproduction — Acts necessary to ensure legitimate use — Article 3 — Communication to the public — Making available — Article 4 — Distribution — Making available for use, at a distance, by downloading, for an unlimited period, of e-books — Exhaustion — Article 5 — Exceptions and limitations — Scope)

Introduction

1. Originally a concept developed in the literature, (2) the exhaustion of the distribution right was introduced at the beginning of the 20th century in the case-law. (3) According to that rule, once a copy of a work protected by copyright has been lawfully placed in circulation, the copyright holder can no longer object to that copy being resold by the person who has acquired it. The reason is that copyright cannot take precedence over the right of ownership held by the person who has acquired a copy of the work in question as an object. Furthermore, when a copy of the work has been placed in circulation by the author or with his consent, the author is deemed to have obtained the remuneration due in respect of that copy.

2. It was also via the case-law that the rule of exhaustion of the distribution right of objects protected by copyright was introduced into EU law. Although that rule already existed in the legal orders of the Member States, the Court extended its scope to the whole of the territory of the European Union. (4) That case-law was motivated principally by the desire to ensure the effectiveness of the free movement of goods.

3. Since then the exhaustion of the distribution right has been recognised both in international law and in EU law, and also in the legal orders of the Member States. (5)

4. However, the digitisation of copyrightable content and the appearance of new means of supplying such content online have upset the balance between the interests of copyright holders and those of users of the protected objects, a balance to which the principle of the exhaustion of the right of distribution contributed.

5. On the one hand, it has become possible to create, at negligible cost, perfectly accurate copies of the digital files containing protected objects and to transfer them, without additional effort or costs, with the help of the internet. That trend threatens the opportunities for copyright holders to obtain appropriate remuneration for their creations and contributes heavily to the development of counterfeiting.

6. On the other hand, modern technical means allow copyright holders to exercise a very firm control on the use which purchasers make of their works, including in their private sphere, and permit the development of commercial models which, often without openly saying so, transform the full enjoyment of the copy of a work into a mere limited and conditional right to use it.

7. It will be the Court's task to decide whether, taking those developments into consideration, the rule of the exhaustion of the right of distribution, established in the real world of copies in the form of objects, can be transposed to the virtual world of copies in the form of digital files.

Legal framework

International law

8. Article 6 of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996 (6) (*'the Copyright Treaty'*), entitled *'Right of distribution'*, provides:

'1. Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

2. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.'

9. An agreed statement annexed to the Copyright Treaty concerning Articles 6 and 7 states:

'As used in these Articles, the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.'

10. Article 8(1) of the Copyright Treaty provides that

'... authors of literary and artistic works shall enjoy the exclusive right of authorising 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 these works from a place and at a time individually chosen by them.'

EU law

11. In accordance with Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: (7)

'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(1) of that directive 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. Last, according to Article 4 of that directive:

'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.'

Netherlands law

14. Article 1 of the Auteurswet (Law on copyright) provides:

'Copyright is the exclusive right of the author of a literary, scientific or artistic work or those entitled under him to publish that work and to reproduce it, subject to the restrictions laid down by law.'

15. According to Article 12(1)(1) of that law:

'1. Publication of a literary, scientific or artistic work means:

(1) the publication of a reproduction of the whole or a part of the work;

...'

16. Under Article 12b of that law:

'If a copy of a literary, scientific or artistic work has been put into circulation by transfer of ownership for the first time in one of the Member States of the European Union or in a State Party to the Agreement on the European Economic Area by or with the consent of its author or a person entitled under him, the putting into circulation of that copy in another fashion, apart from by rental or loan, shall not constitute a breach of copyright.'

Facts, procedure, and questions referred for a preliminary ruling

17. Nederlands Uitgeversverbond (*'NUV'*) and Groep Algemene Uitgevers (*'GAU'*), the applicants in the main proceedings, are associations whose purpose is to defend the interests of Netherlands publishers.

18. Tom Kabinet Internet BV (*'Tom Kabinet'*), the defendant in the main proceedings, (8) is a company governed by Netherlands law. Tom Kabinet has a website which supplies an online market for used e-books. The ways in which that market operates have changed during the main proceedings. At present, in the context of that service, called a *'reading club'* (leesclub), Tom Kabinet resells to individuals registered on its site e-books which it has bought either from the official distributors or from other individuals. The prices charged by Tom Kabinet are lower than the prices charged by the official distributors. Tom Kabinet's site encourages individuals who have bought e-books on its site to resell them to it after they have read them, which entitles them to *'credits'* allowing them then to buy other books. When it buys e-books from individuals, Tom Kabinet requires that they delete their own copy, (9) and it places a digital watermark on the copies which it sells in order to ensure that the copy is legal.

19. On 1 July 2014, NUV and GAU brought an action against Tom Kabinet before the urgent applications judge at the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), who dismissed their application on the ground that there was no prima facie breach of copyright. (10) NUV and GAU appealed against that judgment before the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam, Netherlands), which upheld the judge's decision but prohibited Tom Kabinet from offering an online service that allowed the sale of unlawfully downloaded e-books. No appeal on a point of law was lodged against the judgment of the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam).

20. The referring court, in its interlocutory judgment, considered that the books in question must be classified as *'works'* within the meaning of Directive 2001/29 and that the supply of downloadable e-books in circumstances such as those of the main proceedings does not constitute a communication to the public of those works within the meaning of Article 3(1) of that directive. It observes, however, that the answer is unclear to the questions as to whether making an e-book

available at distance by downloading for use for an unlimited period may constitute an act of distribution within the meaning of Article 4(1) of Directive 2001/29, and as to whether the distribution right may thus be exhausted within the meaning of Article 4(2) of that directive. Furthermore, it wonders whether the copyright holder may, in the event of a resale, object to the acts of reproduction necessary for the transmission between subsequent purchasers of the copy for which the distribution right is, if such be the case, exhausted.

