

The logo for Hogan Lovells, consisting of the firm's name in a serif font inside a solid green square.

Hogan
Lovells


A photograph of two men in a professional setting, likely a law firm, looking at a computer monitor. The image is tilted and partially obscured by white geometric shapes.

The TU Darmstadt Case

CJEU, C-117/13

Dr. Nils Rauer, MJJ

Webinar, 8 June 2016

A magnifying glass is positioned over a map of Europe, which is overlaid with the twelve yellow stars of the European Union flag. The background is a solid blue color. The magnifying glass is in the foreground, and the map is centered within its lens.

The Exception of Article
5 (3) lit. n) of the
Directive 2001/29

The Directive

L 167/10

EN

Official Journal of the European Communities

22.6.2001

**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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European
Community, and in particular Articles 47(2), 55 and 95
thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social
Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article
251 of the Treaty ⁽³⁾,

Whereas:

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.

The Directive

Article 5 (3) lit. n) – Exceptions & Limitations

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

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

The German Copyright Act

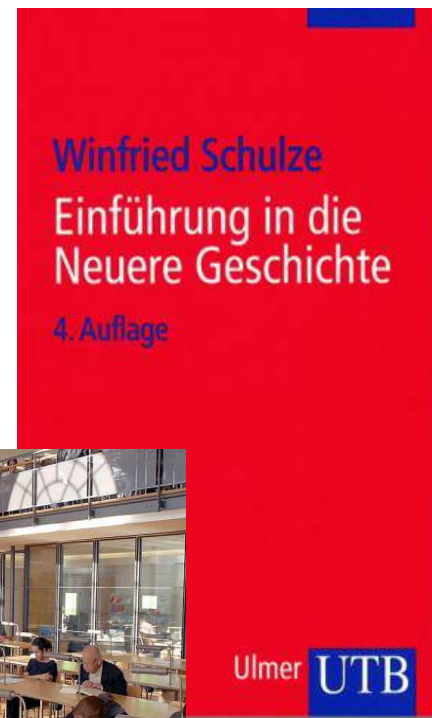
Section 52b – Communication of works at terminals in public libraries, museums and archives

So far as there are no contractual provisions to the contrary, it shall be permissible to make published works **available** from the stocks of publicly accessible libraries, museums or archives, which neither directly nor indirectly serve economic or commercial purposes, exclusively **on the premises** of the relevant institution at **terminals dedicated** to the purpose of research and for private study. In principle, reproduction of a work in excess of the number stocked by the institution shall not be made simultaneously available at such terminals. **Equitable remuneration** shall be paid in consideration of their being made available. The claim may only be asserted by a collecting society.

The Case



The Case



The Case

Course of Action

- **Digitising** of the library's physical book collection
- Reject of publisher's **offer** to license the ebook version
- **Installation** of the dedicated terminals
 - **Search** function
 - **Read** function
 - **Print** function (paper)
 - **Save** function (USB stick)inrichtung der elektronischen Leseplätze
- **Guidelines** for users as to the scope of permissible use
- **Warning letter** issued by the publisher



The Case

Course of Proceedings

- **Landgericht Frankfurt**, Az.: 2-06 O 172/09 **March 2009**
 - **Oberlandesgericht Frankfurt**, Az.: 11 U 40/09 **May 2009**
 - Judgment handed down on **24 November 2009**
 - **Landgericht Frankfurt**, Az.: 2-06 O 378/10 **August 2010**
 - **Bundesgerichtshof**, Az.: I ZR 69/11 **March 2011**
 - **Europäischer Gerichtshof**, Rs.: C-117/13 **Sept 2012**
 - **Bundesgerichtshof**, Az.: I ZR 69/11 **Sept 2014**
 - Judgment handed down on **16 April 2015**
 - **Bundesverfassungsgericht**, Az.:AR 7081/15 **May 2015**
-

The Case

Four Aspects of Dispute

- (1) May a library rely on the exception of § 52b UrhG if the publisher is **offering** a digital version of the book? – **priority of contracts**
- (2) Is there a **right to digitise** even though § 52b UrhG does not say anything about digitising? – **narrow interpretation of exceptions**
- (3) May the library offer the user the option to **print** the displayed pages? – **combination of exceptions**
- (4) May the library offer the user the option to **save** the displayed pages on a data carrier? **combination of exceptions**



The Case

Four Aspects of Dispute

3:1 **4:0**

1:3 **2:2**

...plus alternating reasons given by the courts!





