



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 7 April 2016¹

Case C-160/15

GS Media BV

v

**Sanoma Media Netherlands BV,
Playboy Enterprises International Inc.,
Britt Geertruida Dekker (Request for a preliminary ruling**

from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information society — Article 3(1) — Communication to the public — Website — Making available to the public of hyperlinks to works freely accessible on another website — No authorisation from the holder)

I – Introduction

1. The present request for a preliminary ruling made by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) on 3 April 2015 and lodged at the Court Registry on 7 April 2015 concerns the interpretation 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.²

2. The request has been made in a dispute between GS Media BV ('GS Media'), on the one hand, and Sanoma Media Netherlands BV ('Sanoma'), Playboy Enterprises International Inc. ('Playboy') and Ms Dekker (together, 'Sanoma and Others'), on the other, particularly concerning the publication on the *GeenStijl.nl* ('GeenStijl') website, which is operated by GS Media, of hyperlinks (or 'clickable links') to other websites permitting leaked photographs of Ms Dekker taken for *Playboy* magazine to be viewed.

II – Legislative framework

3. Recitals 2 to 5, 9, 23 and 31 of Directive 2001/29 state:

'(2) The European Council ... 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. ...

¹ — Original language: French.

² — OJ 2001 L 167, p. 10.

- (3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.
- (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. ...
- (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. ...

...

- (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.

...

- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. ...'

4. Article 3 of that directive provides:

'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.'

5. Under Article 6 of the directive:

‘1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

...

3. For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC [of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20)]. Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

...’

6. Article 8 of the directive states:

‘1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

...

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’

7. Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market,³ entitled ‘Hosting’, provides:

‘1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

³ — OJ 2000 L 178, p. 1.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

8. The third sentence of Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights⁴ provides:

'Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive [2001/29].'

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

9. Sanoma, the publisher of the monthly magazine *Playboy*, commissioned a photographer, Mr Hermès, to conduct a photoshoot of Ms Dekker. Ms Dekker appears regularly in television programmes in the Netherlands. The photographer gave Sanoma full power of attorney to represent him for purposes of protection and enforcement of his intellectual property rights arising from the aforementioned commission.

10. On 27 October 2011, GS Media, which operates the GeenStijl website, published a report with the title '[obscenity] leaked! Nude photos ... Dekker'. The report also included part of one of the photographs in the top left-hand corner ('the cutout'). The report ended with the following words: 'And now the link with the pics you've been waiting for. Whoever [obscenity] first, [obscenity] first. HERE. ...'. By clicking on a hyperlink, indicated by 'HERE', readers were directed to an Australian data-storage website called Filefactory.com. By clicking on the following hyperlink, they could open a new window which contained the button 'DOWNLOAD NOW'. By clicking on the button, the readers opened a file in zip format containing 11 files in pdf format, each of which contained one of the photographs.

11. Despite receiving demands from Sanoma, GS Media refused to remove the hyperlink in question. However, the photographs were removed from the Filefactory.com website.

12. On 7 November 2011 a report appeared on the GeenStijl website with the title 'Blote [Dekker] gaat GeenStijl aanklaguh' ('Naked [Dekker] to sue GeenStijl'), referring to the dispute between GS Media and Sanoma and Others regarding the photographs leaked by GeenStijl. The report ended with: 'Update: Not yet seen the nude pics [of Dekker]? They are HERE'. That report, too, contained a hyperlink to the Imageshack.us website, where one or more of the photographs in question could be found. The Imageshack.us website also complied with Sanoma's request to remove those photographs. A third report with a hyperlink leading to the photos appeared on GeenStijl on 17 November 2011 with the title 'Bye Bye Wave Wave Playboy'. On the GeenStijl forum users then posted new links to other websites where the photographs could be viewed.

13. The photographs of Ms Dekker were published in *Playboy* magazine in December 2011.

14. Sanoma and Others brought an action at the Rechtbank Amsterdam (District Court, Amsterdam), claiming in particular that by posting hyperlinks and a cutout of one of the photographs in question on GeenStijl, GS Media had infringed the copyright of Mr Hermès and acted unlawfully towards Sanoma and Others. The Rechtbank Amsterdam (District Court, Amsterdam) largely upheld those claims.

⁴ — OJ 2004 L 157, p. 45, and corrigenda in OJ 2004 L 195, p. 16, and OJ 2007 L 204, p. 27.