21. It was in those circumstances that the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(1) of [Directive 2001/29] to be interpreted as meaning that "any form of distribution to the public by sale or otherwise of the original of their works or copies thereof" as referred to therein includes the making available remotely by downloading, for use for an unlimited period, of e-books (being digital copies of books protected by copyright) at a price by means of which the copyright holder receives remuneration equivalent to the economic value of the work belonging to him?

(2) If question 1 is to be answered in the affirmative, is the distribution right with regard to the original or copies of a work as referred to in Article 4(2) of [Directive 2001/29] exhausted in the Union, when the first sale or other transfer of that material, which includes the making available remotely by downloading, for use for an unlimited period, of e-books (being digital copies of books protected by copyright) at a price by means of which the copyright holder receives remuneration equivalent to the economic value of the work belonging to him, takes place in the European Union through the rightholder or with his consent?

(3) Is Article 2 of [Directive 2001/29] to be interpreted as meaning that a transfer between successive acquirers of a lawfully acquired copy in respect of which the distribution right has been exhausted constitutes consent to the acts of reproduction referred to therein, in so far as those acts of reproduction are necessary for the lawful use of that copy and, if so, which conditions apply?

(4) Is Article 5 of [Directive 2001/29] to be interpreted as meaning that the copyright holder may no longer oppose the acts of reproduction necessary for a transfer between successive acquirers of the lawfully acquired copy in respect of which the distribution right has been exhausted and, if so, which conditions apply?'

22. The request for a preliminary ruling was received at the Court on 16 April 2018. Written observations were lodged by the parties to the main proceedings, by the Czech, Danish, German, Spanish, French, Italian, Portuguese and United Kingdom Governments and by the European Commission. The parties to the main proceedings, the Belgian, Czech, Danish, German and Spanish Governments and the Commission were represented at the hearing on 2 April 2019.

Analysis

Preliminary remarks

23. The referring court has asked the Court four questions concerning whether the supply of e-books by downloading online for permanent use is covered by the right of distribution within the meaning of Article 4 of Directive 2001/29, whether that right is exhausted by such a supply made with the author's consent, and whether the acts of reproduction necessary for the subsequent transfer of an e-book acquired in that way are lawful. Furthermore, a number of the parties which have lodged observations in the present case, in particular NUV and GAU, the Danish and German Governments and the Commission, are of the view that the scope of the questions should be widened to include whether the acts in question are covered by the right of communication to the public, as provided for in Article 3 of Directive 2001/29.

24. I think, however, that these questions must all be analysed together, because they form inseparable parts of a single complex question: must the supply to users of protected works by downloading be considered to be covered by the distribution right, with the effect that that right is exhausted by the original supply made with the author's consent? In particular, the classification of those acts as coming within the right of communication to the public precludes their coming within the right of distribution and vice versa. Furthermore, to draw a distinction between the distribution right and the exhaustion of that right does not seem to me to be either logical, or appropriate, since those two concepts cover the same acts. (11) Last, since a reproduction of the work is indispensable to any transmission at a distance of an electronic file, the question of the right of reproduction is inherent in any discussion of the possible exhaustion of the right of distribution online.

25. In this Opinion, I shall analyse the arguments of a legislative nature, those based on the case-law and the teleological arguments that should guide the Court in its answer to the questions referred for a preliminary ruling.

The legislation

26. It is possible to distinguish two main forms in which the public can have access to works protected by copyright. The first consists in a representation of the work open to the participation of the public. That is the oldest form, which long precedes the appearance of copyright as such. It includes representations of plays or operas, exhibitions of tangible works of art or cinema screenings. It is the copyright holder that organises the representation, and the public must be present at the place and time chosen by him in order to have access to the representation.

27. The appearance of radio and television broadcasting allowed representation at a distance, thus freeing the public from the obligation to travel to the place where that representation takes place, but maintaining the time constraint, which was removed only with the arrival, first of all, of on-demand television services, then of the internet. Those technical means make it possible to initiate the representation not only at a distance, but also at the time desired by the spectator.

28. What those modes of access to the works have in common is that the possibility for the public to have

access to the works is conditional on their being made available by the holders of the copyright in those works. In other words, it is the holders of the rights who decide whether and by which technical means the work is accessible to the public. That power to take decisions is crucial from the aspect of the rightholder's possibility of making a profit from his work. Each representation or each access to the work by a member of the public normally gives rise to remuneration to the rightholder.

29. The second form of access consists in the acquisition by members of the public, on a permanent or temporary basis, of the originals or copies of the works. That is the normal form of access to literary works, and also to musical and audio-visual works (in the form of gramophone records or video recordings), and also to certain plastic works of art.

30. In that case, although the first making available of the work to the public depends of course on the intention of the copyright holder, once the member of the public has acquired a copy he may enjoy it independently of the copyright holder's intention. The remuneration of the copyright holder must then be organised differently. As he is unable to control, and therefore to monetise, each access to the work by a given member of the public, he must content himself with the price obtained for the sale of each copy of the work. (12)

31. Those two modes of public access to works are subject to two exclusive rights of the copyright holders, called, in the provisions with which we are concerned in the present case, right of communication to the public (13) and right of distribution. (14) The question that arises is which of those rights governs the supply to the public by downloading online of works protected by copyright. (15)

32. The answer is not prima facie unambiguous, because that mode of supply combines both forms of public access to the works. In the first place, the work is made available to the public online and any individual can have access to it. Next, instead of making use of the work at a distance, as is the case of a *'classic'* communication to the public, the user himself, with the authorisation of the copyright holder, makes a copy of that work, which he stores on his own computer (16) and to which he then has access, independently, in principle, of the making available carried out by the rightholder. Consequently, as soon as that reproduction has been made by the user, the downloading resembles an act of distribution.

33. The drafters of the Copyright Treaty were aware of that mixed nature of downloading. According to the guide on the interpretation of the Copyright Treaty published by the WIPO, (17) given the *'hybrid forms'* of making available of works online, it was impossible to choose, for that mode of transmission, protection by *'copy-related'* and *'non-copy-related'* rights. It was therefore agreed to adopt an *'umbrella solution'*, which, while giving priority to the right of communication to the public, does not preclude the application of the distribution right.

