

Online sale of ‘second-hand’ e-books requires authorisation

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The Court of Justice of the European Union (the “CJEU”) has ruled¹ that the supply to the public by downloading, for permanent use, of an electronic book (“e-book”) requires consent from the copyright holders for that e-book (unless a copyright exemption applies).

Tom Kabinet Internet BV (“Tom Kabinet”) launched an online service on its website consisting in a virtual market for ‘second-hand’ e-books. This was replaced with a ‘reading club’ with e-books available for download, for a price, to members of the reading club. Those e-books had been purchased by Tom Kabinet or provided to Tom Kabinet by reading club members. E-books downloaded through the reading club could be resold to Tom Kabinet. When providing an e-book to Tom Kabinet, a reading club member had to provide the download link for that e-book and declare that they had not kept a copy of the e-book.

According to the CJEU, the key question was whether the supply by downloading of an e-book for permanent use constituted a “communication to the public” or an act of “distribution”.

Why was the distinction between distribution and communication to the public important?

Distribution of a copyright work and communication to the public of a copyright work are generally activities requiring authorisation from the copyright holders for that work.

The right to control communication to the public cannot be exhausted. However, the distribution right can be exhausted in certain circumstances. Once exhausted, authorisation is not required for an act of distribution.

Tom Kabinet argued that it could provide its reading club service without authorisation from the copyright holders because the reading club service involved an act of distribution and the distribution right had been exhausted in relation to the relevant e-books.

Was there an act of distribution?

The CJEU explained that there is a dividing line between the two activities. In particular:

- the distribution right applies exclusively to the distribution of physical copies; and
- the right to control communication to the public covers any communication of the relevant work other than the distribution of physical copies.

It followed that the supply by downloading, for permanent use, of an intangible work such as an e-book could not constitute an act of distribution.

What is a “communication to the public”?

A “communication to the public” of a copyright work involves:

- an act of communication of that work; and
- the communication of that work to a public
 - using different technical means from those previously used; or
 - to a new public, i.e. to a public not already taken into account by the copyright holders when they authorised the initial communication of their work to the public.

A “communication to the public” of a copyright work includes making that work available to the public in such a way that enables members of the public to access it from a place and at a time individually chosen by them. The critical act is the “making available” of the work. It does not matter whether any person has actually retrieved it.

Was there a communication to the public?

The supply of e-books by Tom Kabinet was an **act of communication**. Tom Kabinet had made the relevant copyright works available to anyone registered with the reading club's website. A reading club member could access the website from a place and at a time individually chosen by them, irrespective of whether they actually downloaded the e-book from that website.

The relevant copyright works were communicated to "**a public**". The number of individuals able to access, at the same time or in succession, the same copyright work via the reading club's platform was substantial.

It was relevant that:

- anyone could become a member of the reading club; and
- there were no technical measures in place on the reading club's platform to ensure that:
 - only one individual had access to a copyright work at any given time; and
 - 'returned' e-books could no longer be used by the individual returning them.

The communication was made to a "**new public**". In general, an individual who downloads an e-book only has permission to read that e-book on their own devices. The copyright holders for an e-book would not have contemplated any individuals subsequently reading the same copy of the e-book. It followed that the supply of e-books by Tom Kabinet to its reading club members was a communication made to a new public.

The CJEU concluded that the supply by downloading, for permanent use, of an e-book was a communication to the public. As such, in the absence of a copyright exemption, Tom Kabinet needed consent from the relevant copyright holders for its reading club service.

What should organisations do?

If making e-books available for download, organisations should:

- check whether they can benefit from a copyright exemption; and
- if not, seek appropriate authorisation from the relevant copyright holders.

ⁱ*Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV, Tom Kabinet Holding BV, Tom Kabinet Uitgeverij BV (Case C-263/18)*

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