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The Relevance of Prior Knowledge on the Existence of Copyright in Balancing Freedom of Expression and Copyright Integrity in *Renckoff* (C-161/17)

1 Introduction

The issue had been provoked by the judgment of the Court of the EU (hereinafter: the ECJ or the Court) in the case *Land Nordrhein-Westfalen v. Dirk Renckoff* of 7 August 2018.[1] The case includes three fundamental rights: the right to property, the right to education and the freedom of expression. They all are expressed in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter: the InfoSoc Directive).[2] The specific expressions of the right to intellectual property are formulated in Arts. 2, 3 and 4. The right to education and the freedom of expression have been taken into account in the exemptions and limitations as laid down in Art. 5. This text investigates only a border line between the copyright and the freedom of expression as it is drawn in the judgment.

The border line between copyright and the freedom of expression has been established by the interpretation of the right of communication of the work to the public as it is laid down in Art. 3 (1) of the InfoSoc Directive. The interpretation of Advocate General Campos Sánchez-Bordona and the interpretation of the ECJ differ and consequently the proposed border line by the Advocate General and the border line established by the Court are different. The different approaches in respect to relevance of prior knowledge on the existence of copyright in the work are of essential importance for the subject-matter of this text. They might be demonstrated in a question as to whether the protection of the copyright in the work placed on the internet should be conditioned by information on the copyright on a web portal, or whether there should be a presumption of the existence of copyright in any work posted on a web portal? Different replies to these questions move the border line in favour of the copyright or in favour of freedom of expression and information. It should be beyond doubt that freedom of expression covers the transfer of the work from the website where it was originally posted to a new website. The text argues that information coming from the context of Art. 3 (1) locates the border on the line proposed by the Advocate General. The text is limited only to this issue, to the issue of possible different interpretation and does not consider the relationship between the copyright and the freedom of expression in general.[3]

The shortest summary of facts is as follows. A pupil found a photograph of the Spanish city

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1 Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckoff* , judgment of 7 August 2018

2 OJ L 167/10, 2001

3 See an analysis of the relationship between copyright and the freedom of information in general: S. van Deursen and T. Snijders, "The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework", *International Review of Intellectual Property and Competition Law*, 49(9), 2018, 1080 – 1098.

Cordoba on an internet portal of a travel magazine. It is a panoramic image of the city. She inserted the photo in a school project and indicated the travel magazine portal as a source.[4] The name of the photographer and the copyright in the photo was not specified in the travel portal.[5] There were no restrictive measures preventing the downloading of the photo. The school project was a Spanish language work and the image was inserted in the project only as an illustration. With the assistance of a teacher, the project containing the inserted photo was then posted on the school website.

The author of the photograph, a professional photographer initiated a judicial proceeding and claimed removal of the image from the school portal and damages, alleging that the image had been posted on the school website without his consent and asserted that was a violation of his copyright. The national court of the first instance ordered the Land of North Rhine-Westphalia, which was liable for the acts of the school, to remove the photo from the school website and to pay 300 euros.[6] The national court of the second instance confirmed that the reproduction right and the right to make available the work to the public had been infringed. That court found that the absence of any restriction of access to the photo in the original website was irrelevant since the installation of the photo on the new website resulted in a disconnection with the original installation.[7]

Acting under an appeal on the legal issues, the national court of the final instance, the Federal Supreme Court considered that an interpretation of the terms "communication to the public" in Art. 3 (1) of the InfoSoc Directive was of decisive importance for the settlement of the case and asked the ECJ to clarify the meaning of the clause. The German Supreme Court raised the following question: "Does the inclusion of a work — which is freely accessible to all internet users on a third-party website with the consent of the copyright holder — on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Art. 3(1) of Directive 2001/29/EC if the work is first copied onto a server and is uploaded from there to that person's own website?"[8] The positive answer implies an illegality of the posting of the photo on the school portal since making available the work to the public is an exclusive right of the author. It means an infringement of the right of the author and a liability of the Land of North Rhine-Westphalia.

The Advocate General proposed a negative reply to the question, but the ECJ answered in a positive way. The two different responses are outcome of different interpretations. The interpretations differ in two main questions: whether uploading the photo on the school website constitutes an act of the communication to the public, and whether the act can be justified by the exception related to education. The essence of the different interpretations which is relevant for the subject-matter of this text, is a different assessment of the consequences of the fact that any information on the copyright was absent.

