

JUDGMENT OF THE COURT (Second Chamber)

9 July 2026 (*)

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Concept of ‘communication to the public’ – Article 6(3) – Effective technological measures – Work that is in the public domain in certain Member States and still protected by copyright in another Member State – Publication of that work on a website – Geo-blocking measure designed to prevent access to that website from the Member State in which the work is still protected – Possibility of circumventing that measure by means of a virtual private network (VPN) or similar service)

In Case C-788/24,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 8 November 2024, received at the Court on 14 November 2024, in the proceedings

Anne Frank Fonds

v

Anne Frank Stichting,

Koninklijke Nederlandse Akademie van Wetenschappen,

Vereniging voor Onderzoek en Ontsluiting van Historische Teksten,

THE COURT (Second Chamber),

composed of K. Jürimäe, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, O. Spineanu-Matei (Rapporteur), M. Gavalec and Z. Csehi, Judges,

Advocate General: A. Rantos,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2025,

after considering the observations submitted on behalf of:

- Anne Frank Fonds, by A. Groen and J.A. Visser, advocaten,
- Anne Frank Stichting, Vereniging voor Onderzoek en Ontsluiting van Historische Teksten and Koninklijke Nederlandse Akademie van Wetenschappen, by T. Cohen Jehoram and I.L.N. Timp, advocaten,
- the Portuguese Government, by P. Barros da Costa, M. Martins da Cruz and L. Medeiros, acting as Agents,
- the European Commission, by J. Samnadda and F. van Schaik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2026,
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 Anne Frank Fonds ('the Anne Frank Fund'), on the one hand, and Anne Frank Stichting (Anne Frank Foundation; 'the Foundation'), Koninklijke Nederlandse Akademie van Wetenschappen (Royal Netherlands Academy of Arts and Sciences; 'the Academy') and Vereniging voor Onderzoek en Ontsluiting van Historische Teksten (Association for Research in and Access to Historical Texts; 'the Association'), on the other, concerning an alleged infringement, in the Netherlands, of the copyright held by the Anne Frank Fund, as a result of the publication on a website, on the initiative of the Foundation, the Academy and the Association, of digitised versions of *The Diary of Anne Frank*.

Legal context

Directive 2001/29

- 3 Recitals 3, 4, 9, 10, 23, 27, 31 and 47 of Directive 2001/29 state:
 - '(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.
 - (4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.
- ...
- (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.

...

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter, must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. 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 transborder 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.

...

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.'

4 Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides, in paragraph 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.'

5 Article 6 of that directive, entitled '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 rightholder 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 rightholders 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.

...’

Netherlands law

- 6 Article 1 of the Auteurswet (Law on copyright) of 23 September 1912 (Stb. 1912, No 308), in the version applicable to the dispute in the main proceedings (‘the Law on copyright’), provides:

‘Copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his or her successors in title, to make the work public and to reproduce it, subject to the limitations laid down by law.’

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

- 7 Anne Frank was a young German-Jewish teenager who lived in the Netherlands and whose personal diary (*The Diary of Anne Frank*), which she kept between 1942 and 1944, bears witness to the Shoah. After her death in a concentration camp, her father, Otto Frank, the family’s sole survivor, published his daughter’s writings in 1947 and, in 1963, established the Anne Frank Fund, an organisation that aims to play a social and cultural role in the spirit of Anne Frank. The purpose of the Foundation, which was established in 1957, is, inter alia, to maintain the Anne Frank House in Amsterdam (Netherlands) and to spread the ideals bequeathed to the world in *The Diary of Anne Frank*.
- 8 Since Otto Frank’s death, the Anne Frank Fund has become the rightholder of the copyright in the works of Anne Frank. A part of those works is, as is clear from a final judgment of the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) of 23 December 2015, protected in the Netherlands until 2037 under transitional provisions laid down by the Law on copyright. In other Member States, including the Kingdom of Belgium, those works are now in the public domain.
- 9 At the end of September 2021, a scholarly edition of Anne Frank’s manuscripts was published, in Dutch, free of charge on the website www.annefrankmanuscripten.org, the domain name of which is owned by the Association (‘the website’), which is registered in Belgium. Access to that site is restricted by a ‘geo-blocking’ system which prevents the website from being accessed if the user attempts to connect to it from a Member State in which the manuscripts are still protected by copyright.
- 10 When an attempt is made to access the website from within the Netherlands, the following message is displayed:
- ‘Access denied
- ...
- We’re sorry ...
- Unfortunately, this site is not available in your country.
 - The scholarly edition of the Anne Frank manuscripts cannot be made available in all countries, due to copyright considerations.
- ...’

