

Case C-392/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

21 May 2019

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

25 April 2019

Defendant and appellant in the appeal on a point of law:

VG Bild-Kunst

Applicant and respondent in the appeal on a point of law:

Stiftung Preußischer Kulturbesitz

Subject matter of the main proceedings

Copyright infringement through framing

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred

Does the embedding of a work — which is available on a freely accessible website with the consent of the rightholder — in the website of a third party by way of framing constitute communication to the public of that work within the meaning of Article 3(1) of Directive 2001/29/EC where it occurs through circumvention of protection measures against framing taken or instigated by the rightholder?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'), in particular Article 11

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, in particular Article 3(1) and (3)

Directive 2014/26/EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, in particular Article 16

Provisions of national law cited

Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten (Law on the management of copyright and related rights; 'the UrhWG'), in particular Paragraph 11(1) (repealed with effect from 1 June 2016)

Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften (Law on the management of copyright and related rights by collecting societies; 'the VGG'), in particular Paragraph 34(1)

Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights; 'the UrhG'), in particular Paragraph 15(2) and Paragraph 19a

Brief summary of the facts and procedure

- 1 The applicant is responsible for the Deutsche Digitale Bibliothek (German Digital Library; 'the DDB'). It provides an online platform which links German cultural and scientific institutions with one another. On that online platform, electronic references (links) can be used to retrieve digitised content stored in the web portals of those institutions. The DDB itself merely stores preview images. If a user clicks on a search result, he reaches the corresponding object page of the DDB with an enlarged image which can be enlarged further by clicking thereon or using the zoom function. Via a search function, the user can search in a targeted manner for objects for which digitised content already exists, and be linked directly to the website of the supplying institution — either to the home page or to the object page.
- 2 The defendant manages the copyright powers of the authors affiliated thereto in respect of works of the visual arts. It makes the conclusion of a contract with the applicant regarding the use of its repertory of works in the form of preview images conditional on the inclusion of the following clause in the contract: 'The licensee

undertakes, when using the works and subject matter to which the contract relates, to apply effective technical measures to protect said works or subject matter against framing.’

- 3 The applicant rejects such a clause. By its action, it sought a declaration that the defendant is obliged to conclude a contract of use without the cited contractual clause. The Landgericht (Regional Court) dismissed the action as inadmissible. The applicant’s appeal on the merits was successful. The Berufungsgericht (Court of Appeal) essentially bases its decision on the free accessibility of the works concerned. By its appeal on a point of law, the defendant continues to pursue its application to have the action dismissed.

Brief summary of the basis for the reference

- 4 The success of the appeal on a point of law depends on the interpretation of Article 3(1) of Directive 2001/29.
- 5 1. Under Paragraph 34(1) of the VGG, by which Article 16 of Directive 2014/26 was transposed into German law, the defendant, as a collecting society, is obliged, on the basis of the rights it manages, to grant rights of use to anyone, on request, under reasonable conditions. The conditions must, in particular, be objective and non-discriminatory and provide for appropriate remuneration.
- 6 According to the principles developed in the case-law under Paragraph 11(1) of the UrhWG, which continue to apply under the VGG, there is, by way of exception, no obligation to contract on the part of the collecting society if, in the individual case, abusive exploitation of the monopoly position is excluded and the collecting society can counter the request for granting of rights of use with overriding legitimate interests. There is, accordingly, a need to balance the interests of the parties concerned in the light of the objectives of the law and the purpose of the fundamental obligation to contract on the part of the collecting society.
- 7 2. The success of the appeal on a point of law depends on whether, on the side of the defendant, its obligation to manage and enforce the rights of its members is to be included in the balancing of interests that is to be performed or whether no rights of the defendant’s members are affected.
- 8 a) The applicant’s planned publication of preview images, stored by it, of copyright protected works belonging to the defendant’s repertory requires, as an act of making works available to the public within the meaning of Paragraph 19a of the UrhG, the consent of the rightholders, the granting of which has been negotiated by the parties.
- 9 b) Conversely, the embedding, which the defendant regards as undesirable, of its preview images in the websites of third parties by way of framing does not constitute an act of making works available to the public, as it is not the applicant,

but solely the party that posted the work on the Internet and thereby made it publicly available, which decides whether it remains available to the public.