34. However, as the Copyright Treaty establishes a minimum level of protection, the Contracting Parties are prohibited from fixing that protection at a lower level. However, to apply the distribution right limited by the rule of its exhaustion instead of the right of communication to the public, which does not have such a rule, would amount to reducing the level of protection to below the threshold prescribed by the Copyright Treaty.

35. Furthermore, the agreed statement concerning Articles 6 and 7 of the Copyright Treaty limits the application of those provisions to *'fixed copies that can be put into circulation as tangible objects'*. Admittedly, that statement is only of a declaratory nature and therefore reflects the way in which those articles were understood by the Parties Signatory to the Copyright Treaty at the time of its signature. It might therefore be argued that the reality of the markets has significantly changed since 1996, the year in which the Copyright Treaty was signed, and that a different approach would thus be justified.

36. However, as the European Union is a signatory to the Copyright Treaty, it incorporated that treaty into its legal order by means, in particular, of Directive 2001/29. (18) In adopting that directive, the EU legislature seems to have clearly taken a position in favour of the right of communication to the public being applicable to the supply of works by downloading online and also of the right of distribution, and therefore of the exhaustion of that right, being limited solely to tangible copies. More specifically, downloading is covered by the right to make works available to the public, provided for in Article 3(2) of that directive.

37. That is sufficiently clear from a reading of recitals 24, 25, 28 and 29 of Directive 2001/29. According to those recitals:

'(24) The right to make available to the public subject matter referred to in Article 3(2) should be understood as covering all acts of making available such subject matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) … It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

…

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. …

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. … Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every

on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.' (19)

38. It is true that those recitals contain certain ambiguities. In particular, the reference to services in recital 29 may seem inappropriate. On-line commerce has blurred somewhat the distinction between goods and services. Thus Directive 2000/31/EC (20) classifies as an *'information society service'* inter alia the sale of goods online. (21) Taken literally, that classification could lead to the absurd outcome that the sale of a CD or a paper book online would not entail exhaustion of the right of distribution.

39. Nonetheless, those recitals clearly show the demarcation line which the EU legislature intended to draw between the right of public communication (in the form of making available to the public) and the right of distribution. Thus the right of communication to the public applies to all forms of online exploitation of the works, as much to those not linked to a copy as to those based on the creation of such a copy. In particular, recital 29 is explicit in that respect. Although that recital mentions only material copies created by the user with the authorisation of the rightholder, it does so because it envisages the exhaustion of the distribution right only for copies on tangible media. It is nonetheless clearly a question of the copies resulting from downloading.

40. It should further be observed that the application of the right of communication to the public to acts such as those carried out by Tom Kabinet may raise doubts owing to the definition of communication to the public given by the Court in its case-law. According to that case-law, communication to the public encompasses, not surprisingly, an act of communication and a public, that public being composed of a fairly large number of persons. (22)

41. In the case of making available by original download, carried out by the rightholder, there is no problem, since it is possible to create as many copies as there are members of the public wishing to acquire a copy. The position is different as regards the subsequent supply by a user of the copy of which he has acquired possession. In the model resulting from the application of the rule of exhaustion of the distribution right, that user would be in a position to supply only a single copy, which could find only a single purchaser. The question may then be asked whether that would constitute a communication to a public, as the work could be communicated only to a single person.

42. I do not share here the Commission's view that the mere making available, that is to say, the fact of offering the copy for resale, constitutes the act of communication. That is true in the situation in which the user has direct access to the work made available to the public, for example on a website. Conversely, where access requires the acquisition of a copy, it is at the time when the copy is downloaded that the act of communication takes place. If the approach proposed by the Commission were to be followed, any offer to acquire copies of a work, including physical copes, would constitute a communication to the public and the distribution right would be deprived of its content. It is therefore probably necessary to clarify the definition of *'communication to the public'* in the situation of a making available by downloading. What matters is not the number of persons to whom the communication is made but the fact that the person at the origin of that communication addresses his offer to persons not belonging to his private circle. In that case, a single acquirer may therefore constitute a public.

43. Apart from the legislature's intention, which is quite clear from the recitals of Directive 2001/29, the wording of article 4 of that directive precludes its application to works made available to the public by downloading online. That article establishes, in favour of authors, the right to authorise or prohibit the distribution of their works *'by sale or otherwise'*. The Court has had occasion to make clear that the expression' otherwise' must be understood as meaning exclusively a transfer of ownership. (23) Thus distribution means the transfer of the ownership of the copy of the work in question, either by sale or by another means. However, it is difficult to speak of ownership in the context of a digital file. (24) A digital file has no material form and therefore does not constitute an asset within the meaning of civil law. A file may, rather, be assimilated to pure information. That information may be protected by different rights, but not by the right of property.

44. Furthermore, the transfer of ownership, in any event a transfer by contract, requires in particular the consent of both parties to that transaction, one transferring to the other all the rights in the object of the ownership. In the reality of the making available of works by downloading online, there is a multitude of conventions specifying the parties' rights and obligations. Those conventions come within the scope of freedom of contract and I do not think that any recognition of the rule of the exhaustion of the distribution rule could limit that freedom. Thus, unlike the situation that prevails for tangible objects, in the case of dematerialised works supplied online it would never be easy to state with certainty whether or not there has been a transfer of ownership and therefore exhaustion of the right of distribution, as the parties to the contract are able to define in different ways the modes of use of the copy of the work.

45. Last, to my mind the right of reproduction, governed by Article 2 of Directive 2001/29, also precludes recognition of the rule of exhaustion of the distribution right in the case of works supplied by downloading online.

