Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 25 April 2018 (1)

Case C-161/17

Land Nordrhein-Westfalen
v
Dirk Renckhoff

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Copyright and related rights in the information society — Concept of communication to the public — Making available to the public on an internet portal of a protected work available to all internet users on another internet portal — Situation in which the work has been copied onto a server without the consent of the copyright holder)

1. Not so very long ago, school projects were produced on pieces of card and usually illustrated with photographs, prints and drawings published in books and magazines. Once finished, they were displayed in school (to the delight of the parents), and the authors of the images in question did not generally claim any royalties.

2. Moving on to current technology, today's pupils also include photographs or drawings in their work, but the difference is that both their work and the images used in it are digital. The internet contains millions of possible illustrations that can be used to complete a school project and, when finished, it is relatively easy to upload the completed project to a website that can be accessed by any internet user.

3. That is what happened in this case. A pupil at the Gesamtschule Waltrop (Waltrop comprehensive school), in Land Nordrhein-Westfalen (Landof North Rhine-Westphalia (2)) in the Federal Republic of Germany, found a photograph of the Spanish city of Cordoba on the internet and included it in a Spanish project. When she finished her project, she posted it on the school's website; the professional photographer who had taken the photograph considered that the image had been used without his consent and that this was an infringement of his copyright (and he sought the discontinuance of the conduct, together with damages).

4. Against this background, the Bundesgerichtshof (Federal Court of Justice, Germany) is asking the Court of Justice to define the boundaries of 'making available to the public' (on the internet), which is the basis for the aforesaid infringement. As *making available* is the equivalent expression in the digital world

to the ‘act of communication’ in the analogue world, (3) the case-law developed in relation to the ‘act of communication’ (4) referred to in Article 3 of Directive 2001/29/EC (5) can be applied *mutatis mutandis*.

5. The referring court wishes to know whether downloading the photograph of Cordoba and subsequently including it in a project that is posted on the school’s website comes within that concept. Although the interpretation of the phrase ‘act of communication to the public’ has already been the subject of several judgments of the Court of Justice, which have been issued as and when the Court has been asked about new techniques and methods of publishing protected works, this reference demonstrates that the interpretative needs of national courts have yet to be completely satisfied. (6)

6. The referring court has questions concerning one of the criteria developed by the Court of Justice: specifically, it asks whether the photograph included in the project that was uploaded to the school’s website has been made available to a ‘new’ public. However, I believe that in order to resolve the dispute, it may be appropriate also to address other elements of the technical means and circumstances surrounding use of the photographic work, and to compare each of these with the other aforesaid criteria developed in the case-law.

I. Legal framework

A. International law

1. WIPO Copyright Treaty

7. On 20 December 1996, the World Intellectual Property Organization (WIPO) adopted in Geneva the WIPO Copyright Treaty, which came into force on 6 March 2002 and was approved on behalf of the European Community by Council Decision 2000/278/EC. (7)

8. Article 1(4) of the Treaty requires the Contracting Parties to comply with Articles 1 to 21 of the Berne Convention. (8)

2. Berne Convention

9. According to Article 2(1) of the Berne Convention:

‘The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ... photographic works to which are assimilated works expressed by a process analogous to photography; ...’

10. Article 11bis (1)(ii) of the Convention stipulates that:

‘(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

...

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one.’

B. EU law. Directive 2001/29

11. The harmonisation of Member States’ intellectual property law has been achieved principally through Directive 93/98/EEC, (9) which was subsequently amended and repealed by Directive 2006/116/EC, (10) which codifies previous versions. The objective of one of those amendments was to regulate the protection of copyright and related rights in the so-called information society, by means of Directive 2001/29.

12. According to recital 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.’

13. According to recital 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 ...’

14. Recital 34 is as follows:

‘Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.’

15. Article 2 (‘Reproduction right’) stipulates that:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...’

16. Paragraph 1 of Article 3 (‘Right of communication to the public of works and right of making available to the public other subject-matter’), provides as follows:

‘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.’

17. Paragraphs 3 and 5 of Article 5 (‘Exceptions and limitations’), are as follows:

‘3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

C. National law. Urheberrechtsgesetz (Law on copyright (11))

18. Paragraph 2, on scope, expressly includes both photographic works (*Lichtbildwerke*) and works that are similarly created.

19. Paragraph 52 in the version in force at the material time, provided as follows:

‘The communication to the public of a published work shall be authorised provided that the organiser is acting on a not-for-profit basis, the audience is admitted free of charge and, in the case of a lecture or a performance of the work, none of the performers receives special remuneration. Reasonable remuneration shall be paid for the communication. The requirement for remuneration shall not apply in respect of … or school events, provided that, in accordance with their social or educational purpose, they are open only to a specific, restricted number of persons.’

20. Under Paragraph 64, which applies to photographic works, copyright shall last for 70 years after the author’s death. By contrast, although under Paragraph 72(1) and (2) ‘other’ photographs enjoy, *mutatis mutandis*, the protection granted to photographic works, copyright is limited to 50 years from publication, or first communication, if earlier (Paragraph 72(3)).

II. Facts of the case and question referred

A. Facts

21. Mr Renckhoff, a professional photographer, filed a claim against the city of Waltrop and the *Land* (12) over the publication of a presentation by a pupil in the Spanish class on the website of the Gesamtschule Waltrop, where it had been available since 25 March 2009, which, according to the order for reference, contained the photograph of Cordoba that is reproduced in the order:

22. Below the image, which was obtained from the portal ‘www.schwarzaufweiss.de’ (which belongs to a digital travel magazine of the same name), the pupil included the reference to the internet site, which did not include any indication of the photograph’s author. (13)

23. Mr Renckhoff claims that he had granted a simple right of use of the photograph solely to the operators of the online magazine portal. In his opinion, therefore, the appearance of the image on the school’s website is an infringement of his rights (under copyright) to authorise the reproduction and communication to the public of the aforesaid photograph.

B. Proceedings before the national courts

24. Mr Renckhoff’s claim in the court of first instance was upheld in part, and the *Land* was ordered to withdraw the photograph and to pay EUR 300 plus interest.

25. Both parties appealed against the judgment given at first instance; the only change the appeal court made to the judgment was to prohibit the reproduction of the photograph for the purposes of placing it on the internet. According to the appeal court, the claimant had a right to obtain a prohibitory injunction against the *Land* under Paragraph 97(1) of the UrhG and on grounds of indirect liability (*Störerhaftung*).