- 11 When an attempt is made to access the website from a Member State in which those works are in the public domain, the following message is displayed:

‘Access check ...

The scholarly edition of the Anne Frank manuscripts is not available in all countries, due to copyright restrictions. This edition can be accessed only from the following public domain countries: [List of countries].

By clicking “Yes” below you state and declare that you are accessing this website from one of the abovementioned public domain countries. If this statement is false, you are circumventing protection measures, which could mean that you are infringing copyrights, for which you will then be liable.’

- 12 A green box and a red box are displayed below that message. The user is invited to click on one of them. The text in the green box reads: ‘YES I am accessing the website from one of the public domain countries listed above’. The text in the red box reads: ‘NO I am accessing the website from another country’.
- 13 In November 2021, the Anne Frank Fund sent a letter of formal notice to the Foundation, the Academy and the Association, requiring them, inter alia, to stop displaying the Anne Frank manuscripts on the website in breach of its copyright, particularly its exclusive right under Article 1 of the Law on copyright to make those works public in the Netherlands.
- 14 Since that notice did not have the desired effect, the Anne Frank Fund brought an action before the Netherlands courts together with an application for interim relief, claiming, in connection with that application, that the Foundation, the Academy and the Association should immediately and in future desist from infringing its copyright. Having had its claims dismissed both at first instance and on appeal in the proceedings for interim relief, on the ground that the Foundation, the Academy and the Association had made reasonable efforts to prevent or discourage access to the website from the Netherlands, the Anne Frank Fund brought an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which is the referring court. The Anne Frank Fund disputes, in particular, the assessment of the lower courts that there was no ‘communication to the public’ of the Anne Frank manuscripts in the Netherlands, within the meaning of Article 3(1) of Directive 2001/29, as transposed into Netherlands law.
- 15 The referring court is uncertain whether, as Advocate General Szpunar had indicated in his Opinion in *Grand Production* (C-423/21, EU:C:2022:818) – a case in which the Court of Justice did not have an opportunity to deliver a ruling because the underlying request for a preliminary ruling was withdrawn – the circle of recipients of a communication to the public that is made on a website must be determined on the basis of the intention of the entity making that communication. That intention could be inferred from technological measures which that entity has put in place to restrict or control access to its content.
- 16 Furthermore, according to the referring court, if the mere possibility, for the public of a particular Member State, of circumventing a geo-blocking measure on a website were sufficient for a communication to the public to be characterised as one which is not authorised by the copyright holder, it would be practically impossible for a work to be published on the internet for so long as that work remained protected by copyright in at least one Member State and the copyright holder objected to any dissemination online in the territory of that Member State. On the other hand, the referring court accepts that the opposite approach would be liable to have the effect of depriving the copyright holder of the opportunity to fully assert his or her rights in the Member State in which the work still enjoys copyright protection.
- 17 In that context, the referring court is uncertain, first of all, as to the factors to be taken into consideration in determining whether the publication, on a website, of a work that is protected by copyright only in certain Member States is directed at a particular public. The referring court considers that it would be necessary in that respect to ascertain whether the person who published the work took all technological measures that were reasonably conceivable and feasible to prevent the public not targeted by its communication from

becoming aware of it, that is to say, internet users located in the Member States in which the work is still protected.