46. Any downloading of a digital file consists in the creation of a copy of that file on the receiving computer. The creation of that copy constitutes an act of reproduction subject to the exclusive right of the copyright holder over the work contained in the file in question. That follows clearly from the very broad formulation of Article 2 of Directive 2001/29, which covers reproduction *'by any means and in any form'*. (25) That approach is confirmed by the second sentence of the agreed statement concerning Article 1(4) of the Copyright Treaty, which states that *'the storage of a protected work in digital form in an electronic medium*

constitutes a reproduction within the meaning of Article 9 of the Berne Convention [(26)]'.

47. In the case of the supply of works by downloading online, the copy of the work by its original purchaser is made with the consent of the copyright holder, as an essential element of that form of making available to the public. However, that consent does not cover the reproductions that would be necessary for the subsequent transmission when the copy of the work is resold.

48. Nor can those reproductions be considered to be covered by the rule of the exhaustion of the right of distribution. Such a conclusion would be tantamount to recognising the exhaustion of the right of reproduction. But that right cannot be exhausted. Thus, any reproduction that accompanies the resale of a work in digital form must either be authorised by the holder of the exclusive right of reproduction or come under an exception to that exclusive right. (27)

49. Furthermore, the creation of those copies is not covered by any of the exceptions to the right of reproduction provided for in Article 5 of Directive 2001/29. In particular, it is not covered by the exception for transient or incidental reproductions which are an integral part of a technological process, contained in Article 5(1) of that directive. First, those reproductions are not provisional or transient, since they are meant to remain on the computer receiving the download. (28) Even if the original copy downloaded is subsequently deleted, it is not the final reproduction that is transient but, at most, the multiplication of the copies. Second, those acts of reproduction are not without independent economic significance, as required by that provision. Quite to the contrary, the purpose of the downloading is specifically to create a copy of the digital file (containing the work in question) on the receiving computer. It is therefore in the act of reproduction that the essential economic significance of any operation lies.

50. To conclude, the various provisions of Directive 2001/29, read in the light of the recitals of that directive and of the relevant provisions of the Copyright Treaty, do not seem to me to allow an interpretation according to which the supply of copyright-protected works by downloading online would be covered by the right of distribution provided for in Article 4 of that directive and by the rule of its exhaustion.

51. That assertion does not seem to me to be called into question by what can be learnt from the Court's case-law.

The case-law

52. The Court has already had the opportunity to express its views in cases having as their subject matter legal problems similar to those that arise in the present case. The first to come to mind is of course the UsedSoft case. (29)

Computer programs

53. That case turned on whether the supply of a copy of a computer program by downloading online, accompanied by a licence to use that program for an unlimited period, exhausted the right to distribute that copy in accordance with Article 4(2) of Directive 2009/24/EC. (30)

54. It is true that certain of the Court's findings in the judgment in UsedSoft (31) might argue in favour of recognising the applicability of the rule of exhaustion of the right of distribution not only in the case of the supply by downloading of computer programs but also in the case of the supply of all categories of works protected by copyright.

55. Thus the Court held that the transfer of a copy of a computer program, whether by means of a material medium or by downloading, accompanied by a licence to use that program for an indeterminate period, is equivalent to the transfer of ownership of that copy and, consequently, to the sale of that copy within the meaning of Article 4(2) Directive 2009/24. (32) According to the Court, any other interpretation would allow the holders of copyright in computer programs to circumvent the rule of exhaustion of the right of distribution and to undermine its effectiveness by simply calling the contract not a *'sale'* but a *'licence'*. (33) Furthermore, as regards the right of communication to the public governed by Article 3 of Directive 2001/29, the Court held that the transfer of the right of ownership of a copy of the computer program changed the act of communication to the public into an act of distribution within the meaning of Article 4 of that directive, giving rise to exhaustion of the distribution right in accordance with Article 4(2) of that directive. (34) Last, the Court stated that, from an economic point of view, the online transmission of a copy of a computer program is the functional equivalent of the supply of a material medium. (35)

56. That being the case, it must be stated that those assertions of the Court were made in relation to specific legislation that constitutes a lex specialis by comparison with Directive 2001/29 (36) and concerns that very special category of works, computer programs.

57. It is true that, according to Article 1(1) of Directive 2009/24, which echoes Article 4 of the Copyright Treaty, computer programs are protected as literary works. To my mind, however, those provisions reflect the intention of the authors of the Copyright Treaty, and then the intention of the EU legislature, not to create a separate category of works rather than a genuine similarity between computer programs and literary works. Computer programs are sequences of instructions intended to be executed by a machine (a computer). Although the computer program may be expressed in language comprehensible by man, in any event by those having certain qualifications (the source code), that is not the purpose of the program. Its purpose is to be understood and executed by the machine, the interest for the user of the program arising not from reading the program but from the functioning of that machine. For the user, reading lines of a program code would be as useful as drinking a glass of diesel oil instead of pouring it into the tank of his vehicle. Thus a computer program is more a tool than a work in the proper sense. That means that the computer program as an object of

