



Press and Information

Court of Justice of the European Union

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Judgment in Case C-263/18

Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others

The sale of second-hand e-books through a website constitutes a communication to the public that is subject to authorisation by the author

In the judgment in *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18), delivered on 19 December 2019, the Grand Chamber of the Court ruled 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’ within the meaning of Directive 2001/29 on copyright¹.

Nederlands Uitgeversverbond (NUV) and Groep Algemene Uitgevers (GAU), two associations whose purpose it is to defend the interests of Netherlands publishers, applied to the *rechtbank Den Haag* (District Court, The Hague, Netherlands) for an injunction prohibiting, inter alia, Tom Kabinet from making e-books available to members of the ‘reading club’ created by that company on its website or from reproducing those books. NUV and GAU claim that those activities infringe their affiliates’ copyright in those e-books. They submit that, by offering ‘second-hand’ e-books for sale in the context of that reading club, Tom Kabinet is making an unauthorised communication of those books to the public. Tom Kabinet contends, however, that such activities are covered by the distribution right which, under Directive 2001/29, is subject to a rule of exhaustion if the object concerned — in this instance, e-books — has been sold in the European Union by the rightholder or with his consent. That rule would mean that, as a result of the sale of the e-books at issue, NUV and GAU would no longer have the exclusive right to authorise or prohibit the distribution of those e-books to the public.

The Court found that the supply by downloading, for permanent use, of an e-book is not covered by the right of ‘distribution to the public’ provided for by Article 4(1) of Directive 2001/29, but that it is covered by the right of ‘communication to the public’ provided for in Article 3(1) of that directive, in which case exhaustion is excluded under paragraph 3 of that article.

In support of that finding, the Court concluded in particular from the World Intellectual Property Organisation (WIPO) Copyright Treaty underlying that directive, and from the *travaux préparatoires* for the directive, that the EU legislature had intended that rule of exhaustion to be reserved for the distribution of tangible objects, such as books on a material medium. By contrast, the application of that rule of exhaustion to e-books would be likely to affect the interests of rightholders in obtaining appropriate reward much more than in the case of books on a material medium, since dematerialised digital copies of e-books do not deteriorate with use and are, therefore, perfect substitutes for new copies on any second-hand market.

As regards more specifically the concept of ‘communication to the public’, the Court indicated that this should 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. That concept involves two cumulative criteria, namely an act of communication of a work and the communication of that work to a public.

¹ 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).

As regards the first criterion, it is apparent from the explanatory memorandum in the proposal for Directive 2001/29 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’. Thus, according to the Court, the making available of the works concerned to anyone who is registered with the reading club’s website must be considered a ‘communication’ of a work, irrespective of whether the person concerned avails himself or herself of that opportunity by actually retrieving the e-book from that website.

So far as concerns the second criterion, account should be taken not only of the number of persons able to access the same work at the same time, but also of how many of them may access it in succession. In the present case, according to the Court, the number of persons who may have access, at the same time or in succession, to the same work via the reading club’s 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.

The Court also 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. In the present case, since the making available of an e-book is 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.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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