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OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 15 January 2026 ¹

Case C-788/24

Anne Frank Fonds
v
**Anne Frank Stichting,
Koninklijke Nederlandse Akademie van Wetenschappen,
Vereniging voor Onderzoek en Ontsluiting van Historische Teksten**

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Concept of ‘communication to the public’ – Publication on a website – Access, by means of a virtual private network (VPN), to protected content in a particular Member State – Criteria – Website intended for the public of a certain country – Restriction measures – Territorialisation of the internet through geo-blocking measures – Potential circumvention of those measures using a VPN)

¹ Original language: French.

Introduction

1. This request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concerns, in essence, the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('the Copyright Directive').²

2. The request has been made in proceedings between Anne Frank Fonds ('the applicant in the main proceedings')³ and Anne Frank Stichting (Anne Frank Foundation), the Koninklijke Nederlandse Akademie van Wetenschappen (Royal Netherlands Academy of Arts and Sciences) and the Vereniging voor Onderzoek en Ontsluiting van Historische Teksten (Association for Research and Access to Historical Texts; 'the Association') (together, 'the defendants in the main proceedings'),⁴ concerning an alleged infringement in the Netherlands of the copyright held by the applicant in the main proceedings, resulting from the publication, on the Association's website, of a new scholarly edition of Anne Frank's diary.

3. Specifically, the referring court raises the question, in essence, of the scope of the concept of 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive and, in particular, whether the publication of content on a website constitutes such 'communication to the public' in a Member State where that content is protected by copyright and in which that website is subject to (state-of-the-art) geo-blocking, such that it can only be accessed by circumventing that blocking measure by means of a virtual private network (VPN) or similar service. That question requires a balance to be struck between two interests protected by the Charter of Fundamental Rights of the European Union ('the Charter'): on the one hand, the copyright of the applicant in the main proceedings, enshrined in Article 17(2) of the Charter; and on the other hand, the freedom of expression and information of the defendants in the main proceedings, guaranteed by Article 11 of the Charter.

² OJ 2001 L 167, p. 10.

³ This is a fund, established in Basel (Switzerland) with a social and cultural objective, in keeping with the spirit of Anne Frank.

⁴ The first two defendants are established in Amsterdam (Netherlands) and the third defendant is established in Brussels (Belgium).

Legal context

European Union law

4. Article 3 of the Copyright Directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides, in paragraph 1:

‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’

5. Article 6 of that directive, headed ‘Obligations as to technological measures’, provides, in paragraph 1:

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

Netherlands law

6. Article 1 of the Auteurswet (Law on Copyright) of 23 September 1912,⁵ in the version applicable to the dispute in the main proceedings, provides:

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

7. Article 12 of that law lists the acts that are (also) treated as a communication of a literary, scientific or artistic work.

The dispute in the main proceedings, the questions referred and the procedure before the Court

8. The applicant in the main proceedings is the holder of the copyright in certain versions of Anne Frank’s diary (‘the protected documents’), which are protected by copyright in the Netherlands until 2037, whereas in 2016 the copyright expired in several other countries, including Belgium (‘the public domain countries’).⁶

⁵ Stb. 1912, No 308.

⁶ These include the following countries: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Italy, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal,

9. The defendants in the main proceedings published on the website www.annefrankmanuscripten.org, in Dutch, a scholarly edition of all the manuscripts of Anne Frank's diary, including versions still protected by copyright in the Netherlands. At the same time, they implemented the following two measures: first, a geo-blocking system, as a result of which the website can only be accessed in public domain countries;⁷ and second, when the website is accessed from a public domain country, a request for the user to confirm that he or she is accessing the website from one of those countries.⁸

10. The applicant in the main proceedings brought an action and lodged an application for interim measures before the national court, arguing that the defendants in the main proceedings had infringed its copyright since the protected documents are accessible online in the Netherlands by means of a VPN. The defendants in the main proceedings claim, for their part, to have taken effective protection measures aimed at preventing any copyright infringement.

11. As the judges hearing the application for interim measures, both at first instance and on appeal, dismissed the application for interim measures on the ground that all the defendants in the main proceedings had made reasonable efforts to impede or discourage access to the website from the Netherlands,⁹ the

Romania, Finland and Sweden. For more details on the history of copyright applicable to the different versions of Anne Frank's diary in Belgium and the Netherlands, see Van Gompel, S., 'Geo-Blocking Measures and the Online Publication of Anne Frank's Diaries', *GRUR international*, 2025, Vol. 74, No 8, pp. 705 and 706.

⁷ When the website is accessed from a country where the work remains protected by copyright, such as the Netherlands, the following message is displayed: 'Access denied ... We regret to inform you that ... This website cannot be accessed from your country'.

