Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 August 2018*

(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 — Concept — Publication online, without the consent of the rightholder, of a photograph previously published on another website without any restrictions and with the consent of the rightholder — New public)

In Case C-161/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 23 February 2017, received at the Court on 31 March 2017, in the proceedings

Land Nordrhein-Westfalen

v

Dirk Renckhoff,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Şereş, Administrator,

after considering the observations submitted on behalf of:

– the Land Nordrhein-Westfalen, by M. Rümenapp, Rechtsanwalt,

– Mr Renckhoff, by S. Rengshausen, Rechtsanwalt,

– the French Government, by D. Segoin, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. De Luca, avvocato dello Stato,

– the European Commission, by J. Samnadda and T. Scharf, acting as Agents,

having regard to the written procedure and further to the hearing on 7 February 2018,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 25 April 2018,

gives the following

Judgment

1 This request for a preliminary ruling 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 (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between the Land Nordrhein-Westfalen (Land of North Rhine-Westphalia, Germany) and Mr Dirk Renckhoff, a photographer, concerning the unauthorised use by a pupil of a school for which that *Land* is responsible of a photograph taken by Mr Renckhoff, which is freely accessible on one website, to illustrate a school presentation posted by that school on another website.

Legal context

3 Recitals 3, 4, 9, 10, 23 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.

(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. This will safeguard employment and encourage new job creation.

…

(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.

…

(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. This right should not cover any other acts.

…

(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. …'

4 Article 3 of Directive 2001/29, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides in paragraph 1:

'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 Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', states in subparagraph 3(a):

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

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.'

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

6 Mr Renckhoff, the applicant who brought the proceedings before the Landgericht Hamburg (Hamburg Regional Court, Germany), is a photographer. Stadt Waltrop (City of Waltrop, Germany) which was originally the defendant at first instance, but which is no longer a party to the dispute in the main proceedings, has responsibility for the Gesamtschule Waltrop (Waltrop secondary school, 'the school'). The Land of Nord Rhine-Westphalia, also a defendant at first instance, has responsibility for the educational supervision of the school and is the employer of the teaching staff working there.

7 From 25 March 2009, it was possible to access on the school website a presentation written by one of the school's pupils as part of a language workshop it organised which included, by way of illustration, a photograph taken by Mr Renckhoff ('the photographer') that that pupil had downloaded from an online travel portal ('the online travel portal'). The photograph was posted on the online travel portal without any restrictive measures preventing it from being downloaded. Below the photograph the pupil included a reference to that online portal.

8 Mr Renckhoff claims that he gave a right of use exclusively to the operators of the online travel portal and that the posting of the photograph on the school website infringes his copyright. He requested the court with jurisdiction at first instance to prohibit the Land of North Rhine-Westphalia, on pain of a

financial penalty, from reproducing/having reproduced and/or making available/having made available to the public the photo and, in the alternative, from allowing school students to reproduce the photo for purposes of posting it on the internet. He also claimed payment of damages from the Land of North Rhine-Westphalia of EUR 400.

9 Since Mr Renckhoff's action was upheld in part, the Land of North Rhine- Westphalia was ordered to remove the photograph from the school website and to pay EUR 300 plus interest.

10 Both parties appealed against that judgment before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), which held, inter alia, that the photograph was protected by copyright and that posting it on the school website was an infringement of the reproduction right and the right to make available to the public held by Mr Renckhoff. That court found that the fact that the photograph was already accessible to the public without restriction on the internet before the acts at issue was irrelevant, since the reproduction of the photograph on the server and the making available to the public on the school website which followed led to a 'disconnection' with the initial publication on the online travel portal.

11 Hearing an appeal on point of law, the referring court considers that the outcome of that appeal depends on the interpretation of Article 3(1) of Directive 2001/29. In particular, that court has doubts as to whether the requirement, laid down in the case-law, according to which the communication to the public concerned must have been made to a 'new' public has been satisfied.

12 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does the inclusion of a work — which is freely accessible to all internet users on a third-party website with the consent of the copyright holder — on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Article 3(1) of [Directive 2001/29] if the work is first copied onto a server and is uploaded from there to that person's own website?'

Consideration of the question referred

13 By its question, the referring court asks essentially whether the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as meaning that it covers the posting on one website of a photograph which has been previously published without restriction and with the consent of the copyright holder on another website.

14 As a preliminary point, it must be recalled that a photograph may be protected by copyright, provided, which it is for the national court to determine in each case, that it is the intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph (see, to that effect, judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 94).

15 As regards the question whether the posting on a website of a photograph previously published without any restrictions and with the consent of the copyright holder on another website constitutes a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, it must be recalled that that provision states that Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

16 It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work (judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 34 and the case-law cited).

