

Provisional text

## JUDGMENT OF THE COURT (Grand Chamber)

9 March 2021 (\*)

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights in the information society – Directive 2001/29/EC – Article 3(1) – Concept of ‘communication to the public’ – Embedding, in a third party’s website, of a copyright-protected work by means of the process of framing – Work freely accessible with the authorisation of the copyright holder on the licensee’s website – Clause in the exploitation agreement requiring the licensee to introduce effective technological measures against framing – Lawfulness – Fundamental rights — Article 11 and Article 17(2) of the Charter of Fundamental Rights of the European Union)

In Case C-392/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 25 April 2019, received at the Court on 21 May 2019, in the proceedings

**VG Bild-Kunst**

v

**Stiftung Preußischer Kulturbesitz,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Ilešič (Rapporteur), L. Bay Larsen, N. Piçarra, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, M. Safjan, D. Šváby, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Szpunar,

Registrar: M. Krausenböck, administrator,

having regard to the written procedure and further to the hearing on 25 May 2020,

after considering the observations submitted on behalf of:

- VG Bild-Kunst, by C. Czychowski and V. Kraetzig, Rechtsanwälte,
- Stiftung Preußischer Kulturbesitz, by N. Rauer, Rechtsanwalt,
- the French Government, by A.-L. Desjonquères and A. Daniel, acting as Agents,
- the European Commission, by T. Scharf, V. Di Bucci and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

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 VG Bild-Kunst, a visual arts copyright collecting society in Germany, and Stiftung Preußischer Kulturbesitz ('SPK'), a German cultural heritage foundation, concerning the refusal of VG Bild-Kunst to conclude with SPK a licence agreement for the use of its catalogue of works unless the agreement contains a provision obliging SPK, as a licensee, to implement, when using protected work and subject matter covered by that agreement, effective technological measures to prevent the framing, by third parties, of such protected work or subject matter.

### Legal context

#### *European Union law*

##### *Directive 2001/29*

- 3 Recitals 3, 4, 9, 10, 23 and 31 of Directive 2001/29 are worded as follows:
  - '(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 ...
- ...
- (9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.
- ...
- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
- ...

(31) A fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders 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. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of trans-border exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

4 Article 3 of that directive, headed 'Right of communication to the public of works and right of making available to the public other subject matter', 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 Article 6(1) and (3) of Directive 2001/29, that article being headed 'Obligations as to technological measures', provides:

'1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

...

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC [of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20)]. Technological measures shall be deemed "effective" where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective.'

#### *Directive 2014/26/EU*

6 Article 16(1) and (2) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72) provides:

'1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.

2. Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.

Right holders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.'

### ***German law***

7 Under Paragraph 19a of the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights), making available to the public work protected by copyright is subject to the authorisation of the right holders.

8 In accordance with the first sentence of Paragraph 34(1) of the 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'), collecting societies are required to grant to any person who so requests, on reasonable terms, a licence to use the rights whose management is entrusted to them.

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

9 SPK is the operator of the Deutsche Digitale Bibliothek (DDB), a digital library devoted to culture and knowledge, which networks German cultural and scientific institutions.

10 The DDB website contains links to digitised content stored on the internet portals of participating institutions. However, as a 'digital showcase', the DDB itself stores only thumbnails, that is to say smaller versions of the original images of the subject matter. When the user clicks on one of those thumbnails, he or she is redirected to the page concerning the particular subject matter on the DDB website, which contains an enlarged version of the thumbnail concerned, with a resolution of 440 by 330 pixels. When that enlarged thumbnail is clicked on, or the 'magnifying glass' function is used, a further enlarged version of the thumbnail, with a maximum resolution of 800 by 600 pixels, is overlaid by means of a 'lightbox'. Further, the 'Display object on original site' button contains a direct link to the website of the institution providing the subject matter, either to its home page or to the page relating to that subject matter.

11 VG Bild-Kunst maintains that the conclusion with SPK of a licence agreement for the use of its catalogue of works in the form of thumbnails should be subject to the condition that the agreement include a provision whereby the licensee undertakes, when using the protected works and subject matter covered by the agreement, to implement effective technological measures against the framing by third parties of the thumbnails of the protected works or subject matter displayed on the DDB website.

12 SPK considers that such a term in the agreement is not reasonable in the light of the legislation relating to copyright, and brought an action before the Landgericht Berlin (Regional Court of Berlin, Germany) seeking a declaration that VG Bild-Kunst is required to grant SPK that licence without any condition requiring SKK to implement such technological measures.

13 That action was dismissed by the Landgericht Berlin (Regional Court of Berlin). An appeal having been brought by SPK, the judgment of the Landgericht Berlin was set aside by the Kammergericht Berlin (Higher Regional Court of Berlin, Germany). By its appeal on a point of law, VG Bild-Kunst

seeks the dismissal of SPK's action.