protection by copyright has certain particular features that justify its specific treatment under the law.
58. So, first, in order to be used a computer program must be loaded on to the computer on which it is intended to function. It is therefore wholly irrelevant whether that program is distributed on a material medium (for example a CD-ROM) or by downloading because in each case the copy of the program will have to be loaded on to a computer, whether or not it is fixed on a material medium; it cannot be used as it is. That does not apply to other categories of works such as, obviously, books, but also works on optical discs (CDs or DVDs), which do not need to pass through a computer, unlike downloaded works.
59. Second, as the computer program is a tool, it often requires additional maintenance and update services, which are normally part of a contract of use called a *'licence'*. The existence of such a licence is independent of the way — material or non-material — in which the program was distributed. That is why the Court had to give a broad interpretation to the concept of *'sale'*. (37) If that were not the case, any supply of a computer program, whether by downloading or on a material medium, might be classified as a licence, without ever having given rise to the exhaustion of the right of distribution, which would undermine the effectiveness of Article 4(2) of Directive 2009/24. In the case of other categories of works, on the other hand, distribution on a material medium is not normally accompanied by a licence, which may be the case of supply by downloading.
60. Those two specific aspects of computer programs allowed the Court to state that, from an economic point of view, a supply by downloading is a functional equivalent of a supply on a material medium. (38) In the case of other categories of works, although their primary usefulness, that is to say, to allow the user to become acquainted with the work, is the same irrespective of the way in which they are supplied to users, the way in which that acquaintance is made may however vary depending on the mode of fixing (digital or analogue) and of supply.
61. Third, in the case of literary, musical or cinematographic works, the usefulness is often exhausted, so to speak, after a single reading, hearing or viewing. The user is therefore prepared to dispose of his copy of the work after the first occasion on which he is acquainted with it, having thereby fully satisfied his needs in connection with the work. That is not the case of a computer program, which is normally intended to be used in the long term. Computer programs are therefore much less likely to be put quickly in circulation on the second-hand market than works in other categories.
62. What is more, as tools belonging to a sector in which technological progress is particularly rapid, computer programs tend to age quickly, in spite of any updates. Therefore, if the user wishes to resell his copy of a computer program, it may be supposed that it is no longer of any use to him, frequently because it is (relatively) obsolete. It will therefore also be less useful to purchase a used program than to purchase a new, technologically fully up-to-date program. It may be said that the loss in value experienced by literary, musical or cinematographic works on material support because of the wear and tear on that material medium has its counterpart in computer programs, because of technological obsolescence. On the other hand, literary, musical or cinematographic works without a material medium retain their full usefulness notwithstanding the passage of time and the number of successive purchasers. Thus a market for used non-material copies of literary and other works is likely to have a much greater effect on the interests of the copyright holders than the used computer program market.
63. The Court therefore assessed the question of the exhaustion of the right to distribute computer programs in the case of supply by downloading in the light of the specific circumstances of that category of works, which are different from those of literary, musical or cinematographic works. In addition to those factual differences there are normative differences between Directive 2009/24 and Directive 2001/29.
64. In the first place, Directive 2009/24 does not make provision, for authors of computer programs, for an exclusive right to authorise or prohibit communication to the public or making available to the public. The only rights governed by that directive are the right of reproduction, the right of transformation and the right to do or authorise *'any form of distribution'* of the original computer program or of copies thereof. (39) The Court thus had to classify the supply of a computer program by downloading online as being covered by the right of distribution, within the meaning of Directive 2009/24; otherwise, it would have been necessary to accept that the rules specifically conceived for computer programs did not grant an exclusive right covering the most widespread technical means whereby they are supplied, which at present is downloading. The application of the right of communication to the public as provided for in Directive 2001/29 would have undermined the lex specialis nature of Directive 2009/24 (40) and of its detailed rules, adapted to the particular features of computer programs as an object of protection. (41)
65. In the second place, unlike Directive 2001/29, Directive 2009/24 contains nothing to indicate that the rule of the exhaustion of the right of distribution, expressly provided for in Article 4(2), is limited to copies incorporated on a tangible medium. (42)
66. Last, in the third place, Article 5(1) of Directive 2009/24 contains an exception to the right of reproduction for the acts *'necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose'*. That provision enabled the Court to find that the acquirer of a used computer program could make a reproduction necessary in order to download that program without breaching the exclusive right of the author of that program. (43) Directive 2001/29 contains no comparable exception. (44)
67. In the present case, Tom Kabinet maintains that an e-book constitutes a computer program and that the

judgment in UsedSoft should therefore be applied directly to it. That argument cannot succeed, however. An e-book is not a computer program, that is to say, a set of instructions for the computer to perform certain operations, but a digital file containing data which the computer must process. There is thus no reason to apply to an e-book the specific rules designed for computer programs, as interpreted by the Court. Furthermore, an e-book is protected by copyright not as a mere digital file but because of its content, that is to say, the literary work which it contains. And that protection is covered by Directive 2001/29.

The lending of e-books

68. In its judgment in Vereniging Openbare Bibliotheken, (45) the Court held that the lending right provided for in Article 3 of Directive 2006/115/EC (46) and the public lending exception provided for in Article 6 of that directive must apply to e-books. Just like Article 4 of Directive 2001/29, Article 3(1)(a) of Directive 2006/115 refers to the original and to copies of the work. It might therefore be suggested that an analogy should be drawn between the lending of e-books and their distribution, as both consist in a download of a digital copy.

69. However, the solution applied by the Court in the judgment in Vereniging Openbare Bibliotheken (47) was arrived at in a different legal environment from that of the present case. The lending right — unlike the rental right also regulated in Article 3 of Directive 2006/115 and also unlike the distribution right at issue in the present case — is not covered by the Copyright Treaty. The Court placed particular emphasis on that difference and concluded that the Copyright Treaty did not preclude an interpretation of Directive 2006/115 that brought the lending of e-books within the scope of the lending right. (48) However, the same conclusion cannot be formulated with respect to the distribution right. (49)

70. Furthermore, the public lending exception provided for in Article 6 of Directive 2006/115 implements a public policy objective and compensation for the authors is required. That is not the position of the rule of exhaustion of the distribution right, the justification for which is quite different, being linked with ownership and with trade in tangible objects containing protected works.

71. Conversely, Tom Kabinet is correct to observe that the Court seems to have accepted the exhaustion of the distribution right as regards e-books when it ruled, in answer to the second question in Vereniging Openbare Bibliotheken, that *'Article 6 of Directive 2006/115 … must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive [2001/29]'* (50)

72. Indeed, such a condition would make little sense if it were not recognised that the right of distribution and the rule of the exhaustion of that right are applicable to dematerialised copies of e-books. It would then be necessary to put the copy on a physical medium before delivering it to the library, an operation that would make no economic sense and that would be contrary to market practice, as e-books are normally supplied by downloading. If the Court were to rule, in the present case, that the distribution right does not apply to the supply of works by downloading, that condition would be rendered meaningless. I do not think, however, that that single assertion of the Court in Vereniging Openbare Bibliotheken could prejudge the solution in the present case.