⁸ In such cases, the following message appears: 'Access check The scholarly online edition of Anne Frank's manuscripts is unavailable in some countries for copyright reasons. This edition is only accessible from the following countries where it has entered the public domain, such that those restrictions do not apply: [list of countries concerned]. By clicking on 'yes' below, you declare that you are accessing this site from one of the aforementioned countries in which the work has entered the public domain. By making a false declaration, you are circumventing protective measures and could be liable for copyright infringement'. Below that message, two alternative options are offered to the user: a green button that says 'Yes, I am accessing the website from one of the aforementioned countries in which the work has entered the public domain' and a red button that says 'No, I am accessing the website from another country'.

⁹ According to those judges, there was no 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive. They also held that an injunction would have the effect of depriving all internet users located in countries where the work is in the public domain of any legal access to the website, a consequence deemed disproportionate. The judge hearing the application for interim measures on appeal relied, inter alia, on the Opinion of Advocate General Szpunar in *Grand Production* (C-423/21, EU:C:2022:818, the 'Opinion in the case *Grand Production*'), according to which, in essence, Article 3(1) must be interpreted as meaning that an operator of a streaming platform does not infringe the exclusive right to communicate works to the public established by that provision by retransmitting a television programme on the internet in a situation where users bypass geo-blocking using a VPN service, so that protected works are available in the territory of the European Union, for which the operator of the aforementioned platform does not have permission from the copyright holder.

applicant in the main proceedings brought a further appeal before the referring court.

12. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is Article 3(1) of the Copyright Directive to be interpreted as meaning that the publication of a work on the internet is only to be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors must be considered in assessing that?
- (2) Can there be a communication to the public in a particular country if, by means of (state-of-the-art) geo-blocking, it is ensured that the website on which the work is published can only be accessed by the public in that country by circumventing the blocking measure using a VPN or similar service? Is the extent to which the public in the blocked country is willing and able to access the website in question via such a service of relevance in that respect? In answering this question, does it make any difference whether, in addition to the measure of geo-blocking, other measures were taken to impede or discourage public access to the website in the blocked country?
- (3) If the possibility of circumventing the blocking measure entails the communication of the work published on the internet to the public in the blocked country within the meaning of Article 3(1) of the Copyright Directive, is that communication made by the party who published the work on the internet, even though knowledge of that communication requires the intervention of the provider of the VPN or similar service in question?’

13. The applicant in the main proceedings, the defendants in the main proceedings, the Portuguese Government and the European Commission submitted written observations to the Court. Those parties also presented oral observations at the hearing held on 6 October 2025.

Analysis

The first question referred

14. By its first question, the referring court asks, in essence, whether Article 3(1) of the Copyright Directive is to be interpreted as meaning that the publication of a work on the internet can only be regarded as a ‘communication to the public’ in a particular country if it is addressed to the public in that country and, if so, what factors must be considered in that assessment. The question is essentially whether a ‘communication to the public’ within the meaning of that provision must effectively be addressed to that public or whether the mere fact

that the public can access the website where the work is published, even by means of circumvention, is sufficient.

15. As a preliminary point, it should be recalled that, under Article 3(1) of the Copyright Directive, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.¹⁰

16. In that regard, it is settled case-law of the Court that the concept of ‘communication to the public’, under that provision, should, as is underlined by recital 23 of that directive, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. It is clear from recitals 4, 9 and 10 of that directive that the principal objective of that directive is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place.¹¹

17. According to equally settled case-law of the Court, the concept of ‘communication to the public’, within the meaning of Article 3(1) of that directive, includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public, and requires an individual assessment.¹²

18. The Court has further held that that concept implies an individual assessment in which account has to be taken of several complementary criteria, which are not autonomous and are interdependent.¹³ Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another.¹⁴

¹⁰ As the Court has repeatedly held, in accordance with that provision, authors thus have a right which is preventive in nature and which enables them to intervene between possible users of their work and any communication to the public which such users might contemplate making, in order to prohibit such communication (see judgment of 20 June 2024, *GEMA*, C-135/23, EU:C:2024:526, paragraph 17 and the case-law cited, the ‘judgment in *GEMA*’).

¹¹ See, inter alia, judgments of 22 June 2021, *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 63 and the case-law cited, the ‘judgment in *YouTube and Cyando*’), and of 20 June 2024, *GEMA* (C-135/23, EU:C:2024:526, paragraph 19 and the case-law cited).

¹² See judgment in *GEMA* (paragraph 21 and the case-law cited.)

¹³ See judgment of 13 July 2023, *Ocilion IPTV Technologies* (C-426/21, EU:C:2023:564, paragraph 58 and the case-law cited).

¹⁴ See judgment in *GEMA* (paragraph 22 and the case-law cited).