15. The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) set aside the judgment of the Rechtbank Amsterdam (District Court, Amsterdam), holding that GS Media had not infringed the copyright of Mr Hermès because the photographs had already been communicated to the public by being posted on the Filefactory.com website. The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) did not rule on whether or not the posting of the photos on the Filefactory.com website was an infringement of the copyright of Mr Hermès. On the other hand, it ruled that by posting those hyperlinks GS Media's conduct in respect of Sanoma and Others had been unlawful because it encouraged visitors to GeenStijl to view the photographs illegally posted on Filefactory.com which, without those hyperlinks, would not have been easy to find. In contrast, the Gerechtshof Amsterdam (Court of Appeal, Amsterdam) held that GS Media had infringed the copyright of Mr Hermès by posting a cutout of one of the photographs on the GeenStijl website.

16. GS Media and Sanoma and Others brought an appeal and a cross appeal respectively at the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

17. GS Media challenges the finding of the Gerechtshof Amsterdam (Court of Appeal, Amsterdam) that it had infringed the copyright of Mr Hermès by posting on its website a cutout of one of photographs with its report on the photographs.

18. Sanoma and Others challenge the ruling of the Gerechtshof Amsterdam (Court of Appeal, Amsterdam) that GS Media had not made the photographs available to the public by posting the hyperlinks on its website. Sanoma and Others, relying in particular on the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), argue before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) that communication to the public can be deemed to take place if there is a link to a website on which a work has been placed without the consent of the copyright holder, whether that work was published previously with his consent or not. In addition, Sanoma and Others claim that the Filefactory.com website had put in place restrictions within the meaning of paragraph 31 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), 'which the users of GeenStijl were able to circumvent through the intervention of GS Media. The pirated photographs were thereby made available to a wider public than the public for whom the photos had been placed in the "digital safe"; at least those photographs were thus made accessible to a public who would not (easily) have been able to find them without that intervention and they would thus have remained inaccessible for that category.'

19. In its examination of the cross appeal, the Hoge Raad der Nederlanden considers that it cannot be inferred with sufficient certainty from the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) and the order in *BestWater International* (C-348/13, EU:C:2014:2315) whether there is a 'communication to the public' if the work has indeed previously been published, but without the consent of the rightholder. It also notes that the cross appeal raises questions regarding the circumvention of restrictions within the meaning of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76). It points out in this regard that prior to the posting of the hyperlinks on the GeenStijl website by GS Media the photographs were not unfindable but, at the same time, they were not easily findable, with the result that the publication of the hyperlink had a highly facilitating character.

20. In these circumstances, the Hoge Raad der Nederlanden decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29?

- (b) Does it make any difference if the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?
 - (c) Is it important whether the "hyperlinker" is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party's website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?
- (2) (a) If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?
- (b) In answering question 2(a), is it important whether the "hyperlinker" is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?
- (3) Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?

IV – Procedure before the Court

21. Written observations were submitted by GS Media, Sanoma and Others, the Federal Republic of Germany, the French Republic, the Portuguese Republic, the Slovak Republic and the European Commission. GS Media, Sanoma and Others, the Federal Republic of Germany, the French Republic and the Commission presented oral argument at the hearing which was held on 3 February 2016.

V – Observations of the parties

22. The Portuguese Republic asserts that, without prejudice to the validity of the final outcome decided by the Court, the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) is likely to influence the dissemination of information and knowledge on the internet. It maintains that the classification of the provision of hyperlinks as an 'act of communication' appears to raise problems for two reasons.

23. First, according to the Portuguese Republic, in the digital society a hyperlink is comparable to a footnote in the analogue cultural environment⁵ and does not have to be classified as an 'act of communication'. Second, in the view of the Portuguese Republic, the person who makes the work directly available to the public and who therefore effects an 'act of communication' within the meaning of Article 3(1) of Directive 2001/29 is the person who places the work on the server from which the internet user is able to access it. It submits that it is not the 'hyperlinker' — who merely makes a secondary or indirect 'communication' — that ensures that 'members of the public may access [the works] from a place and at a time individually chosen by them'. The act which actually produces that effect is undertaken by the person who effected the initial communication.

⁵ — Or a road sign, as was suggested by GS Media at the hearing.

24. The Portuguese Republic claims that if anyone other than the copyright holder refers by means of a hyperlink on a website operated by him to another website which is operated by a third party, is accessible to the general internet public and on which the work has been made available with or without the authorisation of the rightholder, that does not constitute a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.

25. The Commission states that in its observations in *Svensson and Others* (C-466/12, EU:C:2014:76) it had submitted that in a situation where a clickable link (or ‘hyperlink’) on a certain website directs to a work protected by copyright contained on another website and where the users of the first website thus have access to that work, there can be no question of an ‘act of communication’ since there has been neither transmission nor retransmission in accordance with Directive 2001/29.

