

Anonymised version

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Case C-637/19

Reference for a preliminary ruling

Date lodged:

27 August 2019

Referring court:

Svea Hovrätt, Patent- och marknadsöverdomstolen (Sweden)

Date of the decision to refer:

20 August 2019

Appellant:

BY

Respondent:

CX

[...]

Referring court

[...] Svea Hovrätt, Patent- och marknadsöverdomstolen (Svea Patents and Market Court of Appeal, Sweden)

[...] Stockholm, Sweden

[...]

Parties to the main proceedings

[...] Appellant: BY

Respondent: CX

[...]

Subject-matter: copyright infringement, etc.

[...]

Subject-matter of the proceedings and facts of the case in the main proceedings

3. The parties in the main proceedings are two individuals who each have a website. The present dispute stems from the fact that, in another dispute between the parties, CX sent to the ordinary court seised, as evidence, a copy of a page of text, taken from BY's website, which includes a photograph. In the present case, BY claims that he is the copyright holder of that photograph and asks that CX be ordered to pay him damages, [Or. 2] first, for copyright infringement and, second, for infringement of the special protection afforded to photographs. The parties do not contest the facts described by BY which form the basis of the action against CX. However, CX disputes any liability.
4. The court at first instance, the Patent- och marknadsdomstolen (the Patent and Market Court), found that the photograph was protected as a right related to copyright, namely the special protection afforded to photographs. The Patent and Market Court noted that, because that photograph was transmitted to the court as a procedural document, its communication may be requested by anyone in accordance with the applicable provisions of the Swedish constitutional law on the right of access to documents. According to the Patent and Market Court, CX therefore distributed that photograph to the public within the meaning of the Swedish Law on Copyright. However, the Patent and Market Court considered that it had not been established that BY had suffered harm. His application was therefore dismissed.
5. BY brought an appeal against that judgment before the Patent and Market Court of Appeal, seeking its reversal. CX contests the need to amend the judgment.
6. The Patent and Market Court of Appeal must, inter alia, rule on whether the transmission of a copy of that photograph to a court as a procedural document is capable of amounting to unlawfully making available [a work] for the purpose of copyright, in the form of a distribution or communication to the public, and more specifically whether a court may be considered as falling within the scope of the term 'public'. Before the Patent and Market Court of Appeal, the parties to the dispute explained that the photograph at issue was sent to the ordinary court by e-mail, in the form of an electronic copy. Should the Patent and Market Court of Appeal find that transmission of a procedural document must be considered to be a form of making available to the public, the question then arises whether the provisions of national law relating to the limitations to copyright in the context of judicial proceedings may apply: see Article 5(3) (e) 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). However, the questions referred for a preliminary ruling by the

Patent and Market Court of Appeal today do not concern **[Or. 3]** that limitation to copyright.

Relevant national rules and case-law

7. Articles 2 and 49a of the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (upphovsrättslagen) (Law No 729 of 1960 on copyright in literary and artistic works, ‘the Law on Copyright’) are the relevant provisions of national law. They are worded as follows:

‘Article 2

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

[(2)] Any direct or indirect, temporary or permanent reproduction of a work, by any means and in any form, in whole or in part, shall be considered as reproduction.

[(3)] The work is made available to the public in the following cases:

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

[...]

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

Any communication or performance of a work aimed at a large closed circle, in a professional context, shall be treated as a communication to the public or public performance, as the case may be **[Or. 4]**.’

Article 49a

‘The author of a photograph has the exclusive right to reproduce that photograph and to make it available to the public. The right applies regardless of whether the image is used in its original form or in a modified form and irrespective of the technique used.’

8. It is also apparent from the Swedish constitutional laws that the promotion of freedom of expression and pluralistic information entails the right for everyone to access public documents (Chapter 2, Article 1 of the tryckfrihetsförordningen

(Law on the Freedom of the Press). That law also provides that in particular any procedural document transmitted to a court, in any form, is a public document. That provision therefore has the effect that anyone can ask for access to a procedural document transmitted to a court. That rule of principle is however subject to an exception relating to confidential information. The principle is therefore that the right of access to documents concerns also documents covered by copyright and related rights.