- 18 The referring court then asks whether, where there is a geo-blocking measure in place, such as that at issue in the main proceedings, it is important to determine the extent to which the public in the Member State covered by that measure is willing and able to circumvent it by means of a virtual private network (VPN) or similar service.
- 19 Lastly, should it be found that the possibility of circumventing such a measure by means of a VPN or similar service entails a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, in the Member State in which access to the work is supposed to have been blocked, the referring court queries whether that communication is attributable to the person who published the work on the internet or to the provider of the VPN or similar service.
- 20 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the publication of a work on the internet is only to be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors must be considered in assessing that?
- (2) Can there be a communication to the public in a particular country if, by means of (state-of-the-art) geo-blocking, it is ensured that the website on which the work is published can only be accessed by the public in that country by circumventing the blocking measure using a VPN or similar service? Is the extent to which the public in the blocked country is willing and able to access the website in question via such a service of relevance in that respect? In answering this question, does it make any difference whether, in addition to the measure of geo-blocking, other measures were taken to impede or discourage public access to the website in the blocked country?
- (3) If the possibility of circumventing the blocking measure entails the communication of the work published on the internet to the public in the blocked country within the meaning of Article 3(1) of [Directive 2001/29], is that communication made by the party who published the work on the internet, even though knowledge of that communication requires the intervention of the provider of the VPN or similar service in question?’

Consideration of the questions referred

The first and second questions

- 21 As a preliminary point, it must be noted that the first and second questions are raised in the context of a website on which a work that is in the public domain in certain Member States, but is still protected by copyright in the Kingdom of the Netherlands, may be consulted free of charge. Internet users wishing to visit that site from the Netherlands are unable to access it because of geo-blocking, unless they circumvent the geo-blocking measure by means of a VPN or similar service.
- 22 In that context, the referring court seeks to ascertain whether, as a result of its publication on a website, the work that is protected in the Netherlands may be regarded as having been the subject, in the Netherlands, of a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29. If so, that would mean that that communication would have been made without the authorisation of the copyright holder, and therefore that that copyright would have been infringed in the Netherlands. The doubts of the referring court are largely focused on whether a geo-blocking measure is sufficient to support a finding that the public at which that site is directed is limited solely to internet users not affected by that measure or

whether in fact the possibility of circumventing the measure is a factor that should be taken into account for the purpose of assessing whether there is a communication to the public in the Netherlands.

- 23 In those circumstances, it must be stated that, by its first and second 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 a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, and which is published free of charge on a website that incorporates a geo-blocking measure designed to ensure that access to that site is blocked for internet users visiting it from that other Member State, is the subject of a ‘communication to the public’ in that Member State, within the meaning of that provision, when those internet users can circumvent that geo-blocking measure using a VPN or similar service.
- 24 In that regard, it must be recalled that, under Article 3(1) of Directive 2001/29, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
- 25 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, as 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. Indeed, it is clear from recitals 4, 9 and 10 of that directive that the principal objective of the 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 (judgments of 9 March 2021, *VG Bild-Kunst*, C-392/19, EU:C:2021:181, paragraphs 26 and 27, and of 20 June 2024, *GEMA*, C-135/23, EU:C:2024:526, paragraph 19 and the case-law cited).
- 26 It should also be noted that it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on the one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, on the other, the protection both of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the public interest. Accordingly, for the purposes of the interpretation and application of Directive 2001/29, and in particular Article 3(1) thereof, that fair balance must be sought taking into account also the particular importance of the internet to freedom of expression and of information, as safeguarded by Article 11 of the Charter (see, to that effect, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 31 and 45, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraphs 64 and 65).
- 27 As the Court has repeatedly held, 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, and requires an individual assessment (see, to that effect, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 33, and of 20 June 2024, *GEMA*, C-135/23, EU:C:2024:526, paragraph 21 and the case-law cited).
- 28 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 79, and of 20 June 2024, *GEMA*, C-135/23, EU:C:2024:526, paragraph 22 and the case-law cited).
- 29 As regards, first, the concept of ‘act of communication’, the Court has stated that, given the intention of the EU legislature to guarantee a high level of protection for copyright holders, as is apparent from recitals 4 and 9 of Directive 2001/29, that concept must be understood broadly as covering any

transmission or making available of a protected work to a public, irrespective of the technical means or processes used, so that the persons making up that public may access it from a place and at a time individually chosen by them, irrespective of whether or not they avail themselves of that opportunity (see, to that effect, judgments of 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraph 16, and of 20 June 2024, *GEMA*, C-135/23, EU:C:2024:526, paragraph 23 and the case-law cited).