26. GS Media, the Federal Republic of Germany, the Portuguese Republic,⁶ the Slovak Republic and the Commission propose that Question 1(a) and (b) asked by the referring court be answered in the negative. They maintain that there is no ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 where a hyperlink directs to a third-party website which is freely accessible to the general internet public and on which the work concerned has been made available without the authorisation of the rightholder, including where that work has never been published in some other way with the rightholder’s authorisation.

27. With regard to Question 1(c), GS Media, the Federal Republic of Germany, the Portuguese Republic and the Commission assert that subjective criteria are irrelevant in the assessment of a ‘communication to the public’, which must be conducted on an objective basis. The Portuguese Republic does, however, maintain in the alternative, in the event that the Court answers Questions 1 and 2 in the affirmative, that such communication presupposes that the ‘hyperlinker’ was unequivocally aware that the initial communication was not authorised. On the other hand, the Slovak Republic maintains that it is relevant whether the person who posts a hyperlink to a protected work had to be aware that the work had previously been made available to the public without the authorisation of the rightholder. Thus, with a view to safeguarding the objective of Directive 2001/29, as soon as that person is alerted to that fact by the rightholder or as soon as he becomes aware of it for some other reason, he should avert a further copyright infringement by avoiding any new communication to the public of the protected work.

28. With regard to Question 2(a) and (b), GS Media, the Federal Republic of Germany, the Portuguese Republic, the Slovak Republic and the Commission maintain that it should be answered in the negative. According to the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), the sole determining factor is whether or not the hyperlink makes it possible to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work. If that is not the case and that website, and thus the work placed on it, is potentially accessible to the general internet public, it is immaterial whether or not the hyperlink facilitates the finding of the work. Furthermore, the opposite solution is not practicable and creates considerable legal uncertainty at the expense of freedom of expression and information.

29. Sanoma and Others propose that Questions 1 and 3 be answered to the effect that anyone who, in circumstances like those at issue in the main proceedings, deliberately and in full knowledge posts a hyperlink giving access to a work protected by copyright which has never previously been made public with the rightholder’s consent, carries out an operation which constitutes a communication to the public. Sanoma and Others assert that, according to the Court’s case-law, regard must be had to several criteria, which include, first, the fact that, in full knowledge, a user deliberately gives third parties direct access to protected works; second, the fact that, by its intervention, the user plays an indispensable role in those works being made available; third, the fact that the public which thus has

6 — The following observations are made by the Portuguese Republic purely in the alternative to those set out in points 22 to 24 of this Opinion in case the Court were to consider that there is no reason to depart from the rule in *Svensson and Others* (C-466/12, EU:C:2014:76).

access to protected works consists of an indeterminate number of potential users or a fairly large number of persons; fourth, the fact that, by its intervention, the user widens the circle of persons having access to the protected works to a group which the copyright holder for the protected works had not envisaged when he gave his consent for the initial use; and, fifth, the fact that, by its communication, the user pursues a profit-making purpose. According to Sanoma and Others, all these criteria are met in the main proceedings.

30. In the view of the French Republic, in the circumstances of the main proceedings, the making available of the works concerned by means of a clickable link results in those works being communicated to a new public, because although the photographs in question were not unfindable before GS Media posted the clickable link on the GeenStijl website, only persons holding an electronic key could have easily accessed those photographs before the clickable link was published. It asserts that there has been nothing to show that the GeenStijl public could have easily found the photographs in question without the assistance of GS Media. The French Republic states in this regard that the referring court found that the publication of the clickable link had a highly facilitating character. In those circumstances, the French Republic maintains that the existence of a clickable link which considerably facilitates access to storage space containing unpublished photographs protected by copyright constitutes a communication to a new public within the meaning of Article 3(1) of Directive 2001/29.

31. The French Republic submits that it is not relevant for the purposes of classification as ‘communication to the public’ whether or not the copyright holder gave his consent to the making available of the work on the website to which the clickable link directs or whether the person providing the clickable link knew that the rightholder did not give his consent for the work to be made available.

VI – Analysis

A – Preliminary remarks

32. It is apparent from the documents before the Court, subject to verification by the referring court, that protected works, namely photographs, were made available to users of websites such as Filefactory.com and Imageshack.us without the consent of the copyright holders, but that infringement of copyright is not at issue in the main proceedings.

33. In addition, the publication on the GeenStijl website of a cutout of one of the photographs in question is not the subject of the request for a preliminary ruling,⁷ which concerns only the hyperlinks on that website.

34. By its questions, the referring court asks in essence whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of a hyperlink to another website operated by a third party, which is accessible to the general internet public and on which works protected by copyright are made available to the public, without the authorisation of the copyright holder constitutes an act of communication to the public.