26. Both the *Land* (which maintains that the claim should be dismissed in its entirety) and Mr Renckhoff (who is seeking to have his claims upheld in full) appealed to the Bundesgerichtshof (Federal Court of Justice) against the appeal judgment.

27. The referring court has questions concerning whether copying the protected work onto a computer and uploading it to the school's website comes within the concept of 'communication to the public' in Article 3(1) of Directive 2001/29 as interpreted by the case-law of the Court of Justice.

28. The referring court considers that a substantial part of the requirements needed in order for the disputed act to be classed as 'communication to the public' are met. In particular, as regards *communication*:

— publication on the website does not involve direct physical contact between the performers and the target audience; (14)

— nor was it carried out using a specific technical means different from that used the first time the photograph was posted on the internet; and

— in providing users of the school's website with access to the presentation, including the photograph, which they would not have had in the absence of that intervention, the pupil and her teacher acted in full knowledge of the consequences of their behaviour. (15)

29. With regard to the other element — the *public* — the referring court begins by indicating that 'it is uncertain … whether in those circumstances the photo … was communicated to a new public on the school's website, that is to say, to a public which the rightholder did not envisage when he authorised the original communication of his work to the public'. (16)

30. Its final conclusion, however, is that 'it cannot … be assumed that a copyright holder who has given his consent for his work to be posted on a freely accessible website envisages as the public not only internet users who visit that website directly or by means of a link posted on another website, but also internet users who visit another website on which his work has been posted without his consent. The present Chamber considers that the latter category of internet users therefore constitute a new public within the meaning of the case-law of the Court of Justice.'

31. It also considers that the absence of consent from the holder of the copyright for the photograph to be copied onto the school's server and subsequently published on the internet distinguishes this case from cases where hyperlinks or framing were used. (17) Consequently, the copyright provided for in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') will prevail over the users' right to freedom of expression and of information in Article 11 of the Charter.

32. It also emphasises the indispensable role the user plays in the communication by including and maintaining the work on his own website, because he decides on the making available of the work to the public and for how long it is made available, contrary to the author's reproduction right. By contrast, in the case of a hyperlink to an internet site, the link would be broken if the work were taken down from the original site.

33. Lastly, the court considers that the fact that the posting of the photograph on the school's website was not done for profit is not decisive. (18)

34. In these circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to refer the following question to the Court of Justice for a preliminary ruling:

‘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 Article 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?’

III. Procedure before the Court of Justice and observations of the parties

A. Procedure

35. The order for reference was received at the Court Registry on 31 March 2017.

36. The Land of North Rhine-Westphalia, the Italian Government and the Commission submitted written observations.

37. A hearing was held on 7 February 2018, which was attended by the representatives of the *Land*, Mr Renckhoff, the Italian Government, the French Government and the Commission.

38. The Court of Justice invited the parties to comment at the hearing on the relevance of the *GS Media* judgment and on the interpretation of Article 5(3)(a) of Directive 2001/29.

B. Summary of the observations of the parties

39. In the view of the Land of North Rhine-Westphalia and the Italian Government, this case does not involve communication to the public, because the elements required by the case-law are not satisfied. In particular, the pupil and her teacher did not act deliberately and in full knowledge of the consequences of their behaviour. (19) Moreover, given that the photograph was already available to internet users on the travel magazine’s portal, its posting on the school’s website did not offer any opportunity for access (to the photo) that was not already available. Consequently, there had been no communication to a *new* public either, according to the case-law. (20)

40. The *Land* argues that, alongside Article 17(2) of the Charter, on the defence of intellectual property, and Article 11, on freedom of expression and information, an assessment of the conflicting interests involved must take into account the right to education, enshrined in Article 14 of the Charter, on the basis of which the pupil included the photo to illustrate her work. In its view, the right to create portals, like links, also contributes to the sound operation of the internet, at least when the works are already freely available on the internet.

41. Lastly, the *Land* disagrees with the referring court over the role it ascribes to the user. In this case, the work has become detached from its author, who authorised the work, which was available to all internet users, to be published on an internet portal managed by a third party. In so doing, he had voluntarily relinquished his power of decision over use of the photograph. Moreover, the fact that the owner of the work had waived the right to publish a reference to his copyright implies that he consented to users taking the view that the work was not protected by any special right. Lastly, it notes that the pupil stated the source of the photograph in her work, and it emphasises the lack of any profit-making motive.

42. The Italian Government maintains that the work was not protected by any type of restriction on access via the internet, and therefore it was freely available. The pupil and her teacher could not be expected to be fully aware of the unlawfulness of their actions, because those actions were not unlawful.

43. In the view of the Italian Government, therefore, there is no communication to a ‘new’ public within the meaning of the case-law, (21) and the technical means used by the student was no different from that

originally employed. Lastly, it states that the original consent included access to the photograph in the online travel magazine and did not restrict access to certain categories of internet user.

44. The Commission, on the other hand, considers that the publication of the photograph on the school's internet portal is a communication to the public, because it satisfies the requirements laid down in the case-law: a) a protected work was transmitted; (22) b) the concept of communication must be construed broadly, as referring to any transmission, irrespective of the technical means or process used; (23) c) the technical means may be different (24) or the same; (25) d) there is no need for the public to whom the work is made available actually to access it; (26) and e) the public comprises an indeterminate but large number of potential recipients and not a restricted group of interested persons. (27)

45. While in its written observations the Commission held that the case-law on hyperlinks did not apply to this case, (28) at the hearing it presented a much more nuanced stance. It did not maintain its assertion that, in the case of redirection via hyperlinks, the copyright holder retains his power of disposition, and that this is a significant difference as compared with the present case. Instead, it argued that, as in the *GS Media* judgment, it was necessary to proceed to an individual assessment of the act of communication, which took account of aspects concerning the full knowledge of the pupil's behaviour, in particular the fact that she could assume that the photograph was freely available to the public.

46. Like the Italian Government, the Commission draws attention to the possible application to the present case of the exception in Article 5(3)(a) of Directive 2001/29, which the Federal Republic of Germany had implemented in Paragraph 52 of the UrhG. (29)

47. At the hearing, Mr Renckhoff argued that the criteria in the *GS Media* judgment did not apply to the present case. The photograph had been posted on the school's website without the consent of the author, who had been deprived of his right to control the use of his work. Moreover, the internet users who comprised the public that visited that site would be different from the public for the online travel magazine.