- 30 In particular, the Court has emphasised the indispensable role played by the person undertaking such an act and the deliberate nature of that person's intervention. Thus, that person undertakes an 'act of communication' when he or she intervenes, in full knowledge of the consequences of his or her action, to give other persons access to a protected work, particularly where, in the absence of that intervention, those other persons would not, in principle, be able to enjoy the transmitted work (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 42, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 68 and the case-law cited).
- 31 In the present case, it is apparent from paragraphs 8 and 9 of the present judgment that the Association wished to make a new scholarly online edition of the manuscripts of Anne Frank accessible to the internet users concerned, and to bring it to their attention, via the website. In the Netherlands, those works are still partially covered by the copyright held by the Anne Frank Fund until 2037, whereas in other Member States, including the Kingdom of Belgium, those works are no longer protected by copyright and are now in the public domain there.
- 32 With regard, secondly, to the second of the abovementioned elements, that is, that the protected work must actually be communicated to a 'public', the Court has made clear that the concept of 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (see, to that effect, judgments of 2 June 2005, *Mediakabel*, C-89/04, EU:C:2005:348, paragraph 30; of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraphs 37 and 38; and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 69 and the case-law cited).
- 33 The Court has also stated that, according to settled case-law, in order to be categorised as a 'communication to the public', a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holder when it authorised the initial communication of its work to the public (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 70 and the case-law cited).
- 34 It is apparent from the information provided by the referring court that, in the light of the case-law cited in paragraphs 28 to 33 of the present judgment, the work at issue in the main proceedings was made available by a technical process different from those previously used, that is to say, publication of the work on a website, to an indeterminate number of persons not present at the place where the communication originated, that is to say, internet users.
- 35 However, it is important to determine whether, where such a site – which was created without the copyright holder's authorisation by a third party established in a Member State in which the protected work is in the public domain – is subject to a geo-blocking measure to prevent it from being accessed from Member States in which the work is still protected by copyright, access to it may be considered to have been given to internet users who are in those Member States. It is only if that is indeed the case that a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, should be considered to have been made in those Member States.
- 36 In that regard, it must be recalled that under Article 6(1) of Directive 2001/29, Member States are obliged to provide adequate legal protection against the circumvention of any effective 'technological measures'. Article 6(3) of Directive 2001/29, read in the light of recital 47 thereof, provides, in essence, that copyright holders may make use of technological measures, that is to say, technologies, devices or components that, in the normal course of their operation, are designed to prevent or restrict acts which they have not authorised, such as the acts of communication or making available of a protected work to a public referred

to in Article 3(1) of that directive (see, to that effect, judgment of 23 January 2014, *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraph 24).