- 14 The Bundesgerichtshof (Federal Court of Justice, Germany) points out, first, that, pursuant to the first sentence of Paragraph 34(1) of the VGG, which transposes Article 16 of Directive 2014/26, collecting societies are obliged to grant to any person who so requests, on reasonable terms, a licence to use the rights whose management is entrusted to them.
- 15 Second, in accordance with its case-law established in the period during which the national legislation repealed by the VGG was applicable, case-law which, in the opinion of the referring court, continues to be of some relevance, it was accepted that collecting societies could, exceptionally, depart from that obligation and refuse to grant a licence for the use of the rights management of which was entrusted to them, provided that that refusal did not constitute an abuse of monopoly power and that the licence application was objectionable by reference to overriding legitimate interests. In that regard, in order to determine whether there is an objectively justified exception, it was necessary to weigh up the interests of the parties concerned, taking into account the purpose of the legislation and the objective underlying the obligation that applies, in principle, to collecting societies.
- 16 The outcome of the appeal on a point of law depends on the issue whether, contrary to what was held by the appeal court, the embedding of a work – which is available on a website, in this instance that of the DDB, with the consent of the right holder – in the website of a third party by means of framing constitutes a communication to the public of that work within the meaning of Article 3(1) of Directive 2001/29 where it circumvents protection measures against framing adopted by the right holder or imposed by him or her on a licensee. If that were the case, the rights of the members of VG Bild-Kunst would be liable to be affected and VG Bild-Kunst could properly subject the grant of a licence to SPK to the condition that SPK undertake, in the licence agreement, to implement such protection measures.
- 17 The referring court considers that, when thumbnails are embedded by framing in a third-party website so as to circumvent the technological protection measures adopted or imposed by the right holder, such embedding constitutes a communication to a new public. If that were not the case, the right of communication of a work to the public on the internet would, contrary to Article 3(3) of Directive 2001/29, be de facto exhausted as soon as that work was made freely accessible to all internet users on a website with the authorisation of the right holder, and that right holder would be unable to retain control of the economic exploitation of his or her work and to ensure adequate involvement in its use for economic purposes.
- 18 The Bundesgerichtshof (Federal Court of Justice) is however uncertain as to the response to that question, having regard to the case-law of the Court in relation to the practice of framing (order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315) and to the freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter') in the digital context (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 45), case-law which indicates that hyperlinks contribute to the smooth functioning of the internet and to the exchange of opinions and information, and accordingly it decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the embedding of a work – which is available on a freely accessible website with the consent of the right holder – 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 where it circumvents protection measures against framing adopted or imposed by the right holder?'

### **Consideration of the question referred**

- 19 By its question, the referring court seeks, in essence, to ascertain whether Article 3(1) of Directive

2001/29 must be interpreted as meaning that the embedding, by means of the technique of framing, in a third party website page of works that are protected by copyright and that are made freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents protective measures against framing adopted or imposed by the copyright holder, constitutes a communication to the public within the meaning of that provision.

- 20 In that regard, it must be recalled that, under Article 3(1) of Directive 2001/29, Member States are to ensure that authors have 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 obtain access to them from a place and at a time individually chosen by them.
- 21 Under that provision, authors thus have a right which is preventive in nature and which enables them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (see, to that effect, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 29 and the case-law cited).
- 22 In this case, it must, first, be observed that, as is clear from paragraph 10 of the present judgment, the main proceedings largely concern the digital reproductions in the form of thumbnails of protected works, the size of which is, in addition, reduced in comparison with the original.
- 23 It must be observed that, as stated by the referring court, it is common ground between the parties to the main proceedings that the publication, envisaged by SPK, of thumbnails stored by it that derive from works protected by copyright belonging to the catalogue of VG Bild-Kunst constitutes an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29 and is therefore subject to the authorisation of the right holders.
- 24 Since SPK refuses, however, to implement measures to prevent the framing of those thumbnails on third-party websites, it must be determined whether such framing is itself to be considered to be a communication to the public within the meaning of Article 3(1) of Directive 2001/29, which, if that were the case, would enable VG Bild-Kunst, as a copyright collecting society, to insist that SPK implement such measures.
- 25 Further, as stated by the Advocate General in point 120 of his Opinion, the alteration in the size of the works at issue is not a factor in the assessment of whether there is an act of communication to the public, so long as the original elements of those works are perceptible, which it is for the referring court to determine in the main proceedings.
- 26 As the Court has previously held, the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, should, as is underlined by recital 23 of that directive, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 49 and the case-law cited).
- 27 It is, indeed, clear from recitals 4, 9 and 10 of Directive 2001/29 that the principal objective of that directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place (see, to that effect, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 18 and the case-law cited).
- 28 Further, it is apparent from Article 3(3) of that directive that the authorisation of the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications to the public of such works (judgment of 7 March 2013, *ITV Broadcasting*

and Others, C-607/11, EU:C:2013:147, paragraph 23).