9. In an earlier case, the Patent and Market Court of Appeal held that the transmission by email to a national court of a procedural document consisting in a text protected by copyright did not amount to a ‘communication to the public’ within the meaning of Article 2(3)(1) of the Law on Copyright. The Patent and Market Court of Appeal first stated that that transmission did indeed amount to a ‘communication’ and then noted that the Court of Justice of the European Union, in its judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 41), held that the term ‘public’ refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. The Patent and Market Court of Appeal therefore inferred [from that case-law] that the transmission of the work to a court could not be considered to be a communication to the public. It held that, in that context, the fact that Swedish law provides for a broad right of access to documents held by courts [Or. 5] was irrelevant.
10. In another case, the same court [the Patent and Market Court of Appeal] held that the transmission to a court of a procedural document including a photocopy of a photograph, protected as a photographic image under the Law on Copyright, constituted unauthorised distribution to the public within the meaning of Paragraph 2(3)(4) of the Law on Copyright. In that case, the Patent and Market Court of Appeal referred to the judgment of 13 May 2015, *Dimensione Direct Sales and Labianca* (C-516/13, EU:C:2015:315, paragraph 25 and the case-law cited). That court found that it follows from that judgment that the term ‘distribution’ contained in Directive 2001/29 must be interpreted as meaning that it suffices for a single reproduction to have been delivered to at least one member of the public. That court noted that the term ‘public’ was not defined in Directive 2001/29, but after examining different linguistic versions of that directive, it concluded that, in any event, the term ‘public’ implied a clear separation from the private sphere. The Patent and Market Court of Appeal found that the court to which the photograph had been transmitted did not belong to a private group to which the sender also belonged and could not be regarded as merely an intermediary in a distribution channel, since, irrespective of its obligation to provide copies of pleadings, it could not be expected to pass on the physical copies of the documents received. In that case, the court concluded that by transmitting a copy of the photograph to a court, the sender had made a distribution to the public. [...]

Relevant provisions of EU law

11. Article 3(1) of Directive 2001/29 (see above) is worded as follows:

‘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.’

Article 4(1) of that directive provides as follows:

‘Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.’

The need for a preliminary ruling

12. The current wording of the provisions of Article 2(3)(1) and (4) of the Law on Copyright was introduced when Directive 2001/29 was transposed into national law. The text of subparagraphs 1 and 4 corresponds respectively to that of Articles 3(1) and 4(1) of that directive. In its examination, the Patent and Market Court of Appeal must therefore apply those provisions of Swedish law in the light of the corresponding provisions of EU law. However, the Patent and Market Court of Appeal considers that there is a degree of uncertainty concerning the interpretation in EU law of the expressions ‘communication to the public’ and ‘distribution to the public’ in the context of transmission of a protected work to a court in the main part of a procedural document. That uncertainty relates to whether a court can be regarded as falling within the scope of the term ‘public’ within the meaning of Directive 2001/29 and a particular question arises as to whether the meaning of the term ‘public’ is the same, both in the case of ‘communication’ and of ‘distribution’. The case-law of the Court of Justice does not provide an answer to that question.
13. The term ‘public’ is not defined in Directive 2001/29 or any other secondary legislation. In that connection, the Court has already held that, in order to determine whether there has been a communication to the public, it is necessary to take into account several complementary criteria, which are not autonomous and are interdependent. [Or. 7]. 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. The Court therefore considers that the concept of ‘communication to the public’ must be interpreted broadly. Furthermore, the Court has previously held 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’ (judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 35 to 37 and the case-law cited).
14. As regards the second of those cumulative criteria, that is to say the term ‘public’, the Court has held that it refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. As regards the ‘indeterminate’ nature of the public, the Court has observed that it means making

a work perceptible in any appropriate manner to ‘persons in general’, that is, not restricted to specific individuals belonging to a private group (judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 41 and 42 and the case-law cited).

