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EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Second Chamber)

8 September 2016 *

related rights — Directive 2001/29/EC — Information society — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Communication to the public — Definition — Internet — Hyperlinks giving access to protected works, made accessible on another website without the rightholder's consent — Works not yet published by the rightholder — Posting of such links for a profit)

In Case C-160/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 3 April 2015, received at the Court on 7 April 2015, in the proceedings

GS Media BV

v

Sanoma Media Netherlands BV,

Playboy Enterprises International Inc.,

Britt Geertruida Dekker,

THE COURT (Second Chamber),

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

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 February 2016,

* Language of the case: Dutch.

ECR

EN

after considering the observations submitted on behalf of:

- GS Media BV, by R. Chavannes and D. Verhulst, advocaten,
- Sanoma Media Netherlands BV, Playboy Enterprises International Inc. and Ms Dekker, by C. Alberdingk Thijm and C. de Vries, advocaten,
- the German Government, by T. Henze and D. Kuon, acting as Agents,
- the French Government, by D. Segoin, D. Colas and G. de Bergues, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes and T. Rendas, acting as Agents,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by F. Wilman and T. Scharf and by J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2016,

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 GS Media BV and Sanoma Media Netherlands BV (‘Sanoma’), Playboy Enterprises International Inc. and Ms Britt Geertruida Dekker (together, ‘Sanoma and Others’), concerning, inter alia, the posting on the GeenStijl.nl website (‘the GeenStijl website’), operated by GS Media, of hyperlinks to other websites enabling photographs of Ms Dekker, taken for Playboy magazine (‘the photos at issue’), to be viewed.

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. ...

...

- (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. ...
- (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. ... 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. ...

...

- (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 According to Article 5(3) and (5) of that directive:

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

...

c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

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

6 At the request of Sanoma, which is the publisher of *Playboy* magazine, on 13 and 14 October 2011 the photographer, Mr C. Hermès, took the photos at issue, which were to be published in the December 2011 edition of that magazine. In that context, Mr Hermès granted Sanoma authorisation, on an exclusive basis, to publish those photos. He also granted Sanoma authorisation to exercise the rights and powers arising from his copyright.

7 GS Media operates the website *GeenStijl*, which includes, according to information provided by that website, ‘news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense’ and which

is viewed daily by more than 230 000 visitors, making it one of the 10 most visited websites in the area of news in the Netherlands.

- 8 On 26 October 2011, the editors of the GeenStijl website received a message from a person using a pseudonym, which included a hyperlink to an electronic file hosted on the website Filefactory.com ('the Filefactory website'), located in Australia and dedicated to data storage. That electronic file contained the photos at issue.
- 9 On the same day, Sanoma asked GS Media's parent company to prevent the photos at issue being published on the GeenStijl website.
- 10 On 27 October 2011, an article relating to those photos of Ms Dekker, entitled '...! Nude photos of ... [Ms] Dekker', was published on the GeenStijl website, which included part of one of the photos at issue, and which ended with the following words: 'And now the link with the pics you've been waiting for.' By clicking on a hyperlink accompanying that text, users were directed to the Filefactory website, on which another hyperlink allowed them to download 11 electronic files each containing one of those photos.
- 11 On the same day, Sanoma sent GS Media's parent company an email demanding that it confirm that the hyperlink to the photos at issue had been removed from the GeenStijl website. GS Media failed to respond to that demand.
- 12 However, at Sanoma's request, the photos at issue appearing on the Filefactory website were removed.
- 13 By letter of 7 November 2011, counsel for Sanoma and Others demanded that GS Media remove from the GeenStijl website the article of 27 October 2011, including the hyperlink, the photographs it contained and the reactions of users published on the same page of that website.
- 14 On the same day, an article about the dispute between GS Media and Sanoma and Others about the photos at issue was published on the GeenStijl website. That article ended with the following sentence: 'Update: Not yet seen the nude pics of [Ms. Dekker]? They are HERE.' That announcement was, once again, accompanied by a hyperlink to access the website Imageshack.us where one or more of the relevant photographs could be viewed. The operator of that website, however, also subsequently complied with Sanoma's request to remove them.
- 15 A third article, entitled 'Bye Bye Wave Wave Playboy', again contained a hyperlink to the photos at issue, appeared on 17 November 2011 on the GeenStijl website. Forum users of that website then posted new links to other websites where the photos at issue could be viewed.
- 16 In December 2011, the photos at issue were published in *Playboy* magazine.