48. Like the French Government, Mr Renckhoff rejects the application of Article 5(3)(a) of Directive 2001/29, because the use of the photograph was neither obligatory nor necessary, and its inclusion on the school's website went beyond a purely school environment. The French Government adds that the behaviour is contrary to Article 5(5) in that it went beyond reasonable exploitation of the work.

49. In addition, in the view of the French Government, first and foremost this case involves the question of the reproduction right, given that the image was copied onto the school's server (Article 2 of Directive 2001/29), and the question of communication to the public is purely a secondary question. Applying the criteria in the *GS Media* judgment would be contrary to the objective of ensuring a high level of copyright protection.

IV. Analysis of the question referred

A. Preliminary remarks and approach

50. In the terms in which it is formulated, the question from the referring court is limited to an examination of the components that comprise *communication to the public*, as defined by the case-law of the Court of Justice. (30) Indeed, it could be inferred from the observations by that court that, in practice, its only query concerns whether the photograph was made available to a *new* public, within the meaning of that case-law. (31)

51. Specifically, the question to the Court of Justice does not address the act of copying the photograph onto the school's computer or server, and whether this comes within Article 2 of Directive 2001/29. Given the restricted nature of its question, I believe that the court, correctly, takes a holistic view of the behaviour under examination, rather than breaking it down into two juxtaposed concepts (reproduction and communication to the public).

52. However, in view of the importance of the case to the daily lives of millions of pupils in Europe, I believe it is appropriate to analyse other factors that help to set the context for the question referred. I propose, therefore, to adopt the following approach: a) first, I shall examine the Commission's reference to the classification of the photograph of Cordoba as a *protected work*; (32) b) secondly, I shall review the characteristics of 'communication to the public' as established by the Court of Justice, in order to shed light on their possible application to this case; and c) lastly, I shall examine the exception provided for in Article 5(3)(a) of Directive 2001/29, where a protected work is used for purely educational purposes.

B. Protection of 'mere photographs'

53. According to the Commission, the parties to the domestic proceedings agree that the photograph at issue satisfies the requirements laid down in the *Painer* judgment. (33) According to that judgment, a portrait photograph can be protected by copyright 'if … such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. (34)

54. However, without in any way wishing to detract from the merits of the photograph, it seems doubtful to me that a simple shot of the city of Cordoba, with the Roman bridge in the foreground, satisfies the aforesaid requirements of the *Painer* judgment. That case considered whether the defendant newspaper publishers needed the author's consent in order to publish a photo-fit worked up from a portrait photograph taken by Ms Painer, 'because the scope of the protection conferred on such a photograph was restricted, or even non-existent, because of the minor degree of formative freedom allowed by such photographs'. (35)

55. Using Article 6 of Directive 93/98, (36) the Court of Justice set out the criteria that had to be satisfied in order for the photograph in the *Painer* case to enjoy the extended period of protection (70 years after the death of the author) established in that Directive.

56. But the fact that 'mere photographs' do not satisfy the creativity requirements inferred from Directive 93/98 does not mean that they are devoid of the protection afforded by copyright. This is because the aforesaid Article 6 allows for national legislation to protect 'other photographs'.

57. And, according to the order for reference, Paragraph 72(1) and (2) of the UrhG protect photographs (*Lichtbilder*) by applying to them the provisions that protect 'photographic works' (*Lichtbildwerke*). Consequently, it is irrelevant whether or not the image of Cordoba captured by Mr Renckhoff had the attributes required of photographic works within the meaning of the Berne Convention or Directive 93/98 because, under German law, all photographs are protected under the UrhG. (37)

58. While this factor could have had a significant impact on the outcome of the case if it were being heard in the courts of a Member State that did not protect mere photographs, in Germany they enjoy that protection. There is therefore no need to divert our attention to the artistic and creative quality of Mr Renckhoff's photograph. This helps to explain why the referring court is silent on this point.

C. The concept of 'communication to the public'

59. The case-law of the Court of Justice has developed a series of criteria (38) by which to interpret the two components of this concept ('act of communication' and target 'public'). I shall analyse these below, focusing on those criteria that may prove most controversial as regards the facts of the main proceedings.

1. Act of communication

60. Neither party really disputes (whether in the proceedings before the national courts or in this reference for a preliminary ruling) that, by placing the school project containing the photo of Cordoba on the Gesamtschule Waltrop portal, a protected work has been transmitted, irrespective of the technical means used, (39) to a public not present at the place where the communication originates.

61. As noted by the referring court, with which I agree on this point, '[i]n the case of the contested communication of the photo on the school's website, there was no direct physical contact between the actor or performer of a work and the public reached through that communication. There was thus communication … within the scope of Article 3(1) of Directive 2001/29/EC.' The persons who comprise that public therefore had access to the work, irrespective of whether they availed themselves of that opportunity. (40)

(a) Role of the user and subjective elements

62. The first criterion established by the case-law for determining the existence of an act of communication relates to the 'indispensable role played by the user and the deliberate nature of its intervention'. (41) This criterion (42) combines both *subjective factors* concerning the behaviour of the person performing the transmission (who must be intervening in full knowledge of the consequences of his action) and *objective circumstances*, in that the action must provide access to a protected work (such that, in the absence of that intervention, the 'customers' would not be able to enjoy the broadcast work, or would be able to do so only with difficulty). (43)

63. On some occasions the Court of Justice has examined the 'role of the user' from a purely objective standpoint, that is to say, it has confirmed only that, in the absence of the intervention by that user, the new public would not have enjoyed access to the broadcast work. (44)

64. The *GS Media* judgment, however, referred to certain subjective elements which it considered appropriate in order to ascertain whether, in the individual assessment of the act of communication, the requirement for the 'indispensable role played by the user and the deliberate nature of its intervention' was met. These can therefore be taken into consideration during this stage of the analysis.

65. From this perspective, the referring court states that the pupil and the teacher acted in full knowledge of the consequences that their behaviour would have, because they wanted to give users of the school's website access to the presentation, including the photograph, which they would not have had in the absence of that intervention. (45)

66. However, that approach does not provide a sufficiently in-depth examination of the behaviour that allegedly infringed copyright. In particular, it does not give due weight to a) the secondary nature of the photograph, as part of a school project; b) the ease of 'universal' access to that image, which had been posted on the internet with the author's consent, and could therefore be seen by any internet user; and c) the educational setting in which the transmission took place, in which there were no 'customers' and no profit motive. Each of these three factors requires further examination.