19. Amongst those criteria, the Court has, first, emphasised the indispensable role played by the platform operator and the deliberate nature of its intervention. That platform operator makes an ‘act of communication’ when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.¹⁵ There must therefore be a direct link between the provider’s intervention and the copyrighted work thus communicated.¹⁶ Furthermore, the Court has held that it is relevant that a communication to the public, within the meaning of Article 3(1) of the Copyright Directive, is of a profit-making nature, even though that nature is not necessarily an essential condition for the existence of such a communication.¹⁷

20. In addition, the Court specified that the concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people.¹⁸ Thus, the concept of ‘public’ assumes that a minimum threshold has been reached, which excludes from that concept a group of persons concerned that is too small, or insignificant. In order to determine that number, account should be taken, in particular, of the number of persons able to access the work at the same time, but also of how many of them may access it in succession,¹⁹ irrespective of whether or not they avail of that opportunity.²⁰

¹⁵ See, inter alia, the judgments in *YouTube and Cyando* (paragraph 68 and the case-law cited), and in *GEMA* (paragraph 23 and the case-law cited).

¹⁶ See Opinion in the case *Grand Production* (point 48 and the case-law cited). In that case, however, no judgment was delivered, since the referring court withdrew its request for a preliminary ruling (see order of 13 February 2023, *Grand Production*, C-423/21, EU:C:2023:130).

¹⁷ See the judgment in *GEMA* (paragraph 24 and the case-law cited). In that respect, the Court has held that the ‘receptivity’ of the public may be relevant, in that the broadcast of protected works is of a profit-making nature where the user is likely to obtain an economic benefit related to the attractiveness of and, therefore, the increased occupancy of the establishment in which it makes those broadcasts, whereas such a profit-making nature is lacking where the public concerned does not give any importance to such a broadcast (see, to that effect, paragraph 25 and the case-law cited).

¹⁸ See, inter alia, the judgments in *YouTube and Cyando* (paragraph 69 and the case-law cited), and in *GEMA* (paragraph 38 and the case-law cited).

¹⁹ See the judgment in *GEMA* (paragraph 39 and the case-law cited).

²⁰ See judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 19 and the case-law cited). Although there may be indications that a communication is addressed to certain groups of persons, irrespective of the location of those persons (see judgment of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraphs 46 to 50 and the case-law cited), such a specific ‘targeting’ of a given public is not necessary for a publication on the internet to be a communication to the public. It is clear from the case-law of the Court that any act whereby a user, in full knowledge of the consequences of what he or she is doing, gives access to protected work constitutes an act of communication and, therefore, a communication to the public for the purposes of Article 3(1) and (2) of the Copyright Directive

21. The Court has also recalled that, according to settled case-law, in order to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holder when it authorised the initial communication of its work to the public.²¹

22. In the present case, I take the view that, on the one hand, the online publication by the Association of a scholarly edition of all the manuscripts of Anne Frank’s diary constitutes an ‘act of communication’ within the meaning of Article 3(1) of the Copyright Directive. Indeed, in the absence of such an act, the work would not, in principle, be accessible to the public.

23. On the other hand, having regard to the case-law of the Court recalled in point 20 of this Opinion, it seems to me that that act of communication has reached a ‘public’, in so far as it has offered an indeterminate number of persons the possibility of accessing protected documents which they did not have access to previously, irrespective of whether they actually availed themselves of that opportunity or whether that act was addressed to a given public.

24. Accordingly, I propose to answer the first question that Article 3(1) of the Copyright Directive must be interpreted as meaning that it does not require an act of publication of a work on a website to be addressed to the public in the country concerned in order to be classified as an ‘act of communication to the public’ in that country.

The second question

25. By its second question, the referring court asks, in essence, whether the publication of content on a website constitutes a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive in a country where that content is protected by copyright and in which that website is subject to (state-of-the-art) geo-blocking, such that it can only be accessed by circumventing that blocking measure using a VPN or similar service. It also asks whether it is relevant, in that regard, to determine to what extent the public of the blocked country is willing and able to access the website in question via such a service and whether it is appropriate to take additional measures to impede or discourage such access.

26. As a preliminary point, it should be recalled that, as it follows from recitals 3 and 31 of the Copyright Directive, the harmonisation effected by that

(see judgment of 17 June 2021, *M.I.C.M.*, C-597/19, EU:C:2021:492, paragraph 48 and the case-law cited).

²¹ See, inter alia, the judgments in *YouTube and Cyando* (paragraph 70 and the case-law cited), and in *GEMA* (paragraph 43 and the case-law cited).

directive aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights, laid down in Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information, safeguarded by Article 11 of the Charter.²²

27. Respecting that balance seems particularly complex when the protected work is published on the internet. In effect, for the purposes of the interpretation and application of the Copyright Directive, and in particular Article 3(1) thereof, that fair balance must be sought taking into account also the particular importance of the internet to freedom of expression and of information, as safeguarded by Article 11 of the Charter.²³ Moreover, although the territorial nature of copyright means that the rightholder cannot, on the basis of the rights he or she has in one Member State, authorise or prohibit a communication to the public in another Member State where that right has lapsed, the fact remains that publication on a website is inherently accessible to all internet users and is not restricted by the territorial limits of copyright.