15. It also follows from the Court’s case-law that the term ‘distribution’, within the meaning of Article 4(1) of Directive 2001/29, constitutes an independent concept of EU law, the interpretation of which cannot be contingent on the legislation applicable to transactions in which a distribution takes place and that, also within the meaning of that provision of that directive, the expression ‘distribution to the public’ in Article 4(1) therefore has the same meaning as the words ‘making available to the public ... through sale’, within the meaning of Article 6(1) of the World Intellectual Property Organisation Copyright Treaty [adopted in Geneva on 20 December 1996] (judgment of 13 May 2015, *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315, paragraphs [22, 23 and] 25 and the case-law cited). It follows from that judgment that, in order for there to be a ‘distribution to the public’, it is sufficient for the protected work to have been delivered to a member of the public. However, in that context, the Court of Justice did not rule on the meaning of the word ‘public’ and did not refer to its case-law concerning the term ‘public’ in the context of a ‘communication to the public’. Even though the Court has held that it is sufficient [Or. 8] for the work to have been delivered to a member of the public, there remains the issue of whether, in that context, the term ‘public’ must be subject to the same interpretation as that given by the Court to the expression ‘communication to the public, that is to say whether it should be interpreted uniformly in the context of Directive 2001/29.
16. In addition to the case-law referred to above, the Court has also been called upon to interpret the expression ‘communication to the public’ in a number of other contexts, in particular (i) by means of radio and television sets in public houses, hotels, spa establishments or rehabilitation centres, (ii) through links on websites for the livestreaming of television programmes and (iii) the broadcasting of television signals by television broadcasters to specific distributors (see, inter alia, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraphs 42 and 47, of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 196, of 27 February 2014, [*OSA*, C-351/12, EU:C:2014:110], of 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraphs 20 to 23, 33 and 34, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 29 to 55). The Court has also had occasion to interpret the expression ‘distribution to the public’ more fully in a judgment in 2018 (see judgment of 19 December 2018, *Syed*, C-572/17, EU:C:2018:1033).
17. However, the Court has not ruled on the interpretation of the expressions ‘communication to the public’ in Article 3(1) of Directive 2001/29 and ‘distribution to the public’ in Article 4(1) of the same directive, in a context such as that in the main proceedings, that is to say, where a protected work has been transmitted to a court in the main part of a procedural document. Similarly, as

already stated, the Court of Justice has not ruled on whether the term ‘public’ must be given the same meaning in those two different situations. That question is acutely relevant in the dispute in the main proceedings in which the Patent and Market Court of Appeal is called upon to assess whether, when a document is transmitted to a court, whether in the form of a physical document (paper) or an attachment to an email, that transmission, which has the same effect and serves the same purpose in both cases, is a ‘communication to the public’ or a ‘distribution to the public’. **[Or. 9]**

18. According to the Patent and Market Court of Appeal, a factor contributing to that uncertainty is how the Court’s finding that the public is ‘indeterminate’ must be understood in respect of a court (see judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 42). According to the Patent and Market Court of Appeal, neither the court nor its staff can be regarded as constituting a ‘public’ within the general meaning of the word, but nor can they be regarded as belonging to a private group. In addition, although the number of persons who, following the transmission, may have access to the work is limited to the staff of the court, that number may vary and must in principle be regarded as substantial. In addition, under Swedish law, everyone has the right, as a general rule, to consult a document which has been received by a court.
19. An answer to the following questions is necessary in order for the referring court to rule on the dispute in the main proceedings.

Reference for a preliminary ruling

20.
 1. Does the term ‘public’ in Articles 3(1) and 4(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society have a uniform meaning?
 2. If question 1 is answered in the affirmative, is a court to be regarded as falling within the scope of the term ‘public’ within the meaning of those provisions?
 3. If question 1 is answered in the negative:
 - a) in the event of communication of a protected work to a court, can that court fall within the scope of the term ‘public’?
 - b) in the event of distribution of a protected work to a court, can that court fall within the scope of the term ‘public’?
 4. Does the fact that national legislation lays down a general principle of access to public documents in accordance with which any person who makes a request can access procedural documents transmitted to a court, **[Or. 10]** except where they contain confidential information, affect the assessment of whether

transmission to a court of a protected work amounts to a ‘communication to the public’ or a ‘distribution to the public’?

[...]

WORKING DOCUMENT