(1) The secondary nature of the work in relation to the pupil's project

67. While it may seem obvious, when the pupil and her teacher posted a Spanish language project on the school website, their main intention was not to publish the photograph as such, but to publish the presentation as a whole, of which the disputed image of Cordoba forms a part.

68. In so doing, their aim was to show their work to the public who were interested in the teaching of Spanish within the (necessarily restricted) circle of their school or associated family members, fellow pupils and friends. Consequently, I cannot identify any intention to extend the viewing of the photograph of Cordoba much beyond what was entailed when it was placed on the travel magazine portal (for which the potential audience probably exceeds the number of visitors to a modest school website).

(2) The consent of the owner of the work

69. It is true that posting the photograph on the school's website involves publication *without* the owner's consent. In the absence of any examination of the subsidiary elements of this behaviour, it could be concluded that the first requirement for an infringement of copyright to exist has been satisfied. (46)

70. Unlike the situation in the *GS Media* case, in the present case it is not relevant whether the authors of the disputed behaviour (the pupil and her teacher) were aware that the publication of the work on the internet by a third party was illegal. It is not relevant, because the photograph taken by Mr Renckhoff appeared on the internet lawfully, that is, *with* his consent. The question that needs to be asked now is whether they could be required to know that, in order to reproduce the image on their school website, they necessarily required the photographer's consent. If so, it could be assumed that they understood the consequences of their behaviour.

71. The Court of Justice has held that it may be difficult, 'in particular for individuals', to ascertain whether the copyright holders of works on the internet have consented to their posting on the respective sites. (47)

72. Although, as I have explained, the circumstances of this case differ from those of the *GS Media* case (which involved the question of hyperlinks to protected works that were freely available on another website without the consent of the copyright holder), I believe that the reasoning in that judgment as regards the subjective component of the behaviour of persons with no profit motive (48) can be extrapolated, *mutatis mutandis*, to this reference for a preliminary ruling. (49)

73. For present purposes, two of those reasons are of particular note:

– The reason based on the fact that a person who is not pursuing a profit, even where he makes a protected work available to the public by providing other internet users with direct access to it, 'does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet'.

– The reason that emphasises the importance of the fact that the work in question was 'already available with unrestricted access on the website to which the hyperlink provides access', that is to say, that 'all internet users could, in principle, already have access to it even [in] the absence of that intervention'. (50)

74. If the elements referred to in these two reasons are present, it can be inferred, in circumstances such as those of the present case, that there is no communication to the public. This will not be the case, however: a) where the copyright holders give notice that the work to which access is being provided has been 'illegally placed on the internet'; (51) or b) where access to the work is provided in such a way that users of the website on which it is posted can 'circumvent the restrictions taken by the site where the protected work is posted'. (52) Nor will it be the case where the author has notified the person seeking to publish his photograph on the internet that he does not give his consent.

75. If we apply these guidelines to the present case, we see that:

– There was no mention of the author of the photograph on the specific page in the travel magazine on which the photo appeared. (53) One could, therefore, legitimately think that it was simply an image of the city of Cordoba used to attract tourism and that it did not benefit from the protection afforded to protected works.

– The photograph was readily accessible on the aforesaid website (as there were no restrictions or warnings of any kind (54)). This fact, together with the one noted above, would have encouraged the pupil and her teacher to assume, once again legitimately, and without any need for further enquiries, that the photograph was freely available to the public.

76. It does not seem to me that this line of reasoning leads, as the *Land* argues, to the idea that the author has abandoned his right, nor does it suggest that the work was in the public domain.

77. Could it be considered, however, that the author of the photograph implied consented to its use by third parties? (55) It does not seem to me to be essential to arrive at this conclusion either when, in my view, using the assumption technique it is possible to reach another conclusion (with a similar outcome) regarding the conduct of a photographer who consents, in the terms described, to the dissemination of his work on the internet.

78. The division of responsibilities between a *normal* internet user, with no professional interest, and the copyright holder cannot systematically and in a generalised fashion lead to a situation in which the former is expected to be more diligent than the latter (56) with regard to copyright protection. (57) Specifically, I do not believe it is logical to impose on that kind of user the burden of investigating whether images that are available on the internet, with no restrictions or warnings, are protected by copyright, where he wishes to use them for purposes such as educational ones. In these circumstances, such a user can *assume* that the author has no objection to the restricted use of those images for teaching purposes.

79. 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 freedoms of expression and of information enshrined in Article 11 of the Charter. In the present case, it would also prejudice the right to education in Article 14(1) of the Charter.

(3) The lack of profit motive and the absence of 'customers'

80. The third factor in the assessment of the behaviour of the pupil and her teacher is the fact that they were not acting for profit. (58) Although the Bundesgerichtshof (Federal Court of Justice) plays down the interpretative importance of this point, (59) I believe that it has more relevance than has been ascribed to it.

81. The Court of Justice has made a connection between the existence of a profit motive and the assumption that the person is acting in the full knowledge of the protected nature of the work and the lack of consent to publication on the internet. (60) While it does not say so explicitly, it considers that, where there is no profit motive, it will have to be proved that the person knew that the work had been posted on the internet illegally, which will require all the circumstances and elements of the individual case to be taken into consideration.

82. In the dispute in the main proceedings, as I have just described, the fact that the travel magazine web page contained no warning or restriction on the use of the photograph could have led the pupil to believe that there was nothing to stop her including the photograph on the school's website. Such a presumption would not equate to exhaustion of the right, which is prohibited by Article 3(3) of Directive 2001/29, because it could easily be rebutted. It would also enable a balance to be struck between copyright and the 'sound operation as well as … the exchange of opinions and information in that network'. (61)

83. The absence of any statements does not strengthen the hypothesis that the pupil and the teacher were fully aware of the protected nature of the work and of the need to obtain the consent of the copyright holder: in fact, quite the opposite.