The proposed reply of the Advocate General leaves greater space for the freedom of expression. Contrary, the Court's answer restricts that freedom in favor of the copyright. The legal framework,

4 *Renckoff*, para. 7.
5 The Advocate General informs that the photographer's representative stated at the hearing that the "impressum" for the online travel magazine contained a copyright information but that the facts of the order for reference do not include such information. Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckoff*, Opinion of the Advocate General of 25 April 2018, note 13. He gave the Opinion under the assumption of the absence of the copyright notice in the online travel magazine. This text was written under the same assumption.
6 *Renkoff*, paras. 8 and 9.
7 *Ibid*., para 10.
8 *Ibid*., para 12.

the different views of interested parties and the different interpretations will be presented. A new interpretative possibility will be explored.

2 The InfoSoc Directive

The legal framework will be presented as was shaped by the Advocate General and the ECJ. It consists of the InfoSoc Directive, relevant case law and the Charter of Fundamental Rights of the EU. The Advocate General also considered international treaties and literature.

The InfoSoc Directive has harmonized the national provisions on copyright and related rights in the framework of the 1996 WIPO Copyright Treaty (hereinafter: the WCT). Preambular recitals 2 and 3 refer to the development of the information society in Europe, the four freedoms of the internal market and "compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest." The fourth recital distinguishes the increased legal certainty and the high level of protection of intellectual property as a means of fostering investment in creativity and thus the competitiveness of European industry. Recital 9 explains that the high level of protection provides the development of creativity in the interest of authors, consumers, culture, industry and the public at large. "Permitting exceptions or limitations in the public interest for the purpose of education and teaching," as that is stated in recital 14, the InfoSoc Directive intends to advance learning and culture but by protecting the copyright. Recital 15 refers to the WCT and the 1996 WIPO Performances and Phonograms Treaty and explains their importance in fighting piracy worldwide. The InfoSoc Directive implements several new international obligations. Recital 23 attributes a broad meaning to the author's right of communication to the public that is "covering all communication to the public not present at the place where the communication originates". A safeguard of the fair balance of rights and interests of the rightholders and users is announced in Recital 31.

The referring court asked the interpretation of Art. 3 (1) of the Directive which states: "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." The quoted paragraph transmits the content of Art. 8 of the WCT to EU law. The second paragraph guarantees the related rights to performers, phonograph producers, film producers and broadcasting services. It implements relevant obligations established by the WIPO Performances and Phonograms Treaty. The third paragraph states that any act of communication or making the work available to the public does not exhaust the mentioned rights.

Art. 5 (3) (a) entitles the Member States to provide for exceptions to the right "for the sole purpose of illustration for teaching … as long as the source, including the author's name, is indicated, unless this turns to be impossible and to the extent justified by the non-commercial purpose to be achieved". Art. 7 elaborates on the obligations concerning the rights-management information. Para. 2 defines the rights-management information as an information provided by the rightholder which identifies the work, the author and inter alia the terms and conditions for use of the work. Para. 1 (a) obliges the Member States to secure a legal protection against any person who removes or alter any electronic rights-management information. Para. 1 (b) requires the same inter alia in regard to "communication or making available to the public of works… from which electronic rights-management information has been removed". The legal protection has to be provided under the three conditions. A person should know that an electronic rights-management

information has been removed or altered, the communication of the work to the public has been performed without authority and a person should know, or should have reasonable grounds to know, that by the prescribed act he induces, enables, facilitates or conceals an infringement of any copyright.

3 The Charter of Fundamental Rights of the EU

Art. 11 of the Charter of Fundamental Rights of the EU[9]guarantees freedom of expression and information. It includes "freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers". The official Explanations Relating to the Charter of Fundamental Rights[10] states that Art. 11 of the Charter corresponds to Art. 10 of the European Convention on Human Rights. Art. 52 (3) of the Charter secures that the meaning and scope of the right guaranteed by the Charter is the same as the right protected by the Convention. It is well known that the European Court of Human Rights considers that freedom of expression and information is the freedom of key importance in a democratic society. It states: "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[11]

The right to education is protected by Art. 14 of the Charter. Early in 1968, the European Court of Human Rights had observed that the right to education necessitates regulation by the States "which may vary in time and place according to the needs and resources of the community and of individuals."[12] The building of the information society certainly influences the means and content of education.

Art. 17 of the Charter protects the right to property including intellectual property. It formulates the property entitlements and conditions of the expropriation. Further, it states: "The use of property may be regulated by law in so far as is necessary for the general interest." Art. 52 (3) of the Charter equalizes the meaning and scope of the right with the right to property guaranteed by the European Convention of Human Rights. Having in view the growing importance of intellectual property, this type of property is explicitly mentioned.