- 10 c) However, rights of the defendant's members would be affected if the embedding of a work — which is available on a website with the consent of the rightholder — in the website of a third party by way of framing constitutes communication to the public of the work within the meaning of Article 3(1) of Directive 2001/29 where it occurs through circumvention of protection measures against framing taken or instigated by the rightholder.
- 11 aa) The conduct at issue could be in breach of an unnamed right of communication to the public. By interpreting Paragraph 15(2) of the UrhG in accordance with the directive, such a right is to be assumed insofar as Article 3(1) of Directive 2001/29 grants rights that go further than the rights of communication to the public mentioned in the second sentence of Paragraph 15(2) of the UrhG. Under Article 3(1) of Directive 2001/29, 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.
- 12 bb) The communication at issue of preview images on the website of third parties comes within the scope of Article 3(1) of Directive 2001/29, because here there is no direct physical contact between the actors or performers of a work and a public reached by that communication. It therefore involves communication to a public not present at the place where the communication originates (see Court of Justice, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 200 to 202, and of 24 November 2011, *Circul Globus București*, C-283/10, EU:C:2011:772, paragraphs 35 and 36).
- 13 cc) The concept of 'communication to the public' requires an individual assessment. It has two criteria, namely an act of communication and a communication to the public. Account also has to be taken of several complementary criteria, in particular the indispensable role played by the user and the deliberate nature of its intervention, 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 (see Court of Justice, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 32 to 34, of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraphs 28 to 30, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraphs 23 to 25). Accordingly, in its individual assessment of the case at issue as required, the referring court is of the opinion that the embedding, through circumvention of technical protection measures, of preview images in the websites of third parties is in breach of the exclusive right of communication to the public.

- 14 (1) The referring court considers that there is an act of communication. The concept of communication must be construed broadly in light of the principal objective of Directive 2001/29 to ensure a high level of protection for authors (see recitals 4 and 9 of the Directive) (see recital 23 of the Directive; Court of Justice, judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 17, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 29). It refers to any transmission of a protected work, irrespective of the technical means or process used (see Court of Justice, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 186 and 193, of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraphs 23 and 25, and of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 38). Communication requires the user to intervene, in full knowledge of the consequences of his action, that is to say in a deliberate and targeted manner, to give third parties access to the protected work, irrespective of whether the third parties make use of the access (see Court of Justice, judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 19, of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 36, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 31). Such access is created by the provision, on a website, of clickable links to protected works published on another freely accessible website (see Court of Justice, judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 18 and 20, of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 37, and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 32).
- 15 (2) The referring court also considers the requirement of communication to the public to be fulfilled in the case at issue (see Court of Justice, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 22). The term ‘public’ is satisfied only in the case of an indeterminate number of potential recipients and a fairly large number of persons (see Court of Justice, judgments of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 32, of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 21, and of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 27). As regards that last criterion, the cumulative effect of making the works available to potential recipients should be taken into account. In that connection, it is important to ascertain the number of persons who have access to the same work at the same time and successively (see Court of Justice, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 38, of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 33, and of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 28).
- 16 (3) Moreover, to be categorised as ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, a protected work must be communicated using a technical means different from that previously used, or, failing that, to a new public, that is to say, to a public which was not taken into account by the copyright holder when he authorised the initial communication to

the public (see Court of Justice, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraphs 40 and 41, order of 18 March 2010, *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, C-136/09, EU:C:2010:151, paragraph 38, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 197, of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraphs 39 and 24 to 26, and of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 24, and order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, paragraph 14; see also [with regard to cable retransmission] judgment of 16 March 2017, *AKM*, C-138/16, EU:C:2017:218, paragraphs 26 and 27). If neither of the two alternatives applies, there is no communication to the public within the meaning of Article 3(1) of Directive 2001/29 (see Court of Justice, order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, paragraph 19).