84. Moreover, the case-law of the Court of Justice in this area has been developed in a commercial context, as evidenced by the frequent references to 'customers'. It is assumed that a particular undertaking (or professional) offers its customers the opportunity to access certain protected digital content without the owner's consent. In a school context, however, (62) one cannot talk of 'customers', in the commercial sense of the word, who obtain access to the photograph through the work posted on the school's website.

85. To sum up, the combination of these three factors (the secondary nature of the image in relation to the school project; the fact that the photograph was freely accessible, with no mention of any restrictions on use; and the fact that the pupil and the teaching staff were not acting for profit) lead me to believe that, in this case, there was no communication to the public within the meaning of the case-law of the Court of Justice.

(b) Technical means used

86. The order for reference then goes on to analyse whether the technical means used by the pupil and her teacher to post the photograph on the school's website differed from the means used to reproduce the photo on the travel magazine portal, to which the author had granted permission for use.

87. As we know, where a work is transmitted using a different means of transmission from the original broadcast, the conclusion must be drawn that it is intended for a *different* public, whereas if the same technical means is used, then one must go on to examine whether it is really possible to talk of a *new* public. (63)

88. The referring court, the *Land* and the Italian Government maintain that the technical means used by the pupil was the same one that had been used by the travel magazine on its website. While the Commission did not deny that the means was the same, in its written observations it argued that the case-law on hyperlinks did not apply to the present case — an argument which it refined at the hearing.

89. In my view, everything points to the conclusion that the prior reproduction of the image by any means (which could be a pencil copy done from memory or a copy on the computer) and its subsequent downloading onto an internet portal involve the same technical means that was used by the travel magazine to post the photograph on its website.

90. The fact that, in the present case, this technical means is applied in a different way from the one used in the case of the hyperlinks (where the action takes place only on the internet) does not imply any change to the criteria for examining the circumstances surrounding the 'act of communication'. One will therefore have to decide whether the public targeted by the work posted on the school's website constituted a new public. (64)

2. Target public

(a) De minimis?

91. The examination of the 'public' targeted by the communication invariably begins with the *quantitative* aspect: first of all, one will have to determine whether the public in question involves 'an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons'; only then does one go on to ascertain whether it is a 'new' public. (65) The logic of this case-law lies in the fact that a small number of persons who receive the transmission of a work cannot be classified in legal terms as a 'public', within the meaning of Article 3(1) of Directive 2001/29.

92. In order to establish whether the *de minimis* threshold (66) is exceeded, one must consider the cumulative effect of making the works available, and assess how many people have access to these works not only at the same time but also in succession. (67)

93. The Court of Justice has held that communication on a website, with no restrictions on access, is aimed at all potential users (internet users) of that site. (68) The key point, therefore, is the *objective* element, that is, the means of transmission, rather than the *subjective* intention of the person using that means.

94. There is no indication that, when the pupil's work was posted on the school's website, any restrictions were placed on access (for example, by restricting access to the teaching staff, the pupils' parents, or the pupils themselves). Therefore, if any internet user could consult the site and access the protected work (the photograph), the transmission was capable of reaching a *potentially* large number of persons, that is to say, a 'public' within the meaning of Article 3(1) of Directive 2001/29.

(b) Whether it is a 'new' public

95. According to this criterion, the public to whom the broadcast is directed is to be considered 'new' only where it is different from that envisaged for the original broadcast, that is to say, where it can be considered to be 'wider' (69) than the public for which it was originally intended.

96. Insofar as, in this case, both the publication of the photograph by the online travel magazine and the posting of the photograph on the website as part of the school project were available to any internet user, without restriction, that public, to which both websites offered potential access, was the same in both cases (the community of internet users).

97. The referring court, however, has doubts over this conclusion, because it takes the view that: a) when the user places and maintains the work on his own website, he plays an indispensable role in the communication; b) the copyright holder who consents to the inclusion of his work on a website that is freely accessible is thinking only of the public that visits that website, either directly or via a link; and c) to accept the opposite hypothesis would lead to the exhaustion of the copyright, which is expressly prohibited by Article 3(3) of Directive 2001/29.

98. These reservations do not seem to me to justify the classification of the public as 'new' in this case. (70) In this regard, the Court of Justice has used certain criteria, which it invariably applies both to transmissions of works using radio and television signals (71) and to transmissions using hyperlinks on the internet, (72) that is to say, irrespective of the technical medium. A new public would exist where, on the one hand, that public could not enjoy the work without the intervention of the user and, on the other, it was not taken into account when the original consent was given for the work to be made available. (73)

99. With regard to the intervention of the pupil and her teacher, it is hard to believe that the people who accessed the school's internet portal could not likewise (and without major difficulties) access the website of the travel magazine on which the photograph of Cordoba was originally published. The general internet-using public is, therefore, the same when it visits the website of the travel magazine and when it accesses the school's portal.

100. As the image is easily and lawfully available (that is, with the copyright holder's consent) to *all* internet users, I cannot see how the intervention of the pupil and her teacher could be *decisive* in enabling access to a *larger* number of persons.

101. The logic of the internet is that, where access to images posted on the internet with the author's consent is available freely and free of charge, and there are no indications or warnings to the contrary, it is impossible to segment the number or categories of potential visitors, or to envisage that only some, and not others, will be able to see those images.

102. So far, restricting ourselves to the internet, which is the relevant sphere in this case, the issue of a new public has been linked principally to the question of whether access to a protected work has been afforded to a particular group of users, thereby enabling them to circumvent the restrictions put in place by the original website. Such a situation would clearly involve 'a new public, which was not taken into account by the copyright holders when they authorised the initial communication'. (74)

103. However, in this case, there was no breaking of any (non-existent) means of protection, nor was access given to a work that was on the internet without the owner's permission. The absence of these two objective elements, coupled with the essential continuity in the number of possible visitors to the two websites containing the photograph, makes it possible to affirm that there was no communication to a new public, within the meaning set out above.

104. As I have already indicated, this outcome does not entail some form of *exhaustion* of copyright, contrary to Article 3(3) of Directive 2001/29. Rather, it represents the logical consequence of the way in which the holder of the rights in the photograph granted use, given that he knew — or ought to have known — that the absence of any protective measures to prevent the image from being copied could lead internet users to believe that it was freely available to the public.

105. That being the case, I do not believe it would be excessive to expect a professional who publishes a work on the internet, whether himself or through third parties, to take appropriate measures, including technical measures, at least to make clear that he owns the copyright and wishes to control dissemination of the work, thus avoiding any appearance to the contrary.