4 Case law

The presentation of case law is limited to the cases referred to in the opinion and in the judgment. The *Painer* case[13] informs about conditions under which realistic photographs enjoy the copyright protection and on the content of the protection. The photograph must be "an intellectual creation of the author reflecting his personality and expressing his free and creative choices…"[14] The scope and content of the protection of the photograph is not smaller than that enjoyed by other

9 OJ C 326/02, 2012

10 OJ C 303/17, 2007

11 *Steel and Morris v. the United Kingdom* (app. no. 68416/01) judgment 15 February 2005), para. 87; *Stoll v. Switzerland* (app. no. 69698/01) judgment of 10 December 2007, para.101; *Mouvement raëlien suisse v. Switzerland* (app. no. 16354/06) judgment of 13 July 2012, para. 48; *Animal Defenders International v. the United Kingdom* (app. no. 48876/08) judgment of 22 April 2013, para. 100.

12 *The Belgian Linguistic case* (app. no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) judgment of 23 July 1968, p. 28.

13 Case C145/10 *Painer*, judgment of 1 December 2011.

14 *Ibid*., para. 94.

works.[15]

The *Svensson and Others* case[16] explains that the public of a new website, which has made available the work posted on an original website via a clickable link, does not constitute a new public.[17] If the access to the work on the original website is not subject to any restriction, all internet users can have free access to it and thus they constitute "the public targeted by the initial communication".[18] The fact that the appearance of the work on a new site by a click on the link leaves an impression that the work is a component of the new site is not meritorious.[19] The finding is changed only in the case where the clickable link enables users of the new site to circumvent restrictions of access to the work on the original site. In such a case all such users constitute the new public, since they were not taken into account by the copyright holders.[20]

The nature of the right of communication of the work to the public under Art. 3 (1) of the InfoSoc Directive was determined in the *Reha Training* case.[21] The right is of the preventive nature. It means that the right includes an entitlement of the author to prohibit further use of the work by discontinuing the communication of the work to possible users.[22]

The *GS Media* case[23] relates to the connection of two websites via a hyperlink in the circumstances of an illegal posting of the photo on the original website. The ECJ found the relevance of the fact whether a person who had installed the hyperlink, without intention to gain profit, knew or had reasonable grounds to know that the photo had been posted on the original portal without the consent of the author. It might be difficult, the Court observed, for a person who installs the hyperlink to ascertain whether the work posted on the original website is protected and posted with consent of the author.[24] The ECJ noted that "the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Art. 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterized by the availability of immense amounts of information".[25]

The *Soulier and Doke* case[26] broadly alleges that "any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work,"[27] and then the case balances the broadness of the statement by observation that prior consent can be expressed implicitly.[28] The ECJ held that "prior, explicit and unreserved authorization" of an author given for the publication of his articles on the website of a newspaper publisher "without making use of technological measure restricting access to those works from other websites" means the authorization for the communication of these works to the general internet public.[29] The implied prior consent can be presumed only if an author is "informed of the future use of his work by a third

15 *Ibid*., para. 98.
16 Case C466/12, *Svensson and Others*, judgment of 13 February 2014.
17 *Ibid*., para. 25.
18 *Ibid*., para. 26.
19 *Ibid*., para. 29.
20 *Ibid*., para. 31.
21 Case C117/15 *Reha Training*, judgment of 13 May 2016.
22 *Ibid*., para. 30.
23 Case C160/15 *GS Media*, judgment of 8 September 2016.
24 *Ibid*., paras. 46 – 49.
25 *Ibid*., para. 45.
26 Case C301/15, *Soulier and Doke*, judgment of 16 November 2016.
27 *Ibid*., para. 34.
28 *Ibid*., para. 35.
29 *Ibid*., para. 36.

party and the means at his disposal to prohibit it if he so wishes".[30] Invoking the Berne Convention for the Protection of Literary and Artistic Works as binding to the Union, the ECJ remarks that the exercise of the right of communication to the public is not subject to any formality.[31]

Looking at recitals 9 and 10 of the InfoSoc Directive, in the *Stichting Brein II* case[32] the ECJ distinguishes a high level of protection for authors as their principle objective that enables the authors to be rewarded for the use of their works, including in the event of communication to the public. The ECJ considers that this objective implies a broad interpretation of the concept of "communication to the public," as it is explicitly stated in recital 23.[33] It finds that the concept includes two cumulative criteria – an "act of communication" and a "public".[34] The existence of the communication to the public should be assessed against some criteria. The first two are "the indispensable role played by the user" and "the deliberate nature of his intervention." [35] They mean that without of an act of the user the work would not be available to customers or it would be available but only with difficulty and that the user knows the consequences of his intervention. "The public" indicates "an indeterminate number of potential viewers".[36] The communication to the pubic exists when new means of communication has been used or when a new public has been addressed. The new public means a public that has not already been taken into account by the copyright holders when they authorized an initial communication.[37] The ECJ also confirmed a relevance of the issue whether a communication was of the profit-making nature or not.[38]It has been specified by the Court that the concept of "communication to the public" necessitates an individual assessment.[39]