Internet links

73. The right of communication to the public is not, in principle, capable of being exhausted. (51) Nonetheless, in the internet environment, the Court has held that certain acts that might be covered by that right are not subject to the authorisation of the rightholder. They include hypertext links (52) and also links that use the technique known as *'framing'*, (53) which direct the user to content freely accessible on the internet with the consent of the holder of the copyright. According to the Court, those acts of communication, using the same technical means as the original communication (the internet) and being directed to the same public (all internet users), do not require the independent authorisation of the copyright holders. (54) In the literature, that case-law has even been perceived as confirmation of the exhaustion of the right of communication to the public. (55)

74. Without entering into the discussion of its effects and of the merits of those academic theories, I shall observe that, in any event, that case-law cannot be applied by analogy to the making available of works to the public by downloading.

75. First, the case-law on internet links is based on the premiss that by making content freely accessible on the internet the copyright holder has taken into account the fact that, potentially, any internet user could have access to it. (56) That is not the position with respect to downloading. By requiring payment for each acquisition of a digital copy of the work, the copyright holder takes into account, as the target public of his communication, only users who have paid the price for the copy of the work and not subsequent users who have not paid that price or have paid it to a person other than the rightholder. (57) Any subsequent supply of such a copy must therefore be regarded as a communication to a new public.

76. Second, although in the case of internet links there is a communication, it is a secondary communication, in the sense that it is dependent on the original communication. If the copyright holder decides to remove his work from the internet, the link ceases to function. Its functioning thus depends on the intention of the rightholder. In the case of downloading, on the other hand, without specific technical measures, the copyright holder loses de facto control of the copy of his work once it is downloaded by a user. His only means of control is the legal control that derives from his exclusive right.

Final remarks

77. To summarise the considerations set out above, even though the Court has made certain advances in its case-law towards recognising the exhaustion of copyright in the digital environment, it does not follow that such exhaustion must be recognised in the circumstances of the present case.

78. It is true that the Court's case-law may give an impression of complexity and inconsistency and that it would be tempting to simplify the legal situation by acknowledging the rule of exhaustion of the right of distribution in the digital environment for all categories of works. (58) I think, however, that in the absence of full regulation by means of legislation as regards that rule, the diversity of judicial solutions is justified, and even inevitable, in the case of different factual situations, governed by different legislative acts and pursuing specific objectives. To my mind, the desire for consistency cannot on its own serve as a basis for judicial recognition of the rule of exhaustion.

Balancing the interests involved

79. As I mentioned in the introduction to this Opinion, the digitisation of content, including the content of works protected by copyright, and in particular the development of the new means of supplying that content to users made possible by the internet have upset the balance that existed in the analogue environment between, on the one hand, the interests of copyright holders and, on the other hand, the interests of users of the works. The rule of the exhaustion of the right of distribution is one of the instruments that help to maintain that balance. The question is whether the balancing of the interests involved also requires the application of that rule in the case of the supply of works by downloading.

80. Many arguments, raised in the literature, operate in favour of that application. (59)

81. First, the existence of second-hand markets strengthens competition, brings prices down and helps to make assets more accessible, with clear benefits for consumers. As dematerialised digital copies, unlike material copies, are perfect substitutes for new copies, that competition is even stronger.

82. Second, the accessibility, at modest prices, of second-hand copies of works promotes innovation, both on the side of copyright holders (in order to compete with the second-hand supply: see preceding point) and on that of users and third parties, such as online market platforms.

83. Third, the absence of control on the part of copyright holders over the use and the destination of the copy of the work owing to the exhaustion of the right of distribution enhances the protection of the private life of users. The supply of works by downloading allows distributors not only to know the identity of each purchaser, but also to gather information about the way in which he uses the work. The distributors of e-books can know, in particular, whether the reader has read the book to the end or if he has made annotations. The control which distributors have over the downloaded copies also allows them to cancel the contract, making the copy allegedly *'bought'* by the user unusable.

84. Fourth, and last, the exhaustion of the right of distribution makes it possible to prevent anti-competitive practices consisting in tying users to distributors by increasing the cost of changing distributor. Those practices are once again being seen, in particular, on the market for e-books when the purchase and use of such a book are dependent, for example, on opening an account with the distributor and having a reader distributed by that undertaking.

85. However, some of those arguments relate to aspects of general economic policy (price levels, competition, innovation) which may, admittedly, be taken into consideration by the legislature but which in my view should not guide decisions of a judicial nature.

86. Conversely, other arguments relate not to the conduct of the beneficiaries of the copyright but to that of the distributors of the works. To recognise the exhaustion of the right of distribution in order to counteract that conduct would then mean limiting authors' rights for reasons extraneous to the balance between those rights and users' rights. In other words, copyright would serve as a corrective factor of the alleged dysfunctions of the market for the supply of works.

87. I also doubt that the rule of the exhaustion of the right of distribution is in itself capable of providing a remedy for the problems mentioned above. If, under that rule, the purchaser of a dematerialised copy of a work were in a position to resell that copy, that would not automatically have the consequence of cancelling all the contractual terms governing the use of that copy. (60) Nor is it by any means certain that users would always wish to be released from those terms. In fact, the distributors accompany those limitations and intrusions into private life with advantages for users, who may choose to put up with the limitations and intrusions in order to benefit from the advantages.

88. Furthermore, there are also strong arguments against the application of the rule of exhaustion of the right of distribution to the supply of works by downloading.

89. In the first place, as I have already mentioned, dematerialised digital copies do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. To that must be added the ease of exchanging such copies, which requires neither additional effort nor additional cost. The parallel second-hand market is thus likely to affect the interests of the copyright holders much more than the market for second-hand tangible objects.