⁷ — See in particular points 10 and 14 to 17 and of this Opinion.

35. Furthermore, the referring court wishes to ascertain whether the fact that the person who posts the hyperlink to a website is or ought to be aware of the lack of consent by the copyright holder for the initial communication of the works on that website is important for the purpose of Article 3(1) of Directive 2001/29. Lastly, the referring court asks whether, and if so in what circumstances, the fact that a hyperlink has facilitated access to the works in question is relevant in accordance with that provision.

36. The dispute in the main proceedings comes in the wake of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) and the order in *BestWater International* (C-348/13, EU:C:2014:2315), where the Court ruled that, although the publication on a website of hyperlinks to a work freely available on another website is an ‘act of communication’ within the meaning of Article 3(1) of Directive 2001/29,⁸ it is not a ‘communication to the public’ within the meaning of that provision. In paragraph 24 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), the Court ruled that, ‘in order to be covered by the concept of “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29, a communication ... concerning the same works as those covered by the initial communication and made ... by the same technical means [as the initial communication] must also be directed *at a new public*, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public’.⁹

37. The referring court states that in those cases the Court did not clarify whether the authorisation of the copyright holder to the protected work being made available on the website to which the hyperlink directs has a bearing on the absence of a finding of a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

38. It should be noted that in the first paragraph of the operative part of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), the Court ruled that Article 3(1) of Directive 2001/29 had to be interpreted as meaning that the provision on a website of clickable links to works freely available¹⁰ on another website does not constitute an ‘act of communication to the public, as referred to in that provision’.¹¹

39. Whilst it is true that the Court mentioned several times in the grounds of the judgment that ‘the copyright holders ... authorised the initial communication’,¹² no reference is made in the operative part to the issue of whether or not the copyright holder authorised the initial making available of the protected work.

40. In addition, according to paragraph 4 of the order in *BestWater International* (C-348/13, EU:C:2014:2315), the posting online of the protected work and thus its initial communication to the public was not with the authorisation of the copyright holder. However, in accordance with its decision in *Svensson and Others* (C-466/12, EU:C:2014:76) the Court ruled that Article 3(1) of Directive 2001/29 had not been infringed.

41. Consequently, the order in *BestWater International* (C-348/13, EU:C:2014:2315) seems to indicate that the fact that the copyright holder did not authorise the initial communication to the public was not relevant for the purposes of Article 3(1) of Directive 2001/29.

8 — Judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 20).

9 — See, in this regard, order in *BestWater International* (C-348/13, EU:C:2014:2315, paragraph 14). My emphasis.

10 — The Court used the expressions ‘freely accessible’ and ‘freely available’ interchangeably. In addition, the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) seems to indicate that the hyperlink at issue in that case took the users of one website directly to works freely available on another website. In the main proceedings it would appear, subject to verification by the referring court, that the hyperlinks at issue did not take users of the *GeenStijl* website directly to the works in question, but to other websites on which works protected by copyright were stored. I consider that these circumstances must be treated in the same way under Article 3(1) of Directive 2001/29 since the work protected by copyright is freely available on the website to which the hyperlink directs.

11 — See also judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 32).

12 — See, *inter alia*, judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 27).

42. It should be noted in this regard, however, that the question referred to the Court for a preliminary ruling in *BestWater International* (C-348/13, EU:C:2014:2315)¹³ did not specifically concern the absence of authorisation and the Court's reasoning in the order in question makes no reference to it.¹⁴

43. The present case thus gives the Court an opportunity to determine whether the authorisation by the copyright holder of the making available of the protected work on the other website ('initial communication') is essential to a finding that there is no communication to the public within the meaning of Article 3(1) of Directive 2001/29.

44. Before answering the questions asked by the referring court, it is necessary to consider the observations made by the Portuguese Republic¹⁵ and the Commission¹⁶ on whether it is appropriate to depart from the case-law stemming from the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) on the concept of 'act of communication', which is a criterion that must be met in order to establish a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, and its application to hyperlinks.

45. If the Court were to rule that the posting on a website of hyperlinks to protected works which are freely available on another website cannot be classified as an 'act of communication', the question of the copyright holder not having authorised the placement of his work on other websites operated by third parties would no longer arise.

B – *The two criteria under Article 3(1) of Directive 2001/29*

46. Article 3(1) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit any communication to the public of their works. It follows that every act¹⁷ of communication of a work to the public has to be authorised by the copyright holder.

47. Although Directive 2001/29 does not contain any definition of 'communication to the public',¹⁸ the Court's settled case-law states that that concept includes two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public'.¹⁹

13 — In that case the Court decided to rule by way of reasoned order under Article 99 of the Rules of Procedure of the Court of Justice, entitled 'Reply by reasoned order', which provides that '[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.'