5 International treaties

The basic international treaty is the Berne Convention for the Protection of Literary and Artistic Works of 1886 (hereinafter: the Berne Convention). Art. 10 (2) of the Berne Convention authorizes the parties to permit the rational utilization of the protected works "by way of illustration in publications, broadcasts or sound or visual recordings for teaching…" Para. 3 of the Article requires that such utilization indicates the source and the name of the author if it is designated in the source. The parties are authorized by Art. 10 bis (1) to allow the reproduction by the press, broadcasting or the communication to the public of articles published in newspapers or periodicals on current economic, political or religious issues if such reproduction, broadcasting or the communication is not expressly reserved. The source must be indicated. Art. 11 bis (1) guarantees to the authors the exclusive right of authorizing any communication to the public of the work when this communication is rendered by an organization other than the original one.

The preamble of the WCT recognizes the need of maintaining "a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as

30 *Ibid*., para. 38.
31 *Ibid*., para. 50.
32 Case C610/15 *Stichting Brein*, judgment of 14 June 2017.
33 *Ibid*., para. 22.
34 *Ibid*., para. 24.
35 *Ibid*., para. 26.
36 *Ibid*., para. 27.
37 *Ibid*., para. 28.
38 *Ibid*., para. 29.
39 *Ibid*., para. 23.

reflected in the Berne Convention". Obligations concerning rights management information are laid down in Art. 12. The Contracting Parties are obliged to provide legal remedies for the protection of the rights guaranteed by the WIPO Copyright Convention or by the Berne Convention. Art. 12 (1) refers to "adequate and effective legal remedies" and in particular to "civil remedies". They are subject to the three conditions. Adequate and effective remedies can be applied under the first condition that a person knows that induces, enables, facilitates or conceals an infringement of the protected right. The civil remedies can be applied under the first condition that a person has a reasonable ground to know that his or her act produces the described effect. The second condition states that the enumerated acts that include, inter alia, the communication of the work to the public are rendered without authority. The knowledge that electronic rights management information has been removed or altered without authorization consist the third condition. The "rights management information" denotes "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work…"

6 The views of the interested parties

According to the opinions of the Land of North-Westphalia and the Italian Government the uploading of the photo to the school website does not satisfy criteria as established in the case law that the act can be treated as the communication to the public. They allege that the pupil and her teacher "did not act deliberately and in full knowledge of the consequences of their behaviour".[40] Having in view that the photo has been already available to internet users on the travel portal, the two parties assert that the posting on the school website "did not offer any opportunity for access (to the photo) that was not already available" and thus a new public has not been formed.[41] The fact that the author has waived the right of publishing a reference to his copyright implies his consent, according to the opinion of the Land, that users can understand that the work has not been protected.[42] The Italian Government considers that the absence of any type of restriction on access via the internet, including the absence of the exclusion of certain categories of internet users prevents the appearance of a new public. The technical means used by the pupil is the same as those originally used. The actions of the pupil and her teacher have been lawful and consequently their awareness on unlawfulness cannot be expected. [43]

The Commission understands the criteria laid down in the case law in a way that the uploading of the photo on the school website can be treated as an act of the communication to the public. Nevertheless, the Commission argues in favour of an individual assessment of the act of communication which should include the fact that the pupil could assume that the photo has been freely available to the public.[44] The Italian Government and the Commission refer to the possible application of the exception related to education as it is formulated in Art. 5 (3) (a) of the InfoSoc Directive.