- 29 As the Court has held more than once, the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, includes two cumulative criteria, namely an ‘act of communication’ of a work and the communication of that work to a ‘public’ (judgments of 2 April 2020, *Stim and SAMI*, C-753/18, EU:C:2020:268, paragraph 30 and the case-law cited, and of 28 October 2020, *BY (Photographic evidence)*, C-637/19, EU:C:2020:863, paragraph 22 and the case-law cited).
- 30 In the first place, any act whereby a user, in full knowledge of the consequences of what he or she is doing, gives access to protected work is liable to constitute an act of communication for the purposes of Article 3(1) of Directive 2001/29 (see, to that effect, judgments of 2 April 2020, *Stim and SAMI*, C-753/18, EU:C:2020:268, paragraph 32 and the case-law cited, and of 28 October 2020, *BY (Photographic evidence)*, C-637/19, EU:C:2020:863, paragraph 23 and the case-law cited).
- 31 In the second place, in order to be classified as a ‘communication to the public’ within the meaning of that provision, the protected work must in fact be communicated to a public, that communication being directed at an indeterminate number of potential recipients (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 66 and the case-law cited) and involving a fairly large number of people (judgment of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraph 45 and the case-law cited).
- 32 In order to be classified as a ‘communication to the public’, a protected work must further 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 holder when he or she authorised the initial communication of his or her work to the public (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 70 and the case-law cited).
- 33 The Court has also specified that the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, requires an individual assessment (judgment of 14 June 2017, *Stichting Brein*, C-527/15, EU:C:2017:456, paragraph 23 and the case-law cited).
- 34 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Those criteria must, moreover, be applied both individually and in their interaction with each other, in so far as they may, in different particular situations, be present to widely varying degrees (see, to that effect, judgment of 2 April 2020, *Stim and SAMI*, C-753/18, EU:C:2020:268, paragraph 31 and the case-law cited).
- 35 In particular, it follows from the Court’s case-law, on the one hand, that the technique of framing, which consists in dividing a website page into several frames and posting within one of them, by means of a clickable link or an embedded internet link (*inline linking*), an element coming from another site in order to hide from the users of that site the original environment to which that element belongs, constitutes an act of communication to a public within the meaning of the case-law cited in paragraphs 30 and 31 of the present judgment, since the effect of that technique is to make the posted element available to all the potential users of that website (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 20, 22 and 23).
- 36 On the other hand, it is apparent from the Court’s case-law that, provided that the technical means used by the technique of framing are the same as those previously used to communicate the protected work to the public on the original website, namely the Internet, that communication does not satisfy the condition of being made to a new public and, since that communication accordingly does not fall within the scope of a communication ‘to the public’, within the meaning of Article 3(1) of Directive 2001/29, the authorisation of the copyright holders is not required for such a communication (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 24 to 30).

- 37 However, it must be observed that that case-law was based on the finding of fact that the access to the works concerned on the original website was not subject to any restrictive measure (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 26, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraphs 16 and 18). In the absence of such measures, the Court therefore held that, by making his or her work freely accessible to the public or by authorising the provision of such access, the right holder envisaged from the outset all internet users as the public and accordingly consented to third parties themselves undertaking acts of communication of that work.
- 38 Consequently, in a situation in which an author gives prior, explicit and unqualified authorisation to the publication of his or her articles on the website of a newspaper publisher, without making use of technological measures restricting access to that work from other websites, that author may be regarded, in essence, as having authorised the communication of that work to all internet users (judgment of 16 November 2016, *Souliez and Doke*, C-301/15, EU:C:2016:878, paragraph 36 and the case-law cited).
- 39 On the other hand, in accordance with the requirement that an assessment of the concept of ‘communication to the public’ must be tailored to the individual case, recalled in paragraphs 33 and 34 of the present judgment, the finding of the Court in paragraph 37 of that judgment is not applicable where the right holder has established or imposed from the outset restrictive measures linked to the publication of his or her work.
- 40 In particular, if a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place on 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 obtain access to the work 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 their 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 currently available on that site only to a restricted public, whereas it is accessible on another website without the copyright holders’ authorisation (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 31).
- 41 The main proceedings are precisely concerned with a situation where the copyright holder is seeking to make the grant of a licence subject to the implementation of measures to restrict framing in order to limit access to his or her works from websites other than those of his or her licensees. In such circumstances, that copyright holder cannot be regarded as having consented to third parties being able freely to communicate his or her works to the public.
- 42 Therefore, in accordance with the case-law cited in paragraph 38 of the present judgment, by adopting, or by obliging licensees to employ, technological measures limiting access to his or her works from websites other than that on which he or she has authorised communication to the public of such works, the copyright holder is to be deemed to have expressed his or her intention to attach qualifications to his or her authorisation to communicate those works to the public by means of the Internet, in order to confine the public for those works solely to the users of one particular website.
- 43 Consequently, where the copyright holder has adopted, or obliged licensees to employ, measures to restrict framing so as to limit access to his or her work from websites other than that of his or her licensees, the initial act of making available on the original website and the secondary act of making available, by means of the technique of framing, constitute different communications to the public, and each such act must, consequently, be authorised by the rights holders concerned (see, by analogy, judgment of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraph 49).
- 44 In that regard, 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 for those works, is not a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29. On the contrary, those decisions confirm the importance of such authorisation in the light of that provision, which specifically provides that each act of communication of a work to the public must be authorised by the copyright holder (see, to that effect, judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 43).