- 37 In the context of the internet, the Court has 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 what are described as ‘effective’ technological measures within the meaning of Article 6(3) of Directive 2001/29 (see, to that effect, judgments of 23 January 2014, *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraphs 25 and 28, and of 9 March 2021, *VG Bild-Kunst*, C-392/19, EU:C:2021:181, paragraph 46).
- 38 The Court has consequently ruled that, where the copyright holder has already published the protected work on a website which is not subject to any technological measure intended to restrict access to that work from other websites, the public to which access to that work is subsequently given by a third party on a website without the copyright holder’s authorisation comprises all internet users. By virtue of that initial communication, characterised by the absence of such technological measures, that rightholder must be considered to have had the intention from the outset of giving access to his or her work to all internet users and accordingly consented to third parties themselves undertaking acts of communication of that work (see, to that effect, judgment of 9 March 2021, *VG Bild-Kunst*, C-392/19, EU:C:2021:181, paragraphs 37 and 38).
- 39 By contrast, in a situation in which the copyright holder made use of effective technological measures aimed at limiting access to the copyright holder’s work from websites other than that on which the copyright holder authorised communication of that work to the public, the Court ruled that the copyright holder is thereby expressing his or her intention to confine the circle of persons to whom that work is to be accessible on the internet solely to the users of one website in particular (see, to that effect, judgment of 9 March 2021, *VG Bild-Kunst*, C-392/19, EU:C:2021:181, paragraphs 42, 43 and 45 to 47).
- 40 Thus, it follows from the considerations set out in paragraphs 36 to 39 of the present judgment that the existence of effective technological measures adopted or imposed by the copyright holder in the context of an act of communication of a work on the internet reflects the copyright holder’s intention to give access to the protected work only to a particular circle of internet users, not to all internet users.
- 41 As the Advocate General stated, in essence, in points 29, 30 and 33 of his Opinion, the Court’s case-law on this point may be applied by analogy in a situation such as that at issue in the main proceedings.
- 42 Indeed, where a work is protected by copyright in only one Member State but is in the public domain in other Member States, any person who knows or ought reasonably to have known that to be the case (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 49) and who publishes the work on a website must ensure that that work is made accessible only to internet users who are liable to access that website from Member States in which the work is in the public domain, so as not to infringe the exclusive and inexhaustible right of the copyright holder to authorise or prohibit, in the Member State in which the work is still protected, any communication to the public of that work, under Article 3(1) and (3) of Directive 2001/29 (see, to that effect, judgment of 9 March 2021, *VG Bild-Kunst*, C-392/19, EU:C:2021:181, paragraph 50). It follows that such a person is under an obligation to adopt effective technological measures to restrict access to the website solely to those internet users, failing which, given the freely accessible nature of websites, that person would be giving access to the work concerned to all internet users and would thus be infringing that right.
- 43 Consequently, it must be held that a person who publishes, free of charge, on a website a work that is still protected by copyright in one Member State, but is in the public domain in other Member States, is expressing his or her intention to make the work accessible only to those internet users who are liable to access that website from those other Member States when he or she introduces effective technological measures that enable access to that website to be restricted to those internet users, to the exclusion of those who might attempt to access the website from the Member State in which the work is still protected.

- 44 In the present case, it is common ground that a geo-blocking measure such as that at issue in the main proceedings is a ‘technological measure’, within the meaning of Article 6(3) of Directive 2001/29, in so far as it is a process that is aimed at enabling or preventing access to the work published on the website depending on the geographical location of the user in the light of the Internet Protocol address (‘IP address’) which he or she uses to connect to the website.
- 45 As to whether such a geo-blocking measure constitutes an ‘effective’ technological measure, within the meaning of Article 6(3) of Directive 2001/29, it must be recalled that that provision adopts a broad definition of that term by including the 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. Such a definition, moreover, complies with the principal objective of Directive 2001/29 which, as is apparent from recital 9 thereof, is to establish a high level of protection in favour, in particular, of authors, which is crucial to intellectual creation (judgment of 23 January 2014, *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraphs 25 and 27).
- 46 The Court has made clear in that regard that the effectiveness of a technological measure does not have to be absolute, but must be assessed, in accordance with the principle of proportionality, in the light of the objective of preventing or eliminating acts not authorised by the copyright holder, which thus involves, inter alia, verifying that the measure concerned is suitable for achieving that objective and does not go beyond what is necessary for that purpose, and seeking, as indicated in paragraph 26 of the present judgment, a fair balance between the protection of intellectual property rights and the protection of other fundamental rights such as freedom of expression or of information. In particular, it is necessary to examine whether technological measures other than the measure that was implemented could have caused less interference with the activities of third parties not requiring authorisation by the copyright holder or fewer limitations to those activities, while still providing comparable protection of the copyright holder’s rights. Account must also be taken, by way of a comparison, of the costs and the technological and practical implementation of the different types of technological measure available (see, to that effect, judgment of 23 January 2014, *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraphs 31 to 33).
- 47 Furthermore, the effectiveness of a technological measure must be assessed, as is apparent from recital 47 of Directive 2001/29, in the light of technological development and the possibilities of circumventing the technological measure concerned as well as, as the Advocate General noted in point 27 of his Opinion, the territorial nature of copyright.
- 48 It will be for the referring court to ascertain, in the light of those criteria, whether the geo-blocking measure at issue in the main proceedings constitutes an ‘effective’ technological measure within the meaning of Article 6(3) of Directive 2001/29. In that regard, the Court, when giving a preliminary ruling on a reference, may give clarification to guide the national court in its decision (judgment of 12 March 2026, *Winderwill*, C-516/24, EU:C:2026:185, paragraph 42 and the case-law cited).
- 49 In a situation such as that at issue in the main proceedings, a geo-blocking measure would seem to be effective as long as it is ‘state of the art’ and appears suitable for achieving the objective of preventing acts which are not authorised by the copyright holder, since the effect of it is, in principle, to block access, in those Member States in which the work is still protected by copyright, to the website on which that work is published free of charge.
- 50 In addition, such a measure serves to ensure a fair balance between, on the one hand, the interest of the rightholder in his or her work not being freely accessible in the Member States in which he or she still has an exclusive and inexhaustible right to authorise or prohibit any communication of the work to the public under Article 3(1) and (3) of Directive 2001/29 and, on the other hand, the interest of any third party in making the work freely accessible online free of charge in the Member States in which the work is in the public domain as well as the public’s interest in enjoying such access in those Member States, in accordance with both the freedom of expression and the freedom of information.