The photographer, Mr. Renckoff underlines the legal consequence of the difference between facts in *MS Media* and his case. The installation of a hyperlink does not deprive the author of the control over the use of the work. Contrary, by uploading his photo on the school internet portal he

40 *Renkoff* (Opinion), para. 39.
41 *Ibid*.
42 *Ibid*., para. 41.
43 *Ibid*., paras. 42 and 43.
44 *Ibid*., paras. 44 and 45.

has lost the control over the use of the photo.[45] The French Government and Mr. Renckhoff oppose the application of the exception because the posting of the photo on the school internet portal transgresses the borders of education and a reasonable exploitation of the work.[46]

7 The interpretation by the Advocate General

The Advocate General proposed to the ECJ to reply that the posting of the photo on the school internet portal does not constitute a making available of the work to the public in the sense of Art. 3 (1) of the InfoSoc Directive.[47] The following specific circumstances are highlighted in his Opinion. The photo appeared on the school website as the part of an educational work. The photographic image was freely accessible for all internet users and the access was free of charge. The image has already appeared on the internet portal of a travel magazine without any warnings regarding restriction on use. The profit motive does not exist. The source of the image – the original portal – is indicated in the pupil's presentation.[48]

The Advocate General dedicated his attention primarily to the case law of the ECJ. He consulted also some literal sources.[49] The Advocate General notes that the concept of a "communication to the public" consists of the two components – an "act of communication" and a "public" and that the case law of the Court has established a set of criteria for testing the facts.[50] The first criterion concerning an act of communication relates to the role of a person who made the transmission of the work.[51] The criterion explores an objective side of the role – whether an action of the person was indispensable for the access of a new public to the work – and a subjective side of the role – whether a person was aware of the consequences of the action. The referring German court was of the opinion that the pupil and the teacher were aware of the consequences of their behavior since they knew that without the posting of the pupil's presentation that includes the photo on the school website, the users of the school portal would not have the access to the photo.[52] The Advocate General disagreed arguing that the opinion did not attribute the proper weight to the following facts: a) the secondary role of the image in the school project; b) universality and easiness of the access to the photo posted on the original site; and c) the non-profit character of the school exercise.[53]

The following point of the Advocate General's analysis of the subjective side is of particular significance for this text. The Advocate General observed that the author was not mentioned in the travel internet portal. There were no restrictions or warnings regarding the access to the photo. Having in view these facts, the Advocate General was of the opinion that the users, including

45 *Ibid*., para. 47.
46 *Ibid*., para. 48.
47 *Ibid*., para. 129.
48 *Ibid*.
49 The following texts are referred to in notes 3, 57 and 82 of the Opinion: Walter, M.M., "Article 3 — Right of communication to the public", in Walter, M.M./Von Lewinski, S., *European Copyright Law — A Commentary*, Oxford, 2010, p. 978; Elkin-Koren, N., "Copyright in a Digital Ecosystem", Okediji, R.L. (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge University Press, New York, 2017; Hilty, R.M., Geiger, Ch., Griffiths, J., "Declaration: A balanced interpretation of the `three-step test` in copyright law", *International Review of Intellectual Property and Competition Law*, 6/2008, pp. 707 to 713, particularly, p. 709."
50 *Renkoff* (Opinion), para. 59.
51 *Ibid*., para. 62.
52 *Ibid*., para. 65.
53 *Ibid*., para. 66.

the pupil and her teacher, might legitimate assume that the photo was available for use without restrictions.[54] The Advocate General believes that the support for such understanding could be found in *GS Media* (para 46) where the ECJ observed that it might be difficult "in particular for individuals" to ascertain relevant information concerning the copyright holders.[55] Considering the division of a burden of the safeguarding of the respect for the copyright, the Advocate General argued that it would be disproportional to require that a "normal" internet user is more diligent than the rightholder and that the user investigates the existence of the copyright.[56] He stated: "To do otherwise would be to restrict the use of information which is provided in huge quantities by the internet. Such a restriction could undermine the freedom of expression and of information enshrined in Art. 11 of the Charter. In the present case, it would also prejudice the right to education in Art. 14 (1) of the Charter." [57]

8 The interpretation by the ECJ

The ECJ answered to the sent question that the concept of "communication to the public" in Art. 3 (1) of the InfoSoc Directive covers "the posting on one website a photograph previously posted, without any restriction preventing it from being download and with the consent of the copyright holder, on another website".[58] The exception related to education cannot justify the posting. The answer relies on information the ECJ found in the text of Art. 3 (1), its context and the objective of the InfoSoc Directive, the case law of the Court and the Charter of Fundamental Rights of the EU.