**A closer look at
the arguments**

Priority of Contractual Provisions

General Principle vs. Ratio of the Provision

- Recitals of the directive **indeed** give priority to contractual provisions
- Article 5 (3) lit. n): "*not subject to purchase or licensing terms*"
- Offers and opportunities are **not yet** license agreements
- **Reasonableness test** does not work in practice – libraries require legal certainty



1:0 for us

Right to Digitise

Interpretation of Exceptions

- Digitising is an **act of reproduction**
- Article 5 (3) lit. n): "*communication or making available*"
- Principle of **narrow** interpretation of exceptions to copyright (?)
- Rather, interpreting statutory rules in line with their **sense & purpose**

Right to Digitise

Interpretation of Exceptions

- CJEU

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

Right to Digitise

Interpretation of Exceptions

- Still, right to digitise is **not mentioned** in Article 5 (3) lit. n)
- But, in **Article 5 (2) lit. c)** we find a right for libraries to carry out "*specific acts of reproduction*"

Right to Digitise

Interpretation of Exceptions

- CJEU

*"Furthermore, the scope of that ancillary right of digitisation must be determined by interpreting **Article 5(2)(c)** of Directive 2001/29 in the light of **Article 5(5)** of that directive, under which that limitation is applicable only in **certain special cases** which do not prejudice the normal exploitation of the work..."*



2:0 for us

Printing & Storing Option

Points of Discussion

- Another act of **reproduction**, this time at the terminal.
- German legislator: "*a use **equivalent** to analogue use of the physical book*"
- German law: "*reading terminals*"
- Article 5 (3) lit. n) as a limitation to the **right of making available**
- **Article 5 (5) – (1)** how to define adequate means of studying a text in today's world? **(2)** what is reasonable in light of the publisher's core business nowadays also including e-books

Printing & Storing Option

Privileged Institution / Person

- CJEU

*"Such acts of reproduction [...] also **cannot** be permitted under an ancillary right stemming from the combined provisions of Articles 5(2)(c) and 5(3)(n) of Directive 2001/29 [...]. Moreover, since those acts are **carried out not by the establishments** referred to in Article 5(3)(n) of Directive 2001/29, but rather by the users of the dedicated terminals installed within those establishments, they **cannot** be authorised under that provision."*

Printing & Storing Option

Privileged Institution / Person

- CJEU

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

Printing & Storing Option

Scope of Permissible Use


- CJEU

*"Furthermore, such acts of reproduction must observe the conditions set out **in Article 5(5)** of Directive 2001/29. Consequently, the extent of the texts reproduced may not, in particular, unreasonably prejudice the legitimate interests of the rightholder."*

**3:0 and
4:0 for us**

The Judgments

СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
SODNÍ DVŮR EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONENS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN UNION
EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHEIREITHIUNAIS AN AONTAIS EORPAIGH
SUD EVROPSKE UNIE
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA



LUXEMBOURG

EIROPAS SAVIENĪBAS TIESA
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS
AZ EURÓPAI UNIÓ BÍRÓSÁGA
IL-QORTI TAL-GUSTIZZJA TAL-UNJONI EWROPEA
HOF VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVŮR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

URTEIL DES GERICHTSHOFS (Vierte Kammer)