14 — In that case the referring court asked only whether 'the embedding, within one's own website, of another person's work made available to the public on a third-party website, in circumstances such as those in the main proceedings, constitute[s] communication to the public within the meaning of Article 3(1) of Directive 2001/29, even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication'. See order in *BestWater International* (C-348/13, EU:C:2014:2315, paragraph 11).

15 — See points 22 to 24 of this Opinion.

16 — See point 25 of this Opinion.

17 — Judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 15). As is laid down in Article 3(3) of Directive 2001/29, that exclusive right is not exhausted by any act of communication to the public or making available to the public as set out in Article 3 of Directive 2001/29.

18 — Judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 184 and 185).

19 — See judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 16 and the case-law cited). See, by analogy, judgment in *C More Entertainment* (C-279/13, EU:C:2015:199, paragraph 25), which concerns Article 3(2) of Directive 2001/29.

1. The first criterion

48. With regard to the concept of ‘act of communication’, recital 23 of Directive 2001/29 states *inter alia* that communication to the public ‘should cover any ... *transmission or retransmission* of a work to the public [not present at the place where the communication originates] by wire or wireless means, including broadcasting’.²⁰

49. In addition, in paragraph 40 of the judgment in *Circul Globus București* (C-283/10, EU:C:2011:772),²¹ the Court ruled that the right of communication to the public ‘*does not cover any activity which does not involve a “transmission” or a “retransmission” of a work*’.²²

50. Article 3(1) of Directive 2001/29 does not make any reference to acts of transmission or retransmission, but provides in a broad sense that communication to the public includes ‘*making available to the public*’.²³ In my view, this broad²⁴ understanding of the concept of ‘act of communication’ is in keeping with the wish of the European legislature to provide ‘a high level of protection of intellectual property’²⁵ and also ensures that the concept of ‘act of communication’ is flexible and does not become quickly outmoded on account of constant technological changes.²⁶

51. The wording of recital 23 of Directive 2001/29 had led the Commission, in *Svensson and Others* (C-466/12, EU:C:2014:76), to take the position that the concept of ‘act of communication’ had to be limited to ‘transmission’ or ‘retransmission’, which would not be the case with a hyperlink on a certain website which directs to a work protected by copyright contained on another website, where visitors to the first website thus have access to that work.²⁷

52. That position was not accepted as, in paragraph 19 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), the Court ruled that ‘for there to be an “act of communication”, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity’.

53. Having said that, is there an ‘act of communication’ where a hyperlink on a website directs to another website, thereby permitting its visitors to access a protected work freely accessible on that other website?

20 — My emphasis.

21 — It should be stated that that judgment predates the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76).

22 — My emphasis.

23 — My emphasis.

24 — And technologically neutral.

25 — See recitals 4 and 9 of Directive 2001/29 and judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 186). In paragraph 54 of the judgment in *Bezpečnostní softwarová asociace* (C-393/09, EU:C:2010:816), the Court ruled that ‘it follows from [recital 23] in the preamble to Directive 2001/29 that “communication to the public” must be interpreted *broadly*. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can be seen from [recitals 9 and 10], is to establish a high level of protection of, *inter alia*, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public’. My emphasis.

26 — In paragraph 38 of the judgment in *Circul Globus București* (C-283/10, EU:C:2011:772) the Court ruled that ‘regarding the aim of Directive 2001/29, it should be noted that it is clear from recitals 2 and 5 thereto 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 performing protected works’.

27 — See point 25 of this Opinion.

54. Although it is true that hyperlinks posted on a website make it much easier to find other websites and protected works available on those websites²⁸ and therefore afford users of the first site quicker, direct access to those works,²⁹ I consider that hyperlinks which lead, even directly, to protected works do not ‘*make available*’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works. As the Portuguese Republic states in its observations, the act which constitutes the actual ‘making available’ was the action by the person who effected the initial communication.³⁰

55. I would also point out that in the judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), in which a ‘communication [of a work] to the public’ was found, the Court stressed the fact that *without the intervention*, for example, of a hotel to offer a television signal in its rooms via television sets, the work would not have been accessible to the hotel’s customers.³¹

56. In this regard, in paragraphs 195 and 196 of the judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), the Court ruled that the proprietor of a public house effects a ‘communication to the public’ where he intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers and ‘*[w]ithout his intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast’s catchment area*’.³²

57. It follows that, in order to establish an act of communication, the intervention of the ‘hyperlinker’ must be vital or indispensable³³ in order to benefit from or enjoy works.

