



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

28 October 2020*

(Reference for a preliminary ruling – Copyright and related rights – Directive 2001/29/EC – Information society – Harmonisation of certain aspects of copyright and related rights – Article 3(1) – Communication to the public – Notion of ‘public’ – Transmission by electronic means to a court of a protected work as evidence in court proceedings)

In Case C-637/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Svea hovrätt – Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Market Court of Appeal, Stockholm, Sweden), made by decision of 20 August 2019, received at the Court on 27 August 2019, in the proceedings

BY

v

CX,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Swedish Government, by C. Meyer-Seitz and H. Eklinder, acting as Agents,
- the European Commission, by K. Simonsson and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2020,

gives the following

* Language of the case: Swedish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) and Article 4(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 (OJ 2001 L 167, p. 10).
- 2 The request has been made in proceedings between the appellant in the main proceedings, who claims to be the holder of copyright in a photograph, and the respondent in the main proceedings, a user of that photograph, concerning the transmission by that respondent, as evidence in proceedings between the respondent and the appellant before a civil court, of a copy of a page of the appellant's website containing that photograph.

Legal context

EU law

- 3 Recitals 3, 9, 10 and 31 of Directive 2001/29 state:
 - (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.

...
 - (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.

...
 - (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. ... In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

- 4 Article 3 of the directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject matter’, provides, in paragraph 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.’

- 5 Article 4 of that directive, entitled ‘Distribution right’, provides in paragraph 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.’

- 6 Article 9 of that directive, entitled ‘Continued application of other legal provisions’, states:

‘This directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.’

Swedish law

- 7 Paragraph 2 of the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (upphovsrättslagen) (Law 1960:729 on copyright in literary and artistic works; ‘the URL’) provides:

‘Subject to the limitations laid down in this law, copyright include the exclusive right to dispose of the work by reproducing it and by making it available to the public, whether in its original form or in modified form, in translation, in adaptation into another literary or artistic form or using another technique.

Any direct or indirect, temporary or permanent reproduction of a work, by any means and in any form, in whole or in part, shall be considered to be reproduction.

The work is made available to the public in the following cases:

1. When the work is subject to a communication to the public. Communication to the public occurs when the work is made available to the public, by wire or wireless means, from a place other than that where the public can enjoy that work. It includes any communication carried out in such a way that members of the public may access the work from a place and at a time individually chosen by them.

...

4. When a reproduction of the work is offered for sale, rental or on loan or otherwise distributed to the public.

Any communication or performance of a work aimed at a large closed circle, in a professional context, shall be treated as a communication to the public or public performance.’

8 Paragraph 49a of the URL provides:

‘The author of a photographic image shall enjoy the exclusive right of reproduction of that image and to make it available to the public. That right applies irrespective of whether the image is used in its original form or in modified form and regardless of the technique used.’

9 Pursuant to the tryckfrihetsförordningen (Ordinance on the freedom of the press; ‘the TFF’), the promotion of freedom of expression and pluralistic information entails the right for everyone to access public documents. The TFF provides, in that regard, that any procedural document transmitted to a court, in any form, constitutes a public document. It follows that, subject to there being no confidential information in the document, anyone may request access to a procedural document sent to a court.

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

10 The appellant and the respondent in the main proceedings are both natural persons, each of whom operates a website.

11 In litigation before the Swedish civil courts, the respondent sent to the court seised, as evidence, a copy of a page of text containing a photograph, which page was taken from the appellant’s website.

12 The appellant in the main proceedings, who claims to hold the copyright to that photograph, has asked that the respondent in the main proceedings be ordered to pay damages for infringement of copyright and for infringement of the special protection conferred on photographs respectively by Paragraphs 2 and 49a of the URL. The respondent denies any obligation to make reparation.

13 The court hearing the case at first instance held that that photograph was protected under Paragraph 49a of the URL. That court held that, since that photograph had been transmitted to a court in the context of a procedural step, any person could request its disclosure, pursuant to the applicable legal provisions. That court concluded that the respondent in the main proceedings had distributed that photograph to the public, within the meaning of the URL. However, it took the view that it was not established that the appellant in the main proceedings had suffered harm and, accordingly, dismissed his claim.

14 The appellant appealed to the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm, Sweden), the referring court.

15 That court states that it must rule in particular on whether the transmission of a copy of that photograph to a court in the context of a procedural step may constitute an unauthorised act of making a work available, for copyright purposes, as a distribution to the public or a communication to the public, the parties having stated, at the stage of the dispute before it, that the photograph in question had been sent by email to the court seised, in the form of an electronic copy. The national court is also asking whether a court may be regarded as falling within the concept of ‘public’.

16 In that regard, it observes that there is uncertainty as to the interpretation in EU law of the concepts of ‘communication to the public’ and ‘distribution to the public’, in the case of the transmission of a protected work to a court in the context of a procedural step, in particular as to whether a court may be regarded as falling within the concept of ‘public’, within the meaning of Directive 2001/29, and whether the term ‘public’ has the same meaning for the purposes of the application of Article 3(1) and Article 4(1) of that directive.