106. I also believe that to require such diligence does not reduce the high level of protection owed to the owners of rights in images (which remain unaffected if the necessary warnings are added), and it helps to preserve the balance between those rightholders and the legitimate interests of internet users, without undermining the logic of the internet.

107. Lastly, the rightholder does not lose control of the copy of the photograph used on the school's website, and he may require the photograph to be withdrawn if he judges that it is damaging to his interests.

108. To sum up, for all these reasons, I believe that the reply to the question from the Bundesgerichtshof (Federal Court of Justice) should be in the negative.

D. The exception for use for educational purposes

109. Strictly speaking, my suggested reply does not require use of the possible exceptions to copyright set out in Article 5(3) of Directive 2001/29, nor does the referring court ask about them.

110. The court's silence on this point may be due to its belief that the legislation by which the German legislature implemented these exceptions in its domestic law does not cover a case such as the present one. (75)

111. However, both for the sake of completeness and in case the Court of Justice does not follow my proposal, it is appropriate to analyse the application of Article 5(3) of Directive 2001/29 to this case because, in its judgment, the Court of Justice may offer the referring court some additional observations on the interpretation of a precept of EU law which go beyond what is strictly necessary to answer the court's question but which the court may find helpful. (76)

112. Under Article 5(3) of Directive 2001/29, Member States may provide for exceptions to the rights of reproduction, communication and making available to the public. These exceptions include use of protected works for the sole purpose of 'illustration for teaching'. (77) The Italian Government draws attention to the need to invoke this exception in the alternative, and the Commission notes that Germany had implemented it in Paragraph 52 of the UrhG.

113. Unless I am mistaken, this is the first time that the Court of Justice has to address the exception in Article 5(3)(a). Although its case-law requires the scope of exceptions and limitations to be interpreted restrictively, given that they could affect property rights in intellectual creations, (78) it must not be forgotten that the right to education is also enshrined in Article 14(1) of the Charter. (79) The interpretation must therefore observe a reasonable balance between the two rights.

1. Educational purposes

114. The exception to copyright where the protected works are used solely for educational purposes cannot be reduced to a minimum, which is what would happen if it were limited to allowing teachers to illustrate the content of their courses or lessons.

115. An interpretation that gives greater weight to the right to education, within the meaning of Article 14(1) of the Charter, may emphasise the active, rather than purely passive, role of the pupils, allowing them, too, to use images protected by copyright for the same teaching (or, in their case, learning) purpose. This thus helps education to achieve its main task, which is the full development of human personality. (80)

116. The exception is not granted only for the reproduction and making available of protected material on the internet for the purposes of *scientific investigation*. The provision gives equal prominence to this purpose and to that of promoting *education*, and therefore pupils and teachers in the non-university education sector must also benefit from the exception, where the other applicable criteria are satisfied.

117. Indeed, at the hearing, there was some common ground that there would have been no communication to the public (within the meaning of Article 3(1) of Directive 2001/29) if the pupil's work had been posted on a school website to which only members of the school had access. While I consider this interpretation to be overly reductionist, (81) I believe that it reflects the link between the teaching purpose and the inclusion of the photograph on the school's website.

2. Indication of the source and author's name

118. Article 5(3) of Directive 2001/29 makes the exception for educational purposes subject to a requirement that 'the source, including the author's name, is indicated, unless this turns out to be impossible'.

119. And indeed, the photograph included in the work posted on the school's portal was accompanied by the name of the magazine (*Schwarzaufweiss*) in which it appeared. The pupil and the teacher acted with care, and they cannot be criticised for not mentioning the name of the photographer, which did not appear below the image.

3. Non-commercial purpose

120. Article 5(3) of Directive 2001/29 also requires that use of the protected work for educational purposes be 'justified by the non-commercial purpose to be achieved'.

121. As I have already commented, there can be no doubt that the placing of the Spanish project on the school's portal had no commercial purpose. As for the justification, where digital projects are concerned, nowadays the use of images taken from the internet is essential for certain teaching activities.

4. The test in Article 5(5) of Directive 2001/29

122. While use of the photograph may come within the exception in Article 5(3)(a) of Directive 2001/29, it would still have to pass the test in paragraph 5 of the same article, meaning that one has to analyse its conditions of application. (82) In order to do so I shall follow the same method as in my Opinion in the *Stichting Brein* case. (83)

123. First, given that the use occurs in an educational context where there is no profit motive, it seems clear to me that it does not conflict with a normal exploitation of the work (second stage of the test). By posting it on the school's internet site, neither the pupil nor the teacher (nor the school or the *Land*) is undermining the possible financial benefits to be gained from the presence of the photograph on the internet, nor are they obtaining a commercial benefit to the detriment of the author.

124. Another legitimate interest (third stage of the test) could be the recording of the author's name, for the purposes of protecting his moral rights. But moral rights do not come within the scope of Directive 2001/29, as recital 19 of the directive makes clear.

125. The most sensitive issue relates to the first stage of the test, which requires that the exceptions shall only be applied in *certain special cases*.

126. While the present case is unique, the way in which it is resolved could have important consequences for a multitude of students and teachers (and for photographers, too) in similar circumstances. Indeed, it is not too much to assume that behaviour such as that described here is repeated every day in Member States.

127. And if the circumstances examined here apply in all those cases, a balanced interpretation of this final stage of the test, which simultaneously weighs up other legitimate interests (in this case, those arising from the right to education), could lead to the conclusion that what is important is not the quantity of identical or similar actions but the fact that the environment in which they take place is sufficiently well defined so as not to conflict with a normal exploitation of the works and not unreasonably to prejudice the legitimate interests of the rightholder. With that caveat, they would, therefore, involve the same special case. (84)

128. In short, in the final analysis, the exception in Article 5(3)(a) of Directive 2001/29 would apply.

V. Conclusion

129. In the light of the foregoing, I propose that the Court of Justice reply as follows to the question referred by the Bundesgerichtshof (Federal Court of Justice, Germany):

The inclusion on a school's website of an educational work that includes a photographic image freely available to any internet user free of charge, in that the image already appeared on the internet portal of a travel magazine with no warnings regarding restrictions on use, when there is no profit motive and the source is cited, does not constitute a making available to the public within the meaning 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.

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1 *Original language*: Spanish.

