

JUDGMENT OF THE COURT (Fourth Chamber)

13 February 2014 (\*)

(Reference for a preliminary ruling – Approximation of laws – 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 – Meaning – Internet links (‘clickable links’) giving access to protected works)

In Case C-466/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Svea hovrätt (Sweden), made by decision of 18 September 2012, received at the Court on 18 October 2012, in the proceedings

**Nils Svensson,**

**Sten Sjögren,**

**Madelaine Sahlman,**

**Pia Gadd**

v

**Retriever Sverige AB,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan, J. Malenovský (Rapporteur), A. Prechal and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2013,

after considering the observations submitted on behalf of:

- Mr Svensson, Mr Sjögren and Ms Sahlman, by O. Wilöf, förbundsjurist,
- Ms Gadd, by R. Gómez Cabaleiro, abogado, and M. Wadsted, advokat,
- Retriever Sverige AB, by J. Åberg, M. Bruder and C. Rockström, advokater,
- the French Government, by D. Colas, F.-X. Bréchet and B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

- the United Kingdom Government, by J. Beeko, acting as Agent, and by N. Saunders, Barrister,
- the European Commission, by J. Samnadda and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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 Mr Svensson, Mr Sjögren, Ms Sahlman and Ms Gadd, the applicants in the main proceedings, and Retriever Sverige AB ('Retriever Sverige') concerning compensation allegedly payable to them for the harm they consider they have suffered as a result of the inclusion on that company's website of clickable Internet links (hyperlinks) redirecting users to press articles in which the applicants hold the copyright.

#### **Legal context**

##### *International law*

##### The WIPO Copyright Treaty

- 3 The World Intellectual Property Organisation (WIPO) adopted the WIPO Copyright Treaty ('the WIPO Copyright Treaty') in Geneva on 20 December 1996. It was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).
- 4 Article 1(4) of the WIPO Copyright Treaty provides that the contracting parties are to comply with Articles 1 to 21 of the Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

##### The Berne Convention

- 5 Article 20 of the Berne Convention, entitled 'Special Agreements Among Countries of the Union', states:

'The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.'

##### *European Union law*

6 Recitals 1, 4, 6, 7, 9 and 19 in the preamble to Directive 2001/29 state:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

...

(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. ...

...

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

...

(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. ...

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention ...[,] the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. ...'

7 Article 3 of Directive 2001/29 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.’

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

- 8 The applicants in the main proceedings, all journalists, wrote press articles that were published in the *Göteborgs-Posten* newspaper and on the *Göteborgs-Posten* website. Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable Internet links to articles published by other websites. It is common ground between the parties that those articles were freely accessible on the *Göteborgs-Posten* newspaper site. According to the applicants in the main proceedings, if a client clicks on one of those links, it is not apparent to him that he has been redirected to another site in order to access the work in which he is interested. By contrast, according to Retriever Sverige, it is clear to the client that, when he clicks on one of those links, he is redirected to another site.
- 9 The applicants in the main proceedings brought an action against Retriever Sverige before the Stockholms tingsrätt (Stockholm District Court) in order to obtain compensation on the ground that that company had made use, without their authorisation, of certain articles by them, by making them available to its clients.
- 10 By judgment of 11 June 2010, the Stockholms tingsrätt rejected their application. The applicants in the main proceedings then brought an appeal against that judgment before the Svea hovrätt (Svea Court of Appeal).
- 11 Before that court, the applicants in the main proceedings claimed, inter alia, that Retriever Sverige had infringed their exclusive right to make their respective works available to the public, in that as a result of the services offered on its website, Retriever Sverige’s clients had access to the applicants’ works.
- 12 Retriever Sverige contends, in defence, that the provision of lists of Internet links to works communicated to the public on other websites does not constitute an act liable to affect the copyright in those works. Retriever Sverige also contends that it did not carry out any transmission of any protected work; its action is limited to indicating to its clients the websites on which the works that are of interest to them are to be found.
- 13 In those circumstances, the Svea hovrätt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?
- (2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?

- (3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
- (4) Is it possible for a Member State to give wider protection to authors' exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29?