58. Nevertheless, in other judgments, in particular *SGAE* (C-306/05, EU:C:2006:764, paragraph 42) and *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 27 and 31), the Court analysed the criterion of whether an intervention was indispensable in order to find that there had not been a communication to *a new public*.³⁴

59. In my view, the criterion that an intervention must be indispensable can be approached only in examining the existence of an act of communication.³⁵ It is at that point that there is possibly a ‘making available’ within the meaning of Article 3(1) of Directive 2001/29.

28 — I believe that, because of the enormous quantity of information available on the internet, such information would actually be largely unfindable without hyperlinks. In my view, hyperlinks are at present an essential element of the internet architecture.

29 — See judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 18).

30 — See points 22 to 24 of this Opinion.

31 — See also, by analogy, judgments in *SCF* (C-135/10, EU:C:2012:140, paragraphs 82 and 92) and *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 31), which do not concern Article 3(1) of Directive 2001/29, but ‘communication to the public’ of a broadcast phonogram for the purposes of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 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).

32 — My emphasis.

33 — See in particular paragraph 82 of the judgment in *SCF* (C-135/10, EU:C:2012:140), where the Court, in its analysis of the existence of an act of communication based on its decision in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), made reference to ‘the *indispensable role of the user*’, in that case the indispensable role of an operator of a hotel or public house when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. My emphasis.

34 — See point 36 of this Opinion.

35 — The first criterion required by Article 3(1) of Directive 2001/29 for there to be communication to the public. For the second criterion, see points 65 to 70 of this Opinion.

60. Consequently, I consider that hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an ‘act of communication’ within the meaning of Article 3(1) of Directive 2001/29 since the intervention of the operator of the website which posts the hyperlink, in this case GS Media, is not indispensable to the making available of the photographs in question to users, including those who visit the GeenStijl website.

61. Since one of the cumulative criteria necessary for establishing a ‘communication to the public’ under Article 3(1) of Directive 2001/29 is not met, the question of the copyright holder not authorising the placement of his work on other websites operated by third parties³⁶ is, in my view, immaterial.

62. Consequently, I consider that Question 1(a) and (b) asked by the referring court should be answered in the negative.

63. Furthermore, whilst it is clear from the documents before the Court that GS Media was aware that the photographs in question available on websites such as Filefactory.com and Imageshack.us had been leaked and that it provided hyperlinks on the GeenStijl website to the other websites in flagrant violation of the rights of the author of those works, I take the view that in the absence of an act of communication within the meaning of Article 3(1) of Directive 2001/29, GS Media’s motives and the fact that it was or ought to have been aware that the initial communication of those photographs on the other websites had not been authorised by Sanoma or that the photographs had also not been previously made available to the public with Sanoma’s consent are not relevant under that provision.

64. Accordingly, Question 1(c) asked by the referring court should be answered in the negative.

2. The second criterion

65. Because I consider that one of the cumulative criteria necessary for establishing a ‘communication to the public’ under Article 3(1) of Directive 2001/29 is not met, I will examine the second criterion required by Directive 2001/29, namely the communication of a work to a ‘public’,³⁷ in the alternative.

66. It is not disputed that, since the hyperlinks on the GeenStijl website are aimed at all potential users of that website, an indeterminate and fairly large number of recipients, those hyperlinks are certainly aimed at a public.³⁸ However, I consider that the criterion of ‘a new public’, as required by paragraphs 24 and 31 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), is not applicable and in any event is not satisfied in this instance.

67. It is clear from the judgments in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 197) and *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 24 and 31) in particular that the criterion of a new public is applicable only where the copyright holder has authorised the initial communication to the public. Since there is no such authorisation in the main proceedings, the criterion of a ‘new public’ is not applicable.

36 — In particular the Filefactory.com and Imageshack.us websites. See, to that effect, judgment in *SBS Belgium* (C-325/14, EU:C:2015:764, paragraphs 15 and 24).

37 — See judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 16 and the case-law cited).

38 — In paragraph 21 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), the Court ruled that ‘so far as concerns the second of the abovementioned criteria, that is, that the protected work must in fact be communicated to a “public”, it follows from Article 3(1) of Directive 2001/29 that, by the term “public”, that provision refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons’. It adds in paragraph 22 that ‘an act of communication such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients’ and therefore constitutes a communication to a public. See judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 23).

68. Furthermore, the Court ruled in paragraphs 28 and 30 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) that where ‘there is no new public, the authorisation of the copyright holders is in any event not required for’ the communication to the public in question, in the present case the posting of hyperlinks to other websites on which works protected by copyright are freely accessible to the public.