Art. 3 (1) informs that the right to authorize or prohibit any communication of the work to the public is an exclusive right of the author.[59] The exclusiveness implies that any communication of the work without consent of the author and beyond the exceptions infringes the copyright.[60] The textual formulation of the clause "communication to the public" in the Article discloses two cumulative criteria – a "communication" and a "public".[61] The text of the Article indicates that an act of communication denotes the making of the work available to the public.[62] The words in the Article – "Member States shall provide authors with the exclusive right to authorise or prohibit any communication…" – refers to a preventive nature of the right. The ECJ derives the finding from the preventive nature of the right that the author is entitled to discontinue the communication by removing the photo or withdrawing the consent and thus the author has a control over the communication.[63]

Reading recitals 4, 9 and 10 of the InfoSoc Directive the ECJ has understood that the principle objective of the InfoSoc Directive is a high level of protection of the authors that includes securing a proper reward for the use of their works. Having in view the principle objective and the text of recital 23 the Court learns that the concept of the communication to the public must be interpreted

54 *Ibid*., para. 75.
55 *Ibid*., para. 71.
56 *Ibid*., para. 78.
57 *Ibid*., para. 79.
58 *Renkoff*, para. 48.
59 *Ibid*., para. 15.
60 *Ibid*., para. 16.
61 *Ibid*., para. 19.
62 *Ibid*., para. 20.
63 *Ibid*., para. 29.

broadly.[64] Art. 3 (3), read by the Court as the context, informs that the right of communication to the public is not exhausted by any act of communication.[65]

Case law was used as a confirmation of the textual interpretation or as a supplement to the information derived from the text. The ECJ points at the difference in facts between the previous cases and the actual case and creates the interpretation suitable to the facts of the actual case. The findings in *Stichting Brein II* are used for further clarification of the clause a "communication to the public". The Court found in that case that the clause required that one of the two criteria is met: the employment of a new means of the communication or the existence of a new public.[66] Since the means of the communication was the same – the posting of the photo to the websites – the focus was on the exploration of the existence of a new public. The issue was discussed in the context of the findings in *Svensson and Others* and *GS Media*. The ECJ found that redirection of the public via a clickable link, installed on a new website, to the work posted on the original website did not transform the public of the new site into a new public.[67] It observed in *GS Media* that hyperlinks have advanced the operation of the internet.[68] In the actual case, the ECJ emphasized that the factual difference between the hyperlink and posting a photo on a new website required a different interpretation. The hyperlink does not deprive the author of the control over the communication. The author can discontinue the communication, established by a hyperlink, by removing a photo from the original internet portal. However, if a photo is posted on a new website without consent of the author, the author has lost control over the communication. It is the crucial difference which requires that the public of a new website is treated as a new public.[69] Without such treatment of the public the posting of a photo to a new internet portal would not be an act of communication to the public and that would be opposite to the text of Art. 3 (1) and (3) which state that the author may prohibit communication and that the right of communication is not exhausted by any act of communication. The ECJ added that the author would be deprived of the reward.[70]

Thus, the ECJ found that the posting of the photo to the school website was the act of communication to the new public that infringes the exclusive right of the photographer to communicate his photo. This conclusion was not disturbed by the fact that the copyright holder "did not limit the ways in which internet users could use the photograph".71 The Court reminded that it has already held in *Soulier and Doke* that the exercise of the right of communication is not subject to any formality. The ECJ thought that another interpretation would not satisfy the fair balance between the interests of the holders of copyright in the protection of their intellectual property, as guaranteed by Art. 17 (2) of the Charter of Fundamental Rights of the EU and interest of users protected by fundamental rights and in particular the freedom of expression and information laid down in Art. 11 of the Charter and the public interest.72

64 *Ibid*., para. 18.
65 *Ibid*., para. 32.
66 *Ibid*., para. 24.
67 *Ibid*., paras. 37 – 39.
68 *Ibid*., para. 40.
69 *Ibid*., paras. 30, 33.
70 *Ibid*., para. 34.
71 *Ibid*., para. 36.
72 *Ibid*., para. 41.

9 Where is the correct delineation of the border line between copyright and the freedom of expression and information?

The Advocate General was focused primarily on the case law of the ECJ. Some pieces of the literature might also have a role in his reasoning. Thus, he found "a forceful argument in favour of … a rebalancing" of responsibilities between the rightholders and the users of the internet in the text of Elkin-Koren "Copyright in a Digital Ecosystem".[73] The Court attributed the attention primarily to the text of Art. 3 (1), the context (Art. 3 (3)) and the objective of the InfoSoc Directive. The two interpretations differ regarding replies to the main issues, but the difference in the attribution of importance to the absence of any information on the copyright is essential for drawing different border lines between copyright and the freedom of expression and information.

The Advocate General noted that the name of the author was not indicated on the travel internet portal and that there were no restrictions or warnings in respect of the access to the photo. Having that in view he observed that the shifting of the burden of investigating the existence of the copyright to users would undermine the freedom of expression and information. The ECJ did not address the absence of any mark of the copyright[74] but was satisfied to remark that the absence of any limitation on the ways in which the photo can be used is without importance since the exercise of the right of the communication is not subjected to any formalities.