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2 Hereafter referred to interchangeably as the '*Land*' or the 'Land of North Rhine-Westphalia'.

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3 Judgment of 11 September 2014, *Eugen Ulmer* (C−117/13, EU:C:2014:2196, paragraph 42). See the explanations of how the expression 'making available' arose in international copyright, from where it passed into Directive 2001/29, in 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.

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4 Those who submitted observations in these proceedings for a preliminary ruling take the same view, as they base their respective arguments on the case-law concerning the act of communication.

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5 Directive 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).

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6 The expression 'there is nothing worse than a sharp image of a fuzzy concept', attributed to the American photographer Ansel Adams, may perhaps help to understand this series of cases.

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7 Of 16 March 2000 (OJ 2000 L 89, p. 6).

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8 Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

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9 Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9, 'Directive 93/98').

10 Directive of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 372, p. 12).

11 Law of 9 September 1965 (BGBl. I p. 1273), most recently amended on 1 September 2017 (BGBl. I p. 3346), 'the UrhG'.

12 The Land of North Rhine-Westphalia is responsible for inspecting schools within the municipal council which has responsibility for the school and which employs the school's teaching staff.

13 At the hearing, Mr Renckhoff's representative stated that the 'impressum' for the online travel magazine included a copyright notice for the magazine's contents. However, the facts in the order for reference make no mention of this. Any assessment of these questions of fact will be a matter for the referring court.

14 In accordance with the judgment of 24 November 2011, *Circul Globus Bucureşti*, (C−283/10, EU:C:2011:772, paragraphs 35 and 36 and the case-law cited).

15 This is a reference, amongst others, to the judgment of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 19 and the case-law cited).

16 The court cites, amongst others, the judgment of 8 September 2016, *GS Media*, (C−160/15, the '*GS Media* judgment' or the '*GS Media* case', EU:C:2016:644), paragraph 37 and the case-law cited. The interpretation of the court with jurisdiction is that, in any event, the communication was made using the same technical means, and therefore one has to examine whether or not the communication was to that new public, as this aspect is subsidiary to the former aspect.

17 The court cites the *GS Media* judgment, paragraphs 31 and 45.

18 In its opinion, 'It is true that the profit-making nature of the transmission of a protected work is not irrelevant in ascertaining whether a transmission is to be categorised as a "communication to the public", in particular for the purpose of determining any remuneration due in respect of that transmission (see judgment of 4 October 2011, *Football Association Premier League and Others*, C−403/08 and C−429/08, EU:C:2011:631, paragraphs 204 to 206); it does not, however, determine that matter conclusively (judgment of 31 May 2016, ... *Reha Training*, C−117/15, EU:C:2016:379, paragraph 49; but see also [the *GS Media* judgment], paragraph 55).'

19 Contrary to the requirements of the *GS Media* judgment (C−160/15, EU:C:2016:644, paragraph 35 and the case-law cited).

20 Unlike the referring court, the *Land* considers that the case-law of the Court of Justice on hyperlinks and framing does apply to the present case; it cites the *GS Media* judgment, paragraph 52; the judgment of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 18); and the order of 21 October 2014, *BestWater International* (C−348/13, not published, EU:C:2014:2315, paragraph 15).

21 It cites, in particular, the judgments of 26 April 2017, *Stichting Brein* (C−527/15, EU:C:2017:300, paragraph 31 and the case-law referred to there), and of 14 June 2017, *Stichting Brein* (C−610/15, 'the *Stichting*

Brein II judgment', EU:C:2017:456, paragraphs 31 and 44).

22 In accordance with the judgment of 31 May 2016, *Reha Training* (C−117/15, EU:C:2016:379, paragraph 38).

23 The Commission cites the judgment of 4 October 2011, *Football Association Premier League and Others* (C−403/08 and C−429/08, EU:C:2011:631, paragraph 193).

24 Judgment of 7 March 2013, *ITV Broadcasting and Others* (C−607/11, EU:C:2013:147, paragraph 26).

25 Order of 21 October 2014, *BestWater International* (C−348/13, not published, EU:C:2014:2315, paragraph 15).

26 Judgment of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 19).

27 Judgment of 31 May 2016, *Reha Training* (C−117/15, EU:C:2016:379, paragraphs 41 to 44).

28 In particular, the judgments of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 26); and of 8 September 2016, *GS Media* (C−160/15, EU:C:2016:644, paragraphs 41 and 47 to 51).

29 Citing the judgment of 11 September 2014, *Eugen Ulmer* (C−117/13, EU:C:2014:2196, paragraph 55).

30 See the main features of that case-law in the *Stichting Brein II* judgment, (C−610/15, EU:C:2017:456, paragraphs 19 to 34).

31 *Ibidem*, paragraph 28. The starting point for the referring court, in paragraph 38 of the order for reference, is that the photograph posted on the internet as part of the pupil's project is offered to a new public.

32 Point 4 of its written observations.

33 Judgment of 1 December 2011, *Painer* (C−145/10, EU:C:2011:798).

34 *Ibidem*, paragraph 99.

35 *Ibidem*, paragraph 85.

36 According to that article, 'Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'

37 As became clear at the hearing, in practical terms, the difference lies in the protection period: for photographic works the period is 70 years after the death of the author (Paragraph 64 of the UrhG), while for mere photographs the period is reduced to 50 years from first publication (Paragraph 72(3) of the UrhG).

38 See its exposition in the *Stichting Brein II* judgment, paragraphs 19 to 29.

39 Judgment of 29 November 2017, *VCAST* (C−265/16, EU:C:2017:913, paragraph 42 and the case-law cited).

40 Requirements in order for Article 3(1) of Directive 2001/29 to apply, as laid down in the judgment of 26 April 2017, *Stichting Brein* (C−527/15, EU:C:2017:300, paragraphs 35 and 36).

41 *GS Media* judgment of 8 September 2016 (C−160/15, EU:C:2016:644, paragraph 35).

42 Its origin can be traced back to the Guide to the Berne Convention in order to determine the circumstances in which the intervention of the transmitter of a work to a public that was not part of the author's original public was relevant.

43 *Stichting Brein II* judgment of 14 June 2017 (C−610/15, EU:C:2017:456, paragraph 26).

44 Judgment of 31 May 2016, *Reha Training* (C−117/15, EU:C:2016:379, paragraphs 45 and 46), which did not carry out a separate analysis of the subjective elements, which appear to be indissolubly linked to the objective elements.