- 51 While it is true that geo-blocking measures, including state-of-the-art measures, can, like any technological measure, be circumvented, particularly through the use of a VPN or similar service, the possibility of such circumvention cannot, in itself and in all circumstances, be a decisive factor in finding those measures to be inadequate and, therefore, ineffective.
- 52 In particular, in a situation such as that at issue in the main proceedings, to take the view that, because it could be circumvented, a geo-blocking measure that is ‘state of the art’ is not ‘effective’ within the meaning of Article 6(3) of Directive 2001/29 would, as the Advocate General stated in essence in points 27 and 32 of his Opinion, effectively call into question the fair balance referred to in paragraph 50 of the present judgment to such an extent as to significantly impair free access, free of charge, to the work concerned in those Member States in which it is in the public domain, while at the same time giving that copyright excessive territorial scope, when the holder of that copyright does not have the right to authorise or prohibit the communication of his or her work to the public in those Member States.
- 53 Moreover, as the Advocate General noted in essence in point 41 of his Opinion, the fact that other technological measures are likely to take greater account of the copyright holder’s interest, such as measures giving access similar to that of library computer terminals, subscription or login protected by a username and password, does not mean that a geo-blocking measure such as that at issue in the main proceedings must be regarded as ineffective, since the application of those other measures would be likely disproportionately to undermine the fair balance referred to in paragraph 50 of the present judgment by depriving the public in the Member States in which the work is in the public domain of free access to the work, free of charge.
- 54 As to the fact that, in the present case, the Association also installed on its website an alert system which, when an attempt to access the site is made from a Member State in which the work at issue in the main proceedings is in the public domain, calls for a declaration by the user that he or she acknowledges that he or she is accessing the website from one of those Member States, it must be noted that that technological measure, which makes access to the site conditional on the answer given in the declaration, cannot be described as ‘effective’ in so far as it ultimately depends entirely on the internet user’s willingness or unwillingness to complete the declaration in question honestly.
- 55 It follows that a geo-blocking measure such as that which the Association put in place on the website is ‘effective’, within the meaning of Article 6(3) of Directive 2001/29, in so far as it is ‘state of the art’, which it is for the referring court to ascertain. In that scenario, the Association would have to be considered to have expressed its intention to prevent internet users located in the Member States in which the work is still protected by copyright from accessing that website from the place and at a time chosen by them, so that those internet users would not be part of the public affected by the act of communication. In those circumstances, a ‘communication to the public’, within the meaning of Article 3(1) of that directive, cannot be considered to have been made in those Member States by means of that site.
- 56 For the above reasons, the answer to the first and second questions is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, and which is published free of charge on a website that incorporates a geo-blocking measure designed to ensure that access to that site is blocked for internet users visiting it from that other Member State, is not the subject of a ‘communication to the public’ in that Member State, within the meaning of that provision, where that geo-blocking measure is ‘effective’ within the meaning of Article 6(3) of that directive, in that it is ‘state of the art’, even if those internet users can circumvent it using a VPN or similar service.

The third question

- 57 As a preliminary point, it must be noted that, by its third question, the referring court assumes a scenario in which the publication on a website of a work such as that at issue in the main proceedings qualifies as a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, because of the possibility of circumvention of the geo-blocking measure put in place on that site. In that context, it raises

the question as to who may be regarded as being responsible for that communication: the person who disseminated the work on the internet or the person who facilitated access to it by offering a service enabling that measure to be circumvented?