69. In addition, even if the Court were to rule that this criterion is applicable where the copyright holder has not authorised the initial communication to the public, it is clear from the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 27) that it is satisfied only if the intervention in the form of the publication of hyperlinks by the operator of a website was indispensable to the works being made available to a new public,³⁹ that is to say, a public that was not taken into account by the copyright holder when he authorised the initial communication to the public of the works in question.

70. If the photographs were freely available to the general internet public on other websites,⁴⁰ such intervention by GS Media was not indispensable to the works being made available. There would not therefore be a ‘new public’ and the question of the authorisation of the initial communication by the copyright holder would not arise.

71. At the same time I would add that these conclusions are based on the premiss that the works in question were ‘freely accessible’ to the general internet public on third-party websites,⁴¹ which is not clear from the order for reference. Was the intervention by GS Media indispensable in making the works available to visitors to the GeenStijl website? The documents before the Court are contradictory in that they indicate, on the one hand, that third-party websites put in place access restrictions in relation to the photos in question and, on the other, that the hyperlinks merely facilitated access to a certain degree.⁴²

72. It would seem, subject to verification by the referring court, that it still has to resolve this factual question.

73. In any event, it is clear from the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 31) that if a hyperlink makes it possible for users of the site on which it appears to ‘circumvent restrictions’⁴³ put in place on third-party websites to limit access to protected works,⁴⁴ the hyperlink in question constitutes an indispensable intervention without which those users could not

39 — See also, by analogy, judgment in *SGAE* (C-306/05, EU:C:2006:764, paragraph 42), where the Court ruled that ‘[t]he clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. *In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work*’. My emphasis.

40 — In particular the Filefactory.com and Imageshack.us websites.

41 — It should be noted that in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 25 and 26) the works in question were freely accessible, as access to them on the Göteborgs-Posten website was not subject to any restrictive measures. All Internet users could therefore have free access to them.

42 — The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) held that Sanoma and Others had not proved that the files placed by a user on the Filefactory.com website remain private and concluded that ‘that may be different if the user makes his digital key widely known or if someone else does so’. In this regard, Sanoma and Others lodged an additional appeal with the referring court claiming that ‘the photos had been placed in the “digital safe” [or] at least those photos were thus made accessible to a public who would not ... have been able to find them without that intervention and they would thus have remained inaccessible for that category’. See paragraphs 6.1.2 and 6.1.3 of the order for reference.

43 — See, to that effect, the effective technological measures referred to in Article 6 of Directive 2001/29.

44 — According to the Court, ‘where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public’. See judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 31). See, by analogy, Article 6 of Directive 2001/29 regarding obligations as to technological measures and judgment in *Nintendo and Others* (C-355/12, EU:C:2014:25, paragraph 24).

enjoy the works. Accordingly, that intervention makes the works in question available to visitors to the website in question, in this case visitors to the GeenStijl website, and therefore constitutes an act of communication to a public which must be authorised by the copyright holder pursuant to Article 3(1) of Directive 2001/29.

74. On the other hand, it is clear from paragraph 31 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) that it is not sufficient that the hyperlink facilitates or simplifies users' access to the work in question.⁴⁵ Consequently, I concur with the observations made by GS Media, the Federal Republic of Germany, the Portuguese Republic, the Slovak Republic and the Commission, as mentioned in point 28 of this Opinion, to the effect that Question 2(a) and (b) asked by the referring court should be answered in the negative.

C – Question 3 asked by the referring court and the existence of other circumstances

75. By Question 3, the referring court asks whether there are other circumstances which should be taken into account when answering the question whether there is deemed to be a 'communication to the public' if, by means of a hyperlink, access is provided to a work for which authorisation has never been given by the copyright holder for it to be made available to the public on a website.

76. I note that the Court ruled in paragraph 41 of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76) that Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of 'communication to the public' includes a wider range of activities than those referred to in that provision.

77. Furthermore, aside from the fact that, in principle, the posting of the hyperlinks in the main proceedings does not, in my view, constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, I consider that any other interpretation of that provision would significantly impair the functioning of the Internet and undermine one of the main objectives of Directive 2001/29, namely the development of the information society in Europe.⁴⁶ Such an interpretation could also distort the 'fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter'.⁴⁷

78. It is a matter of common knowledge that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture.⁴⁸ While the circumstances at issue in the main proceedings are particularly obvious,⁴⁹ I consider that, as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder's consent. If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.

45 — There must be 'an intervention *without which* [the] users would not be able to access the works' (judgment in *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 31). My emphasis.

46 — See recital 2 of Directive 2001/29.