Thus, the Advocate General followed the two tracks – subjective and objective – in the assessment as to whether the posting of the photo on the school portal constituted an act of the communication and concluded that the right of communication could not be infringed without the knowledge on the copyright in a work. The ECJ used only the objective track and was satisfied by finding that the pupil and the teacher made the photo available on the school website. According to the Court it was an act of communication in sense of Art. 3 (1) of the InfoSoc Directive.

It might be noted that the Advocate General and the ECJ did not consider Art. 7 (1) of the InfoSoc Directive which governs obligations concerning rights-management information. The Article extends certain information which might be relevant for an assessment of the significance of the existence of relevant knowledge. The Article obliges the Member States to provide an adequate legal protection against the two groups of acts: a) "the removal or alternation of any electronic rights-management information"; and b) "the distribution…communication or making available to the public of works … protected under this Directive…" The legal protection must be provided against any person who "knowingly" performs without authority any of enumerated acts "if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright". Obviously, the knowledge constitutes an element of liability. Rights-management information is not a novelty in copyright protection. It exists in traditional analog forms and originates in the XVIII century.[75]

The knowledge plays also a constitutive role in liability for the circumvention of technical measures that protect the copyright as it is foreseen by Art. 6 of the InfoSoc Directive. It might further be remarked that the absence of knowledge of an illegal activity or information exculpates

73 *Renkoff* (Opinion), note 57.

74 It might be that contrary to the Advocate General, the ECJ took the statement of the photographer, given during the oral hearings, that the "impressum" for the online travel magazine contained copyright information as relevant for the judgment in spite of the fact that information did not appear in the statement of facts of the order for reference.

75 M. Perry M, "Rights Management Information", in *In the Public Interest: The Future of Canadian Copyright Law*, Geist M (ed), Irwin Law, Toronto, 2005, p. 251, note 1.

under Art. 14 of the e-commerce Directive the service providers of liability for the stored information.[76]

Art. 7 (1) of the InfoSoc Directive transmits Art. 12 (1) of the WCT in EU law. Art. 12 (1) makes a distinction between "adequate and effective legal remedies" and "civil remedies" regarding the level of culpability. The first sentence of Art. 12 (1) states: "Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:…" The two groups of acts are the same as those enumerated in Art. 7 (1) of the InfoSoc Directive. Thus, "reasonable grounds to know" constitute the precondition for civil remedies. Art. 19 of the WIPO Performances and Phonograms Treaty addresses the same matter in the same way.

The precursor of the copyright, the Bern Convention states in Art. 15 (1) that the appearance of the author's name on the work is condition enough for an entitlement of the author for instituting infringement proceedings. In the case of anonymous and pseudonymous works according to Art. 15 (3), the publisher whose name appears on the work will have a such entitlement. The provisions imply that the appearance of the name of the author or the publisher on the work is a condition for the enforcement of the copyright. It is not easy to see a reason for the opposite solution in the digital sphere.

Art. 7 (1) of the InfoSoc Directive makes the context of Art. 3 (1). Recitals 15 and 19 refer to the WCT and recital 19 refers to the Bern Convention. It might be legitimate expectation that the mentioned texts can be consulted in the interpretation of Art. 3 (1). It might be also expected that the information in respect of relevance of the knowledge as an element of liability for the infringement of the copyright in the works as originated in Arts. 7(1) of the InfoSoc Directive and in 12 (1) of the WCT should be taken into account in interpretation the right of communication to the public in the specific circumstances of the case. If an entitlement of the author to institute an infringement proceeding is conditioned by the appearance of the name on the author on the work in printed version, as it is by Art. 15 (1) of the Berne Convention foreseen, why would the Member States opt for any other solution in respect to the work in a digital form?

It seems that the ECJ was close to a such line of reasoning in *GS Media* where it states: "For the purposes of the individualised assessment of the existence of a 'communication to the public' within the meaning of Art. 3(1) of Directive 2001/29, it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder."[77] An introduction of the subjective element faced some critiques in literature. Arguing that the breach of the right of communication to the public results in a strict liability tort, Cheng Lim Saw thinks that the introduction of knowledge in *GS Media* is an additional argument for distinction between "primary/direct liability" of an owner of a website, where the protected work is originally posted, and "accessory/indirect liability" of an owner of a website, where the hyperlink is installed.[78] It seems that that author allows the relevance of knowledge only for an

76 See K. Klafkowska-Wasniowska, "Under One Umbrella: Problems of Internet Retransmission of Broadcasts and Implication for New Audiovisual Content Services", *JIPITEC* (6) 2015, pp. 93 and 94.