- 58 It is, however, apparent from the answer to the first and second questions that, in a situation such as that at issue in the main proceedings, the categorisation of such publication as a ‘communication to the public’ largely depends on the ineffectiveness of the technological measure put in place on the website concerned, and not as such and in all circumstances, as is apparent from paragraph 51 of the present judgment, on the possibility of that measure being circumvented. Indeed, while it is true that a technological measure may be ineffective as a result of the fact that there are means of circumventing it, such a measure may, despite the risk of circumvention, be characterised as ‘effective’ if that risk is counterbalanced by other factors, as is apparent in essence from paragraphs 48 to 53 of the present judgment.
- 59 Moreover, a reply to the third question is still called for since, in view of the answer given to the first and second questions, it will ultimately be for the referring court to determine whether the geo-blocking measure at issue in the main proceedings is ‘effective’, within the meaning of Article 6(3) of Directive 2001/29.
- 60 In those circumstances, it must be stated that, by its third question, the referring court asks, in essence, whether Article 3(1) of that directive must be interpreted as meaning that where the publication, on a website, of a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, constitutes a ‘communication to the public’ in the latter Member State because the geo-blocking measure put in place on that site is not ‘effective’ within the meaning of Article 6(3) of that directive, that communication is attributable to the person who published the work on that site or to the provider of the VPN or similar service who enabled its user to circumvent that ineffective measure.
- 61 In that regard, and in view of the considerations set out in paragraph 42 of the present judgment, it must be observed that, where the person who published the work did not put in place effective technological measures, within the meaning of Article 6(3) of Directive 2001/29, the relevant communication to the public, and the resulting lack of protection, is attributable to that person.
- 62 By contrast, the provider of a VPN or similar services that are used in order to circumvent an ineffective geo-blocking measure and are lawful technical tools which users may legitimately use cannot be regarded as also having communicated the work to the public.
- 63 Indeed, the Court has previously held that such a provider does not give end users access to a protected work and that even if the provider is aware of the consequence that its service may be used to access protected works without the consent of their authors, the provider is not itself intervening for the purposes of such access, so that it does not play an ‘indispensable role’ within the meaning of the case-law recalled in paragraph 30 of the present judgment. Consequently, it cannot be held, in accordance with what is, moreover, apparent from recital 27 of that directive, that merely because a provider makes a service available that is intended to enable or make a communication to a public, within the meaning of Article 3(1) of the directive, that provider is undertaking an act of communication (see, by analogy, judgments of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraphs 78 and 79, and of 13 July 2023, *Ocilion IPTV Technologies*, C-426/21, EU:C:2023:564, paragraphs 60 and 62 to 65).
- 64 For the foregoing reasons, the answer to the third question is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that where the publication, on a website, of a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, constitutes a ‘communication to the public’ in the latter Member State because the geo-blocking measure put in place on that site is not ‘effective’ within the meaning of Article 6(3) of that directive, that communication is attributable to the person who published the work on that site and not to the provider of the VPN or similar service who enabled its user to circumvent that ineffective measure.

Costs

- 65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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 a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, and which is published free of charge on a website that incorporates a geo-blocking measure designed to ensure that access to that site is blocked for internet users visiting it from that other Member State, is not the subject of a ‘communication to the public’ in that Member State, within the meaning of that provision, where that geo-blocking measure is ‘effective’ within the meaning of Article 6(3) of that directive, in that it is ‘state of the art’, even if those internet users can circumvent it using a virtual private network (VPN) or similar service.

2. **Article 3(1) of Directive 2001/29**

must be interpreted as meaning that where the publication, on a website, of a work which is in the public domain in certain Member States, but is still protected by copyright in another Member State, constitutes a ‘communication to the public’ in the latter Member State because the geo-blocking measure put in place on that site is not ‘effective’ within the meaning of Article 6(3) of that directive, that communication is attributable to the person who published the work on that site and not to the provider of the virtual private network (VPN) or similar service who enabled its user to circumvent that ineffective measure.

[Signatures]

* Language of the case: Dutch.