- 17 Sanoma and Others brought an action before the rechtbank Amsterdam (Amsterdam District Court, Netherlands), claiming, in particular, that by posting hyperlinks and a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright and acted unlawfully towards Sanoma and Others. The rechtbank Amsterdam (Amsterdam District Court) largely upheld that action.
- 18 The Gerechtshof Amsterdam (Amsterdam Court of Appeal, the Netherlands) set aside that decision, finding that, by posting the hyperlinks on the GeenStijl website, GS Media had not infringed Mr Hermès' copyright, since the photos at issue had already been made public before they were posted on the Filefactory website. In contrast, it found that, by posting those links, GS Media acted unlawfully toward Sanoma and Others, as visitors to that website accordingly were encouraged to view the photos at issue which were illegally posted on the Filefactory website. Without those hyperlinks, those photos would not have been easy to find. In addition, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) held that, by posting a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright.
- 19 GS Media brought an appeal against that judgment before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- 20 Sanoma and Others brought a cross-appeal, in which they refer in particular to the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76), claiming that the fact of making a hyperlink available to internet users to a website on which a work has been posted without the consent of the latter's copyright holder constitutes a communication to the public. Sanoma and Others submit, moreover, that access to the photos at issue on the Filefactory website was protected by restrictions within the meaning of that judgment which internet users could circumvent through the intervention of GS Media and its GeenStijl website, so that those photos have been made available to a wider public than the public which would normally have accessed those photos on the Filefactory website.
- 21 In the context of examining that cross-appeal, the referring court considers that it cannot be inferred with sufficient certainty either from the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, *BestWater*, (C-348/13, not published, EU:C:2014:2315) whether there is a 'communication to the public' if the work has in fact previously been published, but without the consent of the copyright holder.
- 22 On the one hand, it follows from that case-law of the Court that it must be established whether the intervention at issue enables a public to be reached which cannot be considered to have been included in the public for which the rightholder had previously given his consent, which is consistent with his exclusive right to exploit the work. On the other hand, if a work is already available on the internet for the general public, posting a hyperlink to the website on which the work is

already posted will result in virtually no new public being reached. Furthermore, the fact that there are many works on the internet that have been communicated to the public without the rightholder's consent must also be taken into account. For the operator of a website it will not always be easy to check, if he intends to post a hyperlink to a website on which a work appears, that the rightholder has consented to the earlier posting of that work.

23 The referring court further observes, moreover, that the cross-appeal also raises the question of the conditions that must be met if they are to constitute 'restrictions' within the meaning of the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76). That court points out, in that regard, that the photos at issue were not impossible to find on the internet before GS Media posted the hyperlink on the GeenStijl website, without however being easy to find, so the fact of posting that link on its site greatly facilitated access to those photos.

24 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 was also not previously 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 Question 1 is answered in the negative: 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?’

Consideration of the questions referred

- 25 By its three questions, which should be examined together, the referring court asks, in essence, whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.
- 26 In that context, it raises the question of the relevance of the fact that the works in question have not yet been published in another way with the consent of that rightholder, that providing those hyperlinks makes it much easier to find those works, given that the website on which they are available is not easily findable by the general internet public, and that whoever posts those links knew or ought to have been aware of those facts and the fact that that rightholder did not consent to the publication of the works in question on that latter website.
- 27 It follows from Article 3(1) of Directive 2001/29 that Member States are to 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.
- 28 Under that provision, authors thus have a right which is preventive in nature and 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 use (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 75, and 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 30).
- 29 As Article 3(1) of Directive 2001/29 does not define the concept of ‘communication to the public’, its meaning and its scope must be determined in light of the objectives pursued by that directive and of the context in which the provision being interpreted is set (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraphs 33 and 34, and 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 184 and 185).
- 30 In that regard, it should be borne in mind that it follows from recitals 9 and 10 of Directive 2001/29 that the latter’s objective is to establish a high level of

protection of 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 ‘communication to the public’ must be interpreted broadly, as recital 23 of the directive indeed expressly states (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 186, and 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 20).

- 31 At the same time, it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest.
- 32 As the Court has previously held, 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 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 16; 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraph 15; and 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 37).
- 33 The Court has, moreover, specified that the concept of ‘communication to the public’ requires an individual assessment (see judgment of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 29 and the case-law cited, relating to the concept of ‘communication to the public’, 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), it having the same scope in that directive as in Directive 2001/29 (see, to that effect, judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 33)).
- 34 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 79; 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 30; and 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 35).