- 17 In addition, it is necessary to determine whether, when a document is transmitted to a court, whether in the form of a ‘physical’ document or an attachment to an email, which transmission has the same effect and serves the same purpose in both cases, that transmission constitutes a ‘communication to the public’ or a ‘distribution to the public’.
- 18 In those circumstances, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Does the term “public” in Articles 3(1) and 4(1) of Directive [2001/29] have a uniform meaning?
- (2) If question 1 is answered in the affirmative, is a court to be regarded as falling within the scope of the term “public”, within the meaning of those provisions?
- (3) If question 1 is answered in the negative:
- (a) in the event of communication of a protected work to a court, can that court fall within the scope of the term “public”?
- (b) in the event of distribution of a protected work to a court, can that court fall within the scope of the term “public”?
- (4) Does the fact that national legislation lays down a general principle of access to public documents in accordance with which any person who makes a request can access procedural documents transmitted to a court, except where they contain confidential information, affect the assessment of whether transmission to a court of a protected work amounts to a “communication to the public” or a “distribution to the public”?’

Consideration of the questions referred

- 19 As a preliminary point, it must be noted that it is apparent from the request for a preliminary ruling that the photograph at issue in the main proceedings was sent by electronic mail to the court seised, in the form of an electronic copy.
- 20 It follows from the case-law that the communication to the public of a work, other than the distribution of physical copies of that work, does not fall within the concept of ‘distribution to the public’ referred to in Article 4(1) of Directive 2001/29, but within that of ‘communication to the public’ within the meaning of Article 3(1) of that directive (see, to that effect, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraphs 45, 51 and 52).
- 21 In those circumstances, the view must be taken that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the concept of ‘communication to the public’, referred to in that provision, covers the transmission by electronic means to a court, as evidence in judicial proceedings between individuals, of a protected work.
- 22 In that regard, in accordance with the settled case-law of the Court concerning Article 3(1) of Directive 2001/29, the concept of ‘communication to the public’ includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 37, and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 61 and the case-law cited).

- 23 As is also clear from that case-law, first, any act by which a user gives access to protected works, with full knowledge of the consequences of that action, is liable to constitute an act of communication for the purposes of Article 3(1) of Directive 2001/29 (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 26).
- 24 That is the case where a protected work is transmitted by electronic means to a court as evidence in judicial proceedings between individuals.
- 25 Second, in order to be categorised as a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a public (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 40 and the case-law cited).
- 26 In that regard, the concept of ‘public’ refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 84; of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 41, and of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraph 45).
- 27 With regard to the indeterminate number of potential recipients, the Court has observed that it means making a work perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group (judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 85, and of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 42).
- 28 In the present case, as noted, in essence, by the Advocate General in points 42 to 44 of his Opinion, a communication such as that at issue in the main proceedings must be regarded as referring to a clearly defined and closed group of persons holding public service functions within a court, and not to an indeterminate number of potential recipients.
- 29 Thus, that communication is made not to persons in general, but to specific individual professionals. In those circumstances, it must be held that the transmission by electronic means of a protected work to a court, as evidence in legal proceedings between individuals, cannot be regarded as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 (see, by analogy, judgment of 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraphs 23 and 24).
- 30 The existence in national law of rules on access to public documents is irrelevant in that regard. Such access is granted not by the user who has transmitted the work to the court, but by the latter to the individuals who so request, under an obligation and a procedure laid down by national law relating to access to public documents, the provisions of which are not affected by Directive 2001/29, as expressly provided for in Article 9 thereof.
- 31 It must be borne in mind, as follows from recitals 3 and 31 of Directive 2001/29, that the interpretation set out in paragraph 29 of this judgment enables, in particular in the electronic environment, the maintenance of a fair balance between the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 32 and the case-law cited).
- 32 In particular, the Court has already had occasion to point out that it is in no way apparent from Article 17(2) of the Charter or from the Court’s case-law that the right to intellectual property enshrined in that provision is inviolable and that protection of that right must therefore be guaranteed

absolutely, since that right must be weighed against the other fundamental rights (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraphs 33 and 34 and the case-law cited), which include the right to an effective remedy guaranteed in Article 47 of the Charter.

- 33 Such a right would be seriously compromised if a rightholder were able to oppose the disclosure of evidence to a court on the sole ground that that evidence contains subject matter protected by copyright.
- 34 In the light of all the foregoing considerations, the answer to the questions referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the concept of ‘communication to the public’, referred to in that provision, does not cover the transmission by electronic means of a protected work to a court, as evidence in judicial proceedings between individuals.

Costs

- 35 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 (Fifth Chamber) hereby rules:

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 concept of ‘communication to the public’, referred to in that provision, does not cover the transmission by electronic means of a protected work to a court, as evidence in judicial proceedings between individuals.

[Signatures]