17 As Article 3(1) of Directive 2001/29 does not define the concept of 'communication to the public', the meaning and scope of that concept must be determined in light of the objectives pursued by that directive and the context in which the provision being interpreted is set (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 21 and the case-law cited).

18 In that regard, it should be borne in mind that it follows from recitals 4, 9 and 10 of Directive 2001/29 that the latter's principal objective is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' must be interpreted broadly, as recital 23 of the directive expressly states (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 22 and the case-law cited).

19 As the Court has consistently held, it is clear from Article 3(1) of Directive 2001/29 that 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 16 March 2017, *AKM*, C-138/16, EU:C:2017:218, paragraph 22, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 24 and the case-law cited).

20 As regards the first of those elements, that is the existence of an 'act of communication', as is clear from Article 3(1) of Directive 2001/29, for there to be such an act 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 or not they avail themselves of that opportunity (judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 19, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 31 and the case-law cited).

21 In the present case, the posting on one website of a photograph previously posted on another website, after it has been previously copied onto a private server, must be treated as 'making available' and therefore, an 'act of communication' within the meaning of Article 3(1) of Directive 2001/29. Such a posting gives visitors to the website on which it is posted the opportunity to access the photograph on that website.

22 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 the case-law of the Court that the concept of 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 21, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 27 and the case-law cited).

23 In the present case, it appears that an act of communication, such as that referred to in paragraph 21 of the present judgment, covers all potential users of the website on which the photograph is posted, that is an indeterminate and fairly large number recipients and must, in those circumstances, be regarded as a communication to a 'public' within the meaning of the case-law cited.

24 However, as is clear from settled case-law, in order to be treated as a 'communication to the public', the protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work (judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 24; of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 37; and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 28).

25 In the present case, it is common ground that both the initial communication of the work on one website and its subsequent communication on another website were made with the same technical means.

26 The parties to the main proceedings and the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union who have submitted written observations disagree, however, as to the question of whether the photograph has been communicated to a 'new public'.

27 The Land of North Rhine-Westphalia and the Italian Government assert, in particular, on the basis of the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76), that there is no need to draw a distinction between the communication of a work by posting it on a website and the communication of such a work by including a hyperlink on a website which leads to another website on which that work was originally communicated without any restriction and with the consent of the copyright holder. Thus, in circumstances such as those at issue in the main proceedings, the work has not been communicated to a new public.

28 However, Mr Renckhoff and the French Government, at the hearing, and the Commission in its written observations, have argued essentially that the case-law referred to in the preceding paragraph of the present judgment is not applicable in circumstances such those at issue in the main proceedings. In particular, the communication of a work by means not of a hyperlink, but by a new posting on a different website from that on which it was initially communicated with the consent of the copyright holder, should be treated as a 'new communication to the public', in particular, having regard to the fact that, as a result of the making available of the photograph once again, the copyright holder is no longer in a position to exercise his power of control over the initial communication of that work.

29 In that connection, first, the Court has consistently held that, subject to the exceptions and limitations laid down in Article 5 of Directive 2001/29, all acts of reproduction or communication to the public of a work by a third party requires the prior consent of its author and that, under Article 3(1) of Directive 2001/29, authors have a right which is preventive in nature which allows them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (see, to that effect, judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 30; of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 33; and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 20 and the case-law cited).

30 Such a right of a preventive nature would be deprived of its effectiveness if it were to be held that the posting on one website of a work previously posted on another website with the consent of the copyright holder did not constitute a communication to a new public. Such a posting on a website other than that on which it was initially posted might make it impossible or at least much more difficult for the holder of a right of a preventive nature to require the cessation of that communication, if necessary by removing the work from the website on which it was posted with his consent or by revoking the consent previously given to a third party.

31 Thus, it is clear that, even if the holder of the copyright holder decides no longer to communicate his work on the website on which it was initially communicated with his consent, that work would remain available on the website on which it had been newly posted. The Court has already held that the author of a work must be able to put an end to the exercise, by a third party, of rights of exploitation in digital format that he holds on that work, and to prohibit him from any future use in such a format, without having to submit beforehand to other formalities (see, by analogy, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 51).

32 Second, Article 3(3) of Directive 2001/29 specifically provides that the right of communication to the public referred to in Article 3(1) of that directive is not exhausted by any act of communication to the public or making available to the public within the meaning of that provision.

33 To hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication.

34 In addition to the fact that it would be contrary to the wording of Article 3(3) of Directive 2001/29, that rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work, set out in recital 10 of that directive, even though, as the Court stated, the specific purpose of the intellectual property is, in particular, to ensure for the rightholders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an appropriate reward for each use of the protected subject matter (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 107 and 108).

