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Provisional text

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 ‘second-hand’ 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 'second-hand' 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), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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 'second-hand' 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 case-law 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 case-law 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 Bucureşti*, 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 case-law 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 second-hand 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 case-law 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 harmonisation of certain aspects of copyright and related rights in the information society.

[Signatures]

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* Language of the case: Dutch.