77 *GS Media*, para. 47.

78 C.L. Saw, "Linking on Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal

indirect liability.[79] Having noted that a subjective criterion of knowledge introduced by the ECJ in *GS Media* is confronted with criticism of copyright scholars, Jane Ginsburg observes that the criterion "avoids a potentially oppressive application of copyright to the great majority of internet users who are unaware that the sites to which they may be supplying links are illicit."[80] She also argues that the subjective criterion of knowledge is of importance for secondary, derivative liability caused by recommunication rather that by initial illicit communication.[81]

If the knowledge on the legality of the posting of the work on an internet portal might be relevant, why is the knowledge on the existence of the copyright in the work not relevant? Does the answer suffice that the author has preserved control over the communication in the first case and lost control in the second case? In other words, whether the preservation of the control over the communication when the copyright has not been marked outweighs the public interest of free use of such work in the context of the freedom of expression?

The matter relates primarily to the relationship between an author and internet users. It has consequences that spread beyond their bilateral relationships, but it concerns the interest of an author that the copyright is respected and the interest of users that can freely use materials on the internet in the absence of contrary information. A reasonable balance of interests[82] might require that the author designates the copyright on the web portal, that the rightholder provides the rights – management information. The disproportional burden would be relocated to users if they were expected to investigate the existence of copyright protection. Providing the rights – management information by the rightholder is a less demanding engagement than the investigation by the users as to whether the posted material is protected by copyright.

10 Conclusion

The ECJ was leading in the interpretation by the principle objective of the InfoSoc Directive that a high level of copyright protection is a facility of the development of the information society and competitiveness. New literature observes however that internet users may play an active role in the development of creativity and social progress.[83] Thus, too a high protection of copyright might be counterproductive from the viewpoint of the general interest of a community.

The qualifying of a transfer of the photo by a pupil and teacher from a travel magazine portal, where there is not any information on the copyright, to a school portal in the context of a school language project as an illegal activity is not very much expected. The issue has principle importance beyond the specific facts and it manifests in relevance in the existence of the rights – management information for constitution of liability for copyright infringement. Guided by the principle objective of the InfoSoc Directive, and thus wishing to provide the highest protection serving copyright, the ECJ used a selective textual method of interpretation ignoring some parts of

Certainty", *International Review of Intellectual Property and Competition Law* 49(5) 2018, pp. 547 and 548.

79 *Ibid*., p. 553.

80 J. Ginsburg, "The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observation on *Brein v. Filmspeler* [C – 527/15] (2017) and *Brein v. Ziggo* [C – 610/15]", 2017, p. 2. https://ssrn.com/abstract=3024302 Accessed 29 January 2019.

81 *Ibid*., p. 8.

82 See in general: S. Al-Sharieh, "Toward a Human Right Method for Measuring International Copyright Law's Compliance with International Human Rights Law", *Utrecht Journal of International and European Law* 32(82) 2016, pp. 5 – 26.

83 N. Elkin-Koren, "Copyright in a Digital Ecosystem: A User-Rights Approach, 2015", pp. 11 – 14. Available at http://ssrn.com/abstract=2637027 Accessed 29 January 2019.

the context to come to the desired interpretation. The relevance of absence of any information on copyright was discussed. By the explanation that the right of communication to the public is not subject to any formality, the Court noted only that absence of limits on the ways in which internet users could use the photo was without importance.

It might be expected in the information society that pupils wish proudly to display their schoolwork on the internet. Now, they might be inhibited to do that if the schoolwork includes a photo which was already posted on the internet. All others might be endangered to be sued if they transfer a photo or something else from one website to another even when they are not informed of the existence of copyright. Thus, the judgment might result in the presumption that all photos or other material on the internet are under the copyright protection. Such a presumption would seriously limit the freedom of expression and the creativity of internet users.

Art. 6 and in particular Art. 7 of the InfoSoc Directive and Art. 12 of the WCT indicate relevance of knowledge as an element of liability for the copyrights infringements and open a possibility for the contrary interpretation of Art. 3 (1) of the InfoSoc Directive. In *GS Media* the ECJ accepted relevance of knowledge although in another set of facts related to hyperlink. The hyperlink does not deprive the author of the control over the communication though the transfer of the photo from an original portal to a new one does. The problem of losing control over the communication might be much easier and better resolved by displaying rights – management information than by the introduction of the presumption that all photos on the internet are under copyright protection.