35 Taking account of those elements, it must be held, in the light of the case-law set out in paragraph 24 of the present judgment, that the posting of a work protected by copyright on one website other than that on which the initial communication was made with the consent of the copyright holder, in circumstances such as those at issue in the main proceedings, must be treated as making such a work available to a new public. In such circumstances, the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users.

36 It is irrelevant to the objective considerations set out in paragraphs 29 to 35 of the present judgment that, as in the case in the main proceedings, the copyright holder did not limit the ways in which internet users could use the photograph. The Court has already held that the enjoyment and the exercise of the right provided for in Article 3(1) of Directive 2001/29 may not be subject to any formality (see, to that effect, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 50).

37 Furthermore, it is true the Court held, in particular in its judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 25 and 26), and in its order of 21 October 2014, *BestWater International* (C-348/13, not published, EU:C:2014:2315, paragraph 16), regarding the making available of protected works by means of a clickable link referring to another website on which the original publication was made, that the public targeted by the original communication was all potential visitors to the website concerned, since, knowing that access to those works on that site was not subject to any restrictive measure, all internet users could access it freely. Therefore, it held that the publication of the works concerned by means of a clickable link, such as that at issue in the cases which gave rise to those judgments, did not result in a communication of those works to a new public.

38 However, that case-law cannot be applied in circumstances such as those at issue in the main proceedings.

39 First, that case-law was handed down in the specific context of hyperlinks which, on the internet, refer to protected works previously published with the consent of the copyright holder.

40 However, unlike hyperlinks which, according to the case-law of the Court, contribute in particular to the sound operation of the internet by enabling the dissemination of information in that network characterised by the availability of immense amounts of information (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 45), the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective.

41 Therefore, to allow such a posting without the copyright holder being able to rely on the rights laid down in Article 3(1) of Directive 2001/29 would fail to have regard to the fair balance, referred to in recitals 3 and 31 of that directive, which must be maintained in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest.

42 In that context, the Land of North Rhine-Westphalia argues that, in circumstances such as those at issue in the main proceedings, in weighing the interests at issue, account must be taken of the right to education, laid down in Article 14 of the Charter of Fundamental Rights. In particular, the action of the pupil concerned is covered by the exercise of that right, since the photograph was placed on the first page of the presentation written by her, for illustration purposes, as part of a language workshop. However, in that connection, it suffices to state that the findings set out in paragraph 35 of the present judgment, relating to the concept of 'new public', are not based on whether the illustration used by the pupil for her school presentation is educational in nature, but on the fact that the posting of that work on the school website made it accessible to all the visitors to that website.

43 Moreover, it must be recalled that, as regards the pursuit of a balance between the right to education and the protection of the right to intellectual property, in Article 5(3)(a) of Directive 2001/29, the EU legislature provided an option for Member States to provide for exceptions or limits to the rights laid down in Articles 2 and 3 of that directive so long as it is for the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved.

44 Second, as stated in paragraph 29 of the present judgment, the rights guaranteed for authors by Article 3(1) of Directive 2001/29 are preventive in nature. As regards the act of communication constituted by the posting on a website of a hyperlink which leads to a work previously communicated with the authorisation of the copyright holder, the preventive nature of the rights of the holder are preserved, since it is open to the author, if he no longer wishes to communicate his work on the website concerned, to remove it from the website on which it was initially communicated, rendering obsolete any hyperlink leading to it. However, in circumstances such as those at issue in the main proceedings, the posting on another website of a work gives rise to a new communication, independent of the communication initially authorised. As a consequence of that posting, such a work may remain available on the latter website, irrespective of the prior consent of the author and despite an action by which the rightholder decides no longer to communicate his work on the website on which it was initially communicated with his consent.

45 Lastly, third, in its judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 27 and 28), the Court, in order to conclude that the communication at issue in the case which gave rise to that judgment was not to a new public, emphasised the lack of any involvement by the administrator of the site on which the clickable link had been inserted, which allowed access to the works concerned on the site on which it had been initially communicated, with the consent of the copyright holder.

46 In the present case, it is clear from the order for reference that the user of the work at issue in the main proceedings reproduced that work on a private server and then posted it on a website other than that on which the work was initially communicated. In so doing, that user played a decisive role in the communication of that work to a public which was not taken into account by its author when he consented to the initial communication.

47 Having regard to all of the foregoing considerations, the answer to the question referred is that the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

Costs

48 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 (Second Chamber) hereby rules:

The concept of 'communication to the public', within the meaning 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, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

[Signatures]