90. The case in the main proceedings is an excellent illustration of that situation. As its representative acknowledged at the hearing, Tom Kabinet may resell e-books at a lower price than the price for which it purchased them. The profitability of such a procedure relates to the fact that the users of its website are encouraged to resell to Tom Kabinet, after reading them, the e-books which they have purchased from it, and it may then offer them to other customers. A string of several resale and purchase operations thus enables Tom

Kabinet to make a profit from its activity, the only cost of which is incurred in the first acquisition of the e-book.
91. That results in two risks for the copyright holders. The first is the risk of competition from copies of the same quality offered at a fraction of the original market price and the second is the risk of an uncontrolled multiplication of the copies in circulation. Multiple exchanges, over a brief period, of a digital copy of the work are equivalent in practice to a multiplication of copies. That is especially true when, as is often the case for books, the user's needs are satisfied after a single reading. (61)
92. In the second place, there is a risk of multiplication, this time genuine multiplication, owing to the fact that downloading consists in a reproduction of the copy on the receiving computer. Although, in principle, after the content has been downloaded by the purchaser, the seller is under an obligation to delete his own copy, compliance with that obligation is difficult to verify, especially among individuals. (62)
93. Admittedly, that problem is more closely linked to digitisation than to downloading online. A digital copy on a tangible medium may be reproduced by its owner (a perfectly lawful act under the *'private copy'* exception), that user subsequently selling the material copy under the exhaustion rule. Although such behaviour is not very honest, it would nonetheless be difficult to declare it unlawful. In addition, its prohibition would be difficult to implement without intruding into the private sphere of the user. However, that does not apply to all categories of works, especially not to books, (63) and in order to resell a material copy it is necessary to bear a cost (for example postage) that does not exist in the case of dematerialised exchanges.
94. In the third place, it is not certain that, once exchanges of second-hand digital copies are authorised, it will always be easy or possible to distinguish legal copies, that is to say, those legally acquired and resold in accordance with the rules, from counterfeit copies. Admittedly, commercial platforms may use technical means to ensure that those rules are complied with, as, according to the information in the request for a preliminary ruling, Tom Kabinet does. It is nevertheless doubtful that individuals will make the same efforts. Thus, recognition of the rule of exhaustion of the right to distribute dematerialised copies might contribute to the development of piracy and make it more difficult to implement the measures intended to combat it.
95. Last, it must be borne in mind that downloading with a permanent right of use as a mode of supplying online content is in the process of being relegated to the past. New modes of access like *'streaming'* or subscription access have emerged and are widely approved, not only by copyright holders and distributors but also by users. These new modes of access ensure higher revenues for the former and provide the latter with more flexible access to a much greater ranger of content. It is true that these new modes of access do not initially concern e-books: it is difficult to imagine streaming a book. Nonetheless, solutions already exist whereby, for the price of a monthly or annual subscription, the user obtains access to an entire library of e-books. Although that access still requires the downloading of the book, there is no payment for each object downloaded and it would therefore be difficult to speak in that case of a *'sale'*. However, the sale of a copy of the work is the condition of the exhaustion of the distribution right.
96. By recognising the rule of exhaustion of the right of distribution in the internet environment, the Court would thus resolve a problem that does not really need to be resolved and that to a large extent belongs to the past.
97. Those considerations lead me to conclude that, although there are strong reasons for recognising the rule of exhaustion of the right of distribution in the case of downloading, other reasons, however, at least as strong, are opposed to such recognition. Thus, the weighing up of the various interests involved does not cause the balance to come down in a different way from that which follows from the letter of the provisions in force.

Conclusion

98. The foregoing considerations lead me to conclude that arguments, of both a legal and a teleological nature, are in favour of recognition of the rule of exhaustion of the distribution right with respect to works supplied by downloading for permanent use. (64) In particular, the permanent possession by the user of a copy of such a work shows the similarity of that mode of supply with the distribution of tangible copies. However, I am of the view that, as EU law now stands, the arguments to the contrary should prevail. These are, in particular, the arguments developed in points 36 to 49 of this Opinion, concerning the EU legislature's clear intention that downloading should be covered by the right of communication to the public, the limitation of the distribution right to acts of transfer of ownership of a copy, and the right of reproduction. Those legal arguments are supported by the arguments of a teleological nature set out in points 89 to 96 of this Opinion.
99. For that reason, I propose that the following answer be given to the questions for a preliminary ruling referred by the Rechtbank Den Haag (District Court, The Hague, Netherlands):
Article 3(1) and Article 4 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 the supply of e-books by downloading online for permanent use is not covered by the distribution right within the meaning of Article 4 of that directive but is covered by the right of communication to the public within the meaning of Article 3(1) of that directive.

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1 Original language: French.
2 Kohler, J., Das Autorrecht: eine zivilistische Abhandlung, Jena, G. Fischer, 1880.
3 See, in particular, judgment of the Reichsgericht (Reich Court of Justice, Germany) of 16 June 1906, I 5/06 Koenigs Kursbuch. A similar idea emerged in the same era in the United States under the name *'first sale doctrine'*: see judgment of the Supreme Court of the