### **Consideration of the questions referred**

#### *The first three questions*

- 14 By its first three 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 provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision, where, on that other site, the works concerned are freely accessible.
- 15 In this connection, it follows from Article 3(1) of Directive 2001/29 that every act of communication of a work to the public has to be authorised by the copyright holder.
- 16 It is thus apparent from that provision 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' (see, to that effect, Case C-607/11 *ITV Broadcasting and Others* [2013] ECR, paragraphs 21 and 31).
- 17 As regards the first of those criteria, that is, the existence of an 'act of communication', this must be construed broadly (see, to that effect, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 193), in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to Directive 2001/29, a high level of protection for copyright holders.
- 18 In the circumstances of this case, it must be observed that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works.
- 19 As is apparent from Article 3(1) of Directive 2001/29, 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 (see, by analogy, Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 43).
- 20 It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision.
- 21 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 (*SGAE*, paragraphs 37 and 38, and *ITV Broadcasting and Others*, paragraph 32).

- 22 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.
- 23 In those circumstances, it must be held that the manager is making a communication to a public.
- 24 None the less, according to settled case-law, 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, such as that at issue in the main proceedings, concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, 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 (see, by analogy, *SGAE*, paragraphs 40 and 42; order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38; and *ITV Broadcasting and Others*, paragraph 39).
- 25 In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.
- 26 The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.
- 27 In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.
- 28 Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.
- 29 Such a finding cannot be called in question were the referring court to find, although this is not clear from the documents before the Court, that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site.
- 30 That additional circumstance in no way alters the conclusion that the provision on a site of a clickable link to a protected work published and freely accessible on another site has the effect of making that work available to users of the first site and that it therefore constitutes a communication to the public. However, since there is no new public, the authorisation of the copyright holders is in any event not required for such a communication to the public.
- 31 On the other hand, 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. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.

- 32 In those circumstances, the answer to the first three questions referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, as referred to in that provision.

*The fourth question*

- 33 By its fourth question, the referring court asks, in essence, whether 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.
- 34 In this connection, it is apparent, in particular, from recitals 1, 6 and 7 in the preamble to Directive 2001/29 that the objectives of the directive are, inter alia, to remedy the legislative differences and legal uncertainty that exist in relation to copyright protection. Acceptance of the proposition that a Member State may give wider protection to copyright holders by laying down that the concept of communication to the public also includes activities other than those referred to in Article 3(1) of Directive 2001/29 would have the effect of creating legislative differences and thus, for third parties, legal uncertainty.
- 35 Consequently, the objective pursued by Directive 2001/29 would inevitably be undermined if the concept of communication to the public were to be construed in different Member States as including a wider range of activities than those referred to in Article 3(1) of that directive.
- 36 It is true that recital 7 in the preamble to the directive indicates that the directive does not have the objective of removing or preventing differences that do not adversely affect the functioning of the internal market. Nevertheless, it must be observed that, if the Member States were to be afforded the possibility of laying down that the concept of communication to the public includes a wider range of activities than those referred to in Article 3(1) of the directive, the functioning of the internal market would be bound to be adversely affected.
- 37 It follows that Article 3(1) of Directive 2001/29 cannot be construed as allowing Member States to give 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.
- 38 Such a conclusion is not affected by the fact, highlighted by the applicants in the main proceedings in their written observations, that Article 20 of the Berne Convention stipulates that the signatory countries may enter into 'special agreements' among themselves with a view to granting copyright holders more extensive rights than those laid down in that Convention.
- 39 In this connection, suffice it to recall that, when an agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Union law, the Member State must refrain from adopting such a measure (Case C-277/10 *Luksan* [2012] ECR, paragraph 62).

- 40 Since the objective of Directive 2001/29 would inevitably be undermined if the concept of communication to the public were construed as including a wider range of activities than those referred to in Article 3(1) of that directive, a Member State must refrain from exercising the right granted to it by Article 20 of the Berne Convention.
- 41 Therefore, the answer to the fourth question is 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.

### **Costs**

- 42 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 (Fourth Chamber) hereby rules:

- 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 provision on a website of clickable links to works freely available on another website 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 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.**

[Signatures]

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\* Language of the case: Swedish.