- 17 (4) The embedding of the preview images by way of framing in the websites of third parties is not made by specific technical means different from that of the initial communication, but instead by the same technical means already used for the communication of the work on the other website (Court of Justice, judgment of 13 February 2014, *Svensson and Others*, paragraph 24, and order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, paragraph 15). In that regard, it is irrelevant whether the third party makes use of the framing technique with such an act of communication and the work coming from the other website is displayed by means of an ‘embedded’ Internet link in a frame on its website, which means that the original setting of that work remains hidden to the users of its website (see Court of Justice, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 29, order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, paragraph 17). If the subsequent communication is made, as in the case of the initial communication, on the Internet, it is made by the same technical means (Court of Justice, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 24).
- 18 (5) The referring court is of the opinion that the embedding, through circumvention of the technical protection measures taken or instigated by the rightholder, of preview images in the websites of third parties by way of framing constitutes communication to a new public.
- 19 If a website provides clickable links to works which are freely available to all Internet users on another website without the consent of the copyright holders, there is communication to the public only if the person posting the link knew or could reasonably have known the illegal nature of the publication of those works on that other website (see Court of Justice, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 49 and 55, and of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 49).

- 20 That restriction is based on the consideration that the Internet is of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to the sound operation of the Internet as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information (see Court of Justice, judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 45). It may be difficult, in particular for individuals who wish to post links on other freely accessible websites, to ascertain whether the works appearing on the other websites are published on the Internet with the consent of the copyright holders (see Court of Justice, judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 46). The functioning of the Internet would be unreasonably impaired if Internet users were more reticent to post hyperlinks to works freely accessible on other websites, because they were at risk of proceedings for infringement of copyright (see Opinion of Advocate General Wathelet of 7 April 2016, C-160/15, *GS Media*, EU:C:2016:221, paragraphs 77 and 78). In view thereof, the provision of hyperlinks is to be regarded as constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29 only if the person concerned knew or ought to have known that the link he posted provides access to a work illegally placed on the Internet, for instance owing to the fact that he was previously notified thereof by the copyright holder (see Court of Justice, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 49, and of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 49).
- 21 In the case at issue, the preview images appear on the applicant's website with the consent of the copyright holders.
- 22 Where clickable links to copyright protected works are posted on a website and such works, due to restrictions, are available on the other website with the consent of the copyright holder to a limited public only, there is communication to the public if that link makes it possible for Internet users to circumvent those restrictions, as the posting of such a link constitutes a deliberate intervention without which those users would not be able to access those works. In such a case, the users who circumvent the restrictions with the help of the clickable link must be deemed to be a new public that was not taken into account by the copyright holder when he authorised the initial communication (see Court of Justice, judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 31, and of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 49).
- 23 In the case at issue, the preview images are freely available to all Internet users on the applicant's website.
- 24 The question arises as to whether there is communication to the public where, on a website (in the case at issue: on the website of a third party), clickable links are provided which, when clicked on, display works coming from another website (in the case at issue: the website of the DDB) in a frame on that website, where those

works are freely available to all Internet users on the other website with the consent of the copyright holder, but the copyright holder has taken or instigated technical protection measures intended to prevent such a retrieval of the works, and those technical protection measures are (deliberately) circumvented with the help of the clickable link. In the opinion of the Chamber, that question is to be answered in the affirmative.

- 25 In such a situation, the copyright holder has consented to communication to the public of the works only for the users of a certain website, in taking or instigating technical protection measures against the embedding of the works on other websites by way of framing. The rightholder did not take account of the public that can make use of those works by way of embedding in other websites when he authorised the initial measure (see Court of Justice, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 35). On the contrary, he took measures against those works being made use of by that public. Through those technical protection measures, the rightholder expressed in the language of the Internet that his consent to the communication to the public is restricted to users of a certain website. Those protection measures must be deliberately circumvented by the third party wishing to embed the preview images in its website in order for the images to be displayed on its website.
- 26 This conclusion satisfies the protective purpose expressed in recitals 4, 9 and 10 of Directive 2001/29 of ensuring a high level of protection in the field of intellectual property and guaranteeing appropriate remuneration of the rightholders. The rightholder's power to restrict his consent is supported by the fact that otherwise — contrary to Article 3(3) of Directive 2001/29 — the right of communication to the public of a work on the Internet would actually be exhausted as soon as the work is made freely available to all Internet users on a website with the consent of the rightholder. The rightholder should also be allowed to restrict his consent because that is the only way for him to control the economic exploitation of his work and to ensure appropriate participation in the economic use of his work.