- 972858 -

11. September 2014*

„Vorabentscheidungsersuchen – Richtlinie 2001/29/EG – Urheberrecht und verwandte Schutzrechte – Ausnahmen und Beschränkungen – Art. 5 Abs. 3 Buchst. n – Nutzung von Werken und sonstigen Schutzgegenständen zu Zwecken der Forschung und privater Studien – Buch, das einzelnen Mitgliedern der Öffentlichkeit in einer öffentlich zugänglichen Bibliothek auf eigens hierfür eingerichteten Terminals zugänglich gemacht wird – Begriff des Werks, für das keine ‚Regelungen über Verkauf und Lizenzen‘ gelten – Recht der Bibliothek, ein zu ihrem Bestand gehörendes Werk zu digitalisieren, um es auf eigens hierfür eingerichteten Terminals zugänglich zu machen – Zugänglichmachung des Werks auf eigens hierfür eingerichteten Terminals, die es ermöglichen, das Werk auf Papier auszudrucken oder auf einem USB-Stück zu speichern“

The Judgments



BUNDESGERICHTSHOF **IM NAMEN DES VOLKES**

URTEIL

I ZR 69/11

Verkündet am:
16. April 2015
Führinger
Justizangestellte
als Urkundsbeamtin
der Geschäftsstelle

in dem Rechtsstreit

Nachschlagewerk: ja
BGHZ: nein
BGHR: ja

Elektronische Leseplätze II

UrhG § 52b Satz 1 und 2

Thank you very much!

Copyright is our business – globally



Read more at:
maps.hoganlovells.com/copyright



Dr. Nils Rauer, MJI (Gießen)
Partner, Frankfurt
T +49 69 962 36 371
nils.rauer@hoganlovells.com

- *”Recommended lawyer for data protection.”*
Legal500, 2015
- *”Frequently recommended lawyer for trademark and competition law.”*
JUVE Handbook, 2014/2015 & 2015/2016
- *”Good IP lawyer“, Competitor*
JUVE Handbook, 2014/2015
- *”knowledgable, tough opponent“, Competitor*
JUVE Handbook, 2015/2016

Referent

Dr. Nils Rauer ist Partner im Frankfurter Büro von Hogan Lovells und leitet dort den Bereich Intellectual Property, Media & Technology (IPMT). Er hat sich auf den Bereich des gewerblichen Rechtsschutzes spezialisiert. Seine Beratungsschwerpunkte liegen hier insbesondere im Urheber- und Wettbewerbsrecht. Er ist Head unseres Global Copyright Teams. Darüber hinaus verfügt er über eine langjährige Expertise im Datenschutzrecht, insbesondere mit Blick auf den internationalen Datenverkehr.

Nils Rauer berät zur Verwertung von Urheberrechten im Internet, digitalen Medien, kollektiver Rechtswahrnehmung und dem Aufbau eines digitalen Binnenmarkts innerhalb der EU. Zu seinen Mandanten zählen Rechteinhaber sowie Internet Provider, Bibliotheken und Verwertungsgesellschaften.

Im Bereich des Wettbewerbsrechts hat sich Nils Rauer auf die Ausgestaltung von Werbekampagnen spezialisiert. Seine Mandanten kommen hier aus der Automobil- und Kosmetikbranche sowie dem Finanz- und Bankensektor.

Nils Rauer verfügt über eine langjährige Erfahrung als Prozessanwalt. Insbesondere im einstweiligen Rechtsschutz verfügt er über eine ausgewiesene Expertise. Unlängst hat Nils Rauer die TU Darmstadt in einem Musterprozess erfolgreich vor dem EuGH in Luxemburg vertreten.

Nils Rauer ist Mitglied des Fachausschusses Urheber- und Verlagsrecht der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (GRUR) sowie der Deutschen Gesellschaft für Recht und Informatik (DGRI). Er ist Lehrbeauftragter an der Johannes Gutenberg-Universität Mainz und Referent der Akademie des Deutschen Buchhandels.



Dr. Nils Rauer, MJI (Gießen)
Partner, Frankfurt
T +49 69 962 36 371
nils.rauer@hoganlovells.com

- *„Empfohlener Anwalt für Datenschutzrecht.“*
Legal500, 2015
- *„Häufig empfohlener Anwalt für Marken- und Wettbewerbsrecht.“*
JUVE Handbuch, 2014/2015 u. 2015/2016
- *„Guter IP-Rechtler“, Wettbewerber*
JUVE Handbuch, 2014/2015
- *„kenntnisreich, harter Gegner“, Wettbewerber*
JUVE Handbuch, 2015/2016