47 — See recital 31 of Directive 2001/29.

48 — See point 54 and footnote 28 of this Opinion.

49 — It seems that GS Media acted in full knowledge of the situation and with no regard for Sanoma's interests. See point 11 of this Opinion.

79. In my view, such interference in the functioning of the internet must be avoided. In any event, I consider that extending the concept of ‘communication to the public’ to cover the posting of hyperlinks to protected works freely accessible on another website would require action to be taken by the European legislature.

D – Remedies available to the copyright holder

80. Although I do not believe that the operator of a website such as GS Media has, in principle,⁵⁰ infringed Article 3(1) of Directive 2001/29 by posting the hyperlinks at issue in the main proceedings, this does not mean, however, that the copyright holder has no recourse in order to ensure that his intellectual property rights are protected and enforced.

81. It is obvious that the copyright holder may bring legal proceedings for infringement of his intellectual property rights against the person who effected the initial communication to the public without his authorisation.⁵¹ It is true that, as that person is unknown in this case, such proceedings hold no real interest for the copyright holder.

82. Nevertheless, under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, holders of intellectual property rights are in a position to apply for an injunction against operators of websites such as Filefactory.com and Imageshack.us which act as intermediaries⁵² within the meaning of those provisions, since their services are likely to be used by users of such websites to infringe intellectual property rights.⁵³

83. In this respect the wording of recital 59 of Directive 2001/29, which concerns ‘intermediaries’, is particularly enlightening. According to that recital, ‘the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such *intermediaries are best placed to bring such infringing activities to an end*. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement of a protected work or other subject-matter in a network’.⁵⁴

84. The injunction under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48 therefore relates to the initial communication to the public which infringes copyright and, in my view, is a direct and appropriate remedy for that infringement.

85. In addition, operators of websites such as Filefactory.com and Imageshack.us may, in certain circumstances, be liable under national law for storage on their servers of information provided by users of those websites.

86. Although Article 14 of Directive 2000/31 seeks to restrict or exempt cases where intermediary information society service providers may be liable under national law, the exemptions in question are subject to strict conditions. In this regard, the Court ruled in paragraph 119 of the judgment in *L’Oréal and Others* (C-324/09, EU:C:2011:474) that a provider of hosting services⁵⁵ may, in situations in which that provider has confined itself to a merely technical and automatic processing of data, only be

50 — This conclusion is based on the premiss that the works in question are freely accessible on another website.

51 — See, in particular, the remedies provided for in Articles 9 to 16 of Directive 2004/48.

52 — It would seem, subject to verification by the referring court, that operators of websites such as Filefactory.com and Imageshack.us which store on their servers information provided by the users of those websites constitute hosting service providers for the purposes of Article 14 of Directive 2000/31 and ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48. See, to that effect, judgment in *SABAM* (C-360/10, EU:C:2012:85, paragraphs 27 and 28).

53 — See, to that effect, judgment in *SABAM* (C-360/10, EU:C:2012:85, paragraph 28 and the case-law cited).

54 — My emphasis.

55 — Within the meaning of Article 14 of Directive 2000/31.

exempt, under Article 14(1) of Directive 2000/31, from any liability for unlawful data that it has stored ‘on condition that it has not had “actual knowledge of illegal activity or information” and, as regards claims for damages, has not been “aware of facts or circumstances from which the illegal activity or information is apparent” or that, having obtained such knowledge or awareness, it has acted expeditiously to remove, or disable access to, the information’.

87. It should be noted that the operators of the Filefactory.com and Imageshack.us websites complied with Sanoma’s request to remove the photographs in question from their websites.⁵⁶ Consequently, the hyperlinks to those other websites on the GeenStijl website were rendered ineffective.

VII – Conclusion

88. In the light of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden as follows:

- (1) 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 must be interpreted as meaning that the posting on a website of a hyperlink to another website on which works protected by copyright are freely accessible to the public without the authorisation of the copyright holder does not constitute an act of communication to the public, as referred to in that provision.
- (2) Article 3(1) of Directive 2001/29 must be interpreted as meaning that it is not important whether the person who posts on a website a hyperlink to another website on which works protected by copyright are freely accessible to the public is or ought to be aware that the copyright holder has not authorised the placement of the works in question on that other website or that, in addition, those works had not previously been made available to the public with the copyright holder’s consent.
- (3) Article 3(1) of Directive 2001/29 must be interpreted as meaning that a hyperlink to another website on which works protected by copyright are freely accessible to the public, which facilitates or simplifies users’ access to the works in question, does not constitute a ‘communication to the public’ within the meaning of that provision.

⁵⁶ — See points 11 and 12 of this Opinion.