- 35 Of those criteria, the Court emphasised, in the first place, the indispensable role played by the user and the deliberate nature of its intervention. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 82 and the case-law cited, and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 31).
- 36 In the second place, it specified that the concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 84 and the case-law cited, and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 33).
- 37 Moreover, it is settled case-law of the Court that, to be categorised as a ‘communication to the public’, a 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 (judgment of 13 February 2014, *Svensson and Others*, C-466/12, ECLI:EU:C:2014:76, paragraph 24, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraph 14 and the case-law cited).
- 38 In the third place, the Court has held that it is relevant that a ‘communication’, within the meaning of Article 3(1) of Directive 2001/29, is of a profit-making nature (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 204; 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 88; and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 36).
- 39 It is in the light, in particular, of those criteria that it is to be assessed whether, in a situation such as that at issue in the main proceedings, the fact of posting, on a website, a hyperlink to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.
- 40 In that regard, it should be recalled that, in the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76), the Court interpreted Article 3(1) of Directive 2001/29 as meaning that posting hyperlinks on a website to works freely available on another website does not constitute a ‘communication to the public’ as covered by that provision. That interpretation was also adopted in

the order of 21 October 2014, *BestWater International*, (C-348/13, not published, EU:C:2014:2315) about such links using the technique known as ‘transclusion’ (‘framing’).

- 41 However, it follows from the reasoning of those decisions that, by them, the Court intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder, the Court having concluded that there was no communication to the public on the ground that the act of communication in question was not made to a new public.
- 42 In that context, it noted that, given that the hyperlink and the website to which it refers give access to the protected work using the same technical means, namely the internet, such a link must be directed to a new public. Where that is not the case, in particular, due to the fact that the work is already freely available to all internet users on another website with the authorisation of the copyright holders, that act cannot be categorised as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Indeed, as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, EU:C:2014:76, paragraphs 24 to 28, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraphs 15, 16 and 18).
- 43 Accordingly, it cannot be inferred either from the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, *BestWater International*, (C-348/13, not published, EU:C:2014:2315) that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder.
- 44 GS Media, the German, Portuguese and Slovak Governments and the European Commission claim, however, that the fact of automatically categorising all posting of such links to works published on other websites as ‘communication to the public’, since the copyright holders of those works have not consented to that publication on the internet, would have highly restrictive consequences for freedom of expression and of information and would not be consistent with the right balance which Directive 2001/29 seeks to establish between that freedom and the public interest on the one hand, and the interests of copyright holders in an effective protection of their intellectual property, on the other.

- 45 In that regard, it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.
- 46 Furthermore, it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it.
- 47 For the purposes of the individualised assessment of the existence of a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder.
- 48 Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 18 to 23) does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet. In addition, where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention.
- 49 In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.
- 50 The same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast (see, by analogy, judgment of

13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 27 and 31).

- 51 Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.
- 52 However, if there is no new public, there will be no communication to the ‘public’ within the meaning of that provision in the event that, referred to in paragraphs 40 to 42 of the present judgment, the works to which those hyperlinks allow access have been made freely available on another website with the consent of the rightholder.
- 53 Such an interpretation of Article 3(1) of Directive 2001/29 provides the high level of protection for authors sought by that directive. Indeed, under that directive and within the limits set by Article 5(3) thereof, copyright holders may act not only against the initial publication of their work on a website, but also against any person posting for profit a hyperlink to the work illegally published on that website and, under the conditions set out in paragraphs 49 and 50 of the present judgment, against persons having posted such links without pursuing financial gain. In that regard, it should in particular be noted that those rightholders, in all cases, have the possibility of informing such persons of the illegal nature of the publication of their work on the internet and of taking action against them if they refuse to remove that link, and those persons may not rely upon one of the exceptions listed in Article 5(3).
- 54 As regards the case in the main proceedings, it is undisputed that GS Media operates the GeenStijl website and that it provided the hyperlinks to the files containing the photos at issue, hosted on the Filefactory website, for profit. It is also undisputed that Sanoma had not authorised the publication of those photos on the internet. Moreover, it appears to follow from the presentation of the facts, as they result from the order for reference, that GS Media was aware of that latter fact and that it cannot therefore rebut the presumption that the posting of those links occurred in full knowledge of the illegal nature of that publication. In those circumstances, it appears that, subject to the checks to be made by the referring court, by posting those links, GS Media effected a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, and it is unnecessary to assess in that context the other circumstances referred to by that court, referred to in paragraph 26 of the present judgment.

- 55 Having regard to the foregoing considerations, the answer to the questions raised is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

Costs

- 56 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:

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, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

[Signatures]