45 See point 24 of the order for reference.

46 Judgment of 16 November 2016, *Soulier and Doke* (C−301/15, EU:C:2016:878, paragraph 34).

47 *GS Media* judgment, paragraph 46.

48 While I address the relevance of the profit motive below, the point needs to be emphasised here.

49 The argument against such an extrapolation maintains that the *GS Media* case-law applies only to links that redirect to an internet site on which the work already appears, whereas in the present case the image is uploaded to the person's own website, thus making it directly accessible to third parties. However, in my opinion, this difference is not relevant when it comes to assessing the subjective components and other circumstances of the behaviour addressed in the *GS Media* judgment. This was acknowledged by the Commission at the hearing.

50 *GS Media* judgment, paragraph 48.

51 *Ibidem*, paragraph 49.

52 *Ibidem*, paragraph 50.

53 See footnote 13 of this Opinion.

54 The owner could have taken steps to prevent the photograph from being copied, using one of the technical security methods currently available.

55 The judgment of 16 November 2016, *Soulier and Doke* (C−301/15: EU:C:2016:878), paragraph 35, allows for the possibility of implied consent. However, it is based on the premiss that the user who wants to make use of a work knows, or can get to know, the author, which therefore obliges him to give the author actual prior notice; that is not the case here. See paragraphs 38 and 39 of the judgment.

56 This would be unduly generous towards the copyright holder, who could neglect his right in reliance on disproportionate protection. Such an attitude would also encourage a potential increase in disputes with users who trust (and want to believe) in transparency and freedom of access to information available on the internet. The rightholder must therefore be expected to display a certain degree of diligence in protecting his right.

57 For a forceful argument in favour of such a rebalancing, see 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, p. 132 et seq., especially p. 159.

58 In recent judgments the Court of Justice has taken this subjective element into account; see the judgment of 26 April 2017, *Stichting Brein* (C−527/15, EU:C:2017:300, paragraph 49); and the *Stichting Brein II* judgment (C−610/15, EU:C:2017:456, paragraph 46).

59 Point 39 of the order for reference.

60 *GS Media* judgment, paragraph 51: 'when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder'.

61 *Ibidem*, paragraph 45.

62 The assessment of this criterion might be different if the school demanded payment in order to visit the website that provides access to the work containing the photograph.

63 Judgment of 29 November 2017, *VCAST* (C−265/16, EU:C:2017:913, paragraph 48 and the case-law cited).

64 *Ibidem*, paragraph 50, in the reverse sense.

65 Judgments of 31 May 2016, *Reha Training* (C−117/15, EU:C:2016:379, paragraph 41); of 29 November 2017, *VCAST* (C−265/16, EU:C:2017:913, paragraph 45); and the *Stichting Brein II* judgment (C−610/15, EU:C:2017:456, paragraph 41).

66 This is how it is referred to in the judgment of 15 March 2012, *SCF* (C−135/10, EU:C:2012:140, paragraph 86).

67 *Ibidem*, paragraph 87.

68 Judgments of 29 November 2017, *VCAST* (C−265/16, EU:C:2017:913, paragraphs 46 and 47), and of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 22).

69 The adjective used in the Guide to the Berne Convention.

70 In this context, perhaps the notion of 'additional public' might be preferable.

71 Judgment of 4 October 2011, *Football Association Premier League and Others* (C−403/08 and C−429/08, EU:C:2011:631, paragraphs 197 and 198).

72 *Stichting Brein II* judgment (C−610/15, EU:C:2017:456, paragraphs 44 and 45).

73 Judgment of 31 May 2016, *Reha Training* (C−117/15, EU:C:2016:379, paragraph 60).

74 Judgment of 13 February 2014, *Svensson and Others* (C−466/12, EU:C:2014:76, paragraph 31).

75 Paragraph 52a of the UrhG distinguishes between small-scale works (*Werke geringen Umfangs*) in subparagraph 1, where communication is restricted to the circle of pupils taking part in each lesson, and works (*Werke*) in subparagraph 2, where the author's consent is always required. This paragraph has been repealed by Paragraph 1(7) of the Law of 1 September 2017 to adapt copyright to the current requirements of the knowledge society (*Gesetz zur Angleichung des Urheberrechts an die aktuellen Erfordernisse der Wissensgesellschaft*; the most recent amendment to the UrhG, which came into force on 1 March 2018). It has been replaced by the new Paragraph 60a on legally permitted uses for educational, scientific and institutional purposes, subparagraph 1 of which has removed the scale of the works as the criterion for determining permitted use and replaced it with a maximum percentage of the work (15%) that may be copied, made available or communicated to the public. This amendment does not apply, *ratione temporis,* to the present case.

76 These observations may help, when the time comes, to interpret national legislation in the light of the EU law that it implements.

77 Article 5(3)(a) of Directive 2001/29.

78 Judgment of 10 April 2014, *ACI Adam and Others* (C−435/12, EU:C:2014:254, paragraph 22 and the case-law cited).

79 In summary, in such cases private property has an underlying social function, recognised in the case-law, which allows this right to be restricted, provided that those restrictions correspond to objectives of general interest pursued by the Union and do not constitute disproportionate and intolerable interference impairing the very substance of the right guaranteed. See the judgments of 15 January 2013, *Križan and Others* (C−416/10, EU:C:2013:8, paragraph 113), and of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA* (C−347/03, EU:C:2005:285, paragraph 119 and the case-law cited).

80 This is recognised in Article 26(2) of the 1948 Universal Declaration of Human Rights (UDHR) and in Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations by General Assembly resolution 2200A (XXI) of 16 December 1966, and in force since 3 January 1976, in accordance with Article 27.

81 Given the characteristics of a school website, I do not believe that there is much difference between displaying the photo on the *intranet*, on the *extranet* or on the school's internet portal: the public that will access the site will, in all probability, be the same in all three cases, namely the pupils and their families and friends, together with the teachers.

82 However, I agree with the suggestion that a mechanical application of the test, based on the cumulative nature of the three criteria, should be avoided, preferring instead to weigh up the importance of each element. See 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.

83 Case C−527/15, EU:C:2016:938, points 73 to 81.

84 For a similar approach, see the judgment of 11 September 2014, *Eugen Ulmer* (C−117/13, EU:C:2014:2196, paragraph 34).