United States of 1 June 1908, Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).
4 See, in particular, judgments of 8 June 1971, Deutsche Grammophon Gesellschaft (78/70, EU:C:1971:59), and of 20 January 1981, Musik-Vertrieb membran and K-tel International (55/80 and 57/80, EU:C:1981:10).
5 See legal framework, below.
6 Treaty approved by Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).
7 OJ 2001 L 167, p. 10.
8 It is apparent from the order for reference that the forms of order sought against the other defendants, Tom Kabinet Holding BV and Tom Kabinet Uitgeverij BV, will be dismissed by the referring court.
9 In fact, the *'transfer'* of a digital file consists in creating a new copy of the file on the receiving computer.
10 According to the request for a preliminary ruling, the judge based his decision in particular on the judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407).
11 See, to that effect, judgment of 17 April 2008, Peek & Cloppenburg (C-456/06, EU:C:2008:232, paragraph 34).
12 That, moreover, is the premiss on which, in economic terms, the rule of the exhaustion of the distribution right is based: once the copy of the work is sold, the copyright holder is deemed to have obtained the appropriate remuneration for that copy.
13 Article 8 of the Copyright Treaty and Article 3 of Directive 2001/29.
14 Article 6 of the Copyright Treaty and Article 4 of Directive 2001/29.
15 I shall leave to one side, for the moment, the question of the acts of reproduction, also subject to an exclusive copyright, which are necessary for those two methods of making available to the public.
16 By *'computer'* I mean any device capable of being connected to the internet and of storing data.
17 Guide to the Copyright and Related Rights Treaties Administered by WIPO, WIPO, Geneva, 2003, p. 210 et seq.
18 See recital 15 of that directive.
19 Emphasis added.
20 Directive of the European Parliament and of the Council du 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*'Directive on electronic commerce'*) (OJ 2000 L 178, p. 1).
21 See recital 18 of Directive 2000/31.
22 See, most recently, judgment of 7 August 2018, Renckhoff (C-161/17, EU:C:2018:634, paragraphs 19 and 22).
23 See judgment of 17 April 2008, Peek & Cloppenburg (C-456/06, EU:C:2008:232, operative part).
24 Except, of course, where the file is fixed on a physical platform, in which case the right of ownership relates to that platform.
25 In Infopaq, the Court seems to have had no doubt that the storage of an extract of a work constitutes an act of reproduction: see judgment of 16 July 2009, Infopaq International (C-5/08, EU:C:2009:465, paragraph 1 of the operative part), and also Opinion of Advocate General Trstenjak in that case (C-5/08, EU:C:2009:89, point 52).
26 Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979.
27 See to that effect judgment of 12 October 2016, Ranks and Vasiļevičs (C-166/15, EU:C:2016:762, paragraph 38).
28 See, in that regard, von Lewinsky, S., Walter, M., European Copyright Law, Oxford University Press, Oxford 2010, p. 1027.
29 Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).
30 Directive of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16).
31 Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).
32 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraphs 45 to 48).
33 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 49).
34 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 52).
35 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 61).
36 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 51).
37 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 49).
38 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 61).
39 Article 4(1)(c) of Directive 2009/24.
40 See to that effect judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 51).
41 The rules on authorship (Article 2), the exceptions (Article 5) and decompilation (Article 6).
42 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 55).
43 See judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 81).
44 Apart from that in Article 5(1) of Directive 2001/29, which, however, is not applicable to permanent reproductions such as downloaded copies.
45 Judgment of 10 November 2016 (C-174/15, EU:C:2016:856).
46 Directive of the European Parliament and of the Council du 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).
47 Judgment of 10 November 2016 (C-174/15, EU:C:2016:856).
48 Judgment of 10 November 2016, Vereniging Openbare Bibliotheken (C-174/15, EU:C:2016:856, paragraph 39).

49 See points 33 to 35 of this Opinion.
50 Judgment of 10 November 2016, Vereniging Openbare Bibliotheken (C-174/15, EU:C:2016:856, paragraph 2 of the operative part).
51 See Article 3(3) of Directive 2001/29.
52 Judgment of 13 February 2014, Svensson and Others (C-466/12, EU:C:2014:76).
53 Order of 21 October 2014, BestWater International (C-348/13, not published, EU:C:2014:2315).
54 Judgment of 13 February 2014, Svensson and Others (C-466/12, EU:C:2014:76, paragraphs 24, 27 and 28).
55 See, in particular, note by A. Lucas on the judgment in Svensson and Others, Propriétés intellectuelles, No 51 (2014), p. 165 et seq., and Rosén, J., *'How Much Communication to the Public Is "Communication to the Public"?'*, in Stamatoudi, I.A. (Eds), New Developments in EU and International Copyright Law, Wolters Kluwer, Alphen aan den Rijn 2016, p. 331 et seq.
56 Judgment of 13 February 2014, Svensson and Others (C-466/12, EU:C:2014:76, paragraph 27).
57 I shall leave to one side the question of works distributed free of charge, which is not raised in the present case.
58 See to that effect Sganga, C., *'A Plea for Digital Exhaustion in EU Copyright Law'*, JIPITEC, 9/2018, p. 211.
59 See, in particular, Perzanowski, A., Schultz, J., *'Digital Exhaustion'*, UCLA Law Review, 2011, No 58, p. 889; Sganga, C., op. cit. For a more nuanced approach to the arguments for and against, see Kerber, W., *'Exhaustion of Digital Goods: An Economic Perspective'*, Intellectual Property Journal, 2016, No 8, p. 149.
60 Copyright does not govern, in principle, the contracts whereby works are made available to the final user, see Lucas-Schloetter, A., *'La revente d'*occasion de fichiers numériques contenant des œuvres protégées par le droit d'auteur', in Bernault, C., Clavier, J.-P., Lucas-Schloetter, A., Lucas, F.-X., (dir), Mélanges en l'honneur du Professeur André Lucas,, LexisNexis, Paris 2014, p. 573 et seq.
61 The same remark applies, for example, to cinematographic works.
62 Although Amazon has patented a system for marketing used digital goods that allows automatic deletion of the original copy after downloading (Karapapa, S., *'Reconstructing copyright exhaustion in the online world'*, Intellectual Property Quarterly, 4/2014, p. 307), such systems could be applied only by commercial platforms. It would be difficult to require their use by private individuals.
63 E-books are not normally distributed on a tangible medium. Conversely, scanning a hard-copy book does not result in the creation of an e-book.
64 See also, in addition to the works already cited, Bernabou, L., *'Digital Exhaustion of Copyright in the EU or Shall We Cease Being so Schizophrenic?'*, in Stamatoudi, I.A. (ed.), op. cit., p. 351; von Lewinsky, S., Walter, M., op. cit., p. 987 et seq.; Mezei, P., Copyright Exhaustion. Law and Policy in the United States and the European Union, Cambridge University Press, Cambridge, 2018; and Wójcik, A., *'The evolution of the copyright exhaustion doctrine in the European Union: limitations and controversy in the digital age'*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, 2017, No 1, p. 178.