- 45 The same findings must be made where a third party communicates to the public protected works that are freely accessible on certain websites with the authorisation of the copyright holder, when that right holder has adopted, or obliged licensees to employ, technological measures limiting access to his or her works from other websites, by means of the technique of framing, in order to confine the public for his or her works solely to the users of the original website.
- 46 It must be made clear that, in order to ensure legal certainty and the smooth functioning of the internet, the copyright holder cannot be allowed to limit his or her consent by means other than effective technological measures, within the meaning of Article 6(1) and (3) of Directive 2001/29 (see, in that regard, judgment of 23 January 2014, *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraphs 24, 25 and 27). In the absence of such measures, it might prove difficult, particularly for individual users, to ascertain whether that right holder intended to oppose the framing of his or her works. To do so might prove even more difficult when that work is subject to sub-licences (see, by analogy, judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 46).
- 47 Further, in such circumstances, as stated by the Advocate General in points 73 and 84 of his Opinion, the public which was taken into consideration by the copyright holder when he or she authorised the communication of his or her work on the website on which that work was initially published consists solely of the users of that site, and not the users of the website on which the work has been subsequently framed without the authorisation of the copyright holder, nor other internet users (see, by analogy, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 35).
- 48 In the light of those factors, it must be held that, in such circumstances, the embedding, by means of the technique of framing, in a third party website page of a work protected by copyright and made freely available to the public with the authorisation of the copyright holder on another website must be classified as an act of ‘making that work available to a new public’.
- 49 Admittedly, it cannot be forgotten that hyperlinks, whether they are used in connection with the technique of framing or not, contribute to the smooth operation of the Internet, which is of particular importance to freedom of expression and information, enshrined in Article 11 of the Charter, as well as to the exchange of opinions and information on the Internet, which is characterised by the availability of incalculable amounts of information (judgment of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 81 and the case-law cited).
- 50 Nonetheless, an approach whereby a copyright holder is to be deemed, even if he or she has introduced measures to restrict the framing of his or her work, to have consented to any act of communication to the public of that work by a third party for the benefit of all internet users would be incompatible with his or her exclusive and inexhaustible right to authorise or prohibit any communication to the public of his or her work, under Article 3(1) and (3) of Directive 2001/29.
- 51 As stated by the Advocate General in points 100 and 101 of his Opinion, a copyright holder cannot be faced with the choice of either tolerating the unauthorised use of his or her work by a third party, or surrendering the use of that work, in some cases by means of a licence agreement.
- 52 Indeed, if it were to be held that the embedding, in a third party website page, by means of the technique of framing, of a work previously communicated on another website with the authorisation of the copyright holder, though that right holder adopted or imposed measures to provide protection

from framing, does not constitute an act of making that work available to a new public, that would amount to creating a rule on exhaustion of the right of communication (see, by analogy, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 32 and 33).

- 53 In addition to the fact that it would be contrary to the wording of Article 3(3) of Directive 2001/29, such a rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work, set out in recital 10 of that directive, even though, as the Court has stated, the specific purpose of intellectual property is, in particular, to ensure for the rights holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an appropriate reward for each use of the protected subject matter (judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 34 and the case-law cited).
- 54 If such embedding, by means of the technique of framing, without the copyright holder's being able to rely on the rights laid down in Article 3(1) of Directive 2001/29, were to be permitted, the consequence would be that the need to safeguard a fair balance, referred to in recitals 3 and 31 of that directive, in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter, as well as the public interest, would be disregarded (see, by analogy, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 41).
- 55 In the light of the foregoing, the answer to the question referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the embedding, by means of the technique of framing, in a third party website page, of works that are protected by copyright and that are freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing, constitutes a communication to the public within the meaning of that provision.

### 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 (Grand 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 the embedding, by means of the technique of framing, in a third party website page, of works that are protected by copyright and that are freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing, constitutes a communication to the public within the meaning of that provision.**

[Signatures]