28. In the present case, the defendants in the main proceedings, having lawfully published the protected documents on a website in a country where those documents have entered the public domain, have put in place a geo-blocking measure for countries other than public domain countries so as not to infringe the copyright of the applicant in the main proceedings. However, the applicant in the main proceedings, who holds the rights to those documents in the countries concerned, argues that that measure is ineffective, since users can circumvent it by means of a VPN service.

29. In that regard, I recall that geo-blocking is one of the digital rights management instruments designed to protect copyright, which are themselves protected by EU law.²⁴ In particular, the Court has held that, by adopting

²² See the judgment in *YouTube and Cyando* (paragraph 64 and the case-law cited). Similarly, as regards intellectual property rights more generally, recital 2 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45) states that ‘the protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet’.

²³ See the judgment in *YouTube and Cyando* (paragraph 65 and the case-law cited).

²⁴ Article 6 of the Copyright Directive requires Member States to extend legal protection to ‘any effective technological measures’. See also, in that sense, Opinion in the case *Grand Production* (points 28 to 30). In his view, those instruments are also used as a tool to manage copyright in such works, making it possible to charge a separate fee for different forms of distribution of the same work, segment the market and apply so-called price discrimination to its different segments, or, finally, charge fees for the content made available on websites.

technical measures against the framing of a protected work made available on the internet, the copyright holder limits the circle of persons to whom the work is communicated to the users of the website where it was originally made available.²⁵

30. Accordingly, as Advocate General Szpunar pointed out in his Opinion in the case *Grand Production*, if the copyright holder (or its licensee) has applied geo-blocking, the protected content is directed only to the circle of persons accessing that content from the territory specified by the rightholder (that is to say, the territory where access is not blocked). In such a situation, that rightholder does not communicate that content to the public in other territories.²⁶

31. It is common ground that, in both the virtual and real world, no security measure is absolutely inviolable.²⁷ Any protection is capable of being circumvented or compromised, such that the sole aim must be to enhance the level of reliability. This also applies to geo-blocking.²⁸

32. However, the fact that users manage to circumvent a geo-blocking measure put in place to restrict access to a protected work does not, in itself, mean that the entity that put the geo-blocking in place communicates that work to the public in a territory where access to it is supposed to be blocked. Such an interpretation would make it impossible to manage copyright on the internet on a territorial basis and would mean that any communication to the public on the internet would be global.²⁹ As the Commission pointed out in its written observations, the holder of an exclusive right in a work does not have the right to authorise or prohibit, on the basis of the right granted to it in one Member State, communication to the public in another Member State in which that right has ceased to have effect.

²⁵ See judgment of 9 March 2021, *VG Bild-Kunst* (C-392/19, EU:C:2021:181, paragraphs 42 and 43), as well as the Opinion in the case *Grand Production* (point 35).

²⁶ See the Opinion in the case *Grand Production* (point 36).

²⁷ Indeed, the possibility for users to circumvent protection measures is a risk inherent in the distribution of copyrighted works in digital form, especially on the Internet (see the Opinion in the case *Grand Production*, point 42).

²⁸ See the Opinion in the case *Grand Production* (C-423/21, EU:C:2022:818, point 38). As the Advocate General points out, various technical means, including VPN services, enable those blockades to be bypassed, in particular by changing virtually the user's location. While there are technical means of counteracting such practices, they are not and probably never will be fully effective, as breach techniques are always one step ahead of security techniques.

²⁹ See the Opinion in the case *Grand Production* (point 39). In the view of the Advocate General, the situation would be different if a distributor of audiovisual programmes protected by copyright intentionally applied ineffective geo-blocking in order actually to allow access to persons from outside the territory in which it was authorised to communicate to the public the programmes concerned and if it made accessing those programmes easier than by using the possibilities that objectively exist online, including, in particular, publicly available VPN services (point 44 and the case-law cited).

33. Accordingly, I consider that, when the person responsible for the publication places a copyrighted work on a website in certain countries and adopts effective technical measures intended to prevent acts not authorised by the copyright holder, such as geo-blocking access to that website from countries where the work is still copyright-protected, that person cannot be considered to be communicating that protected work to the public in those countries. It would be different if the technical measures adopted by that person were found to be deliberately ineffective so that they could be easily circumvented.³⁰ Moreover, it is for the Member States, under Article 6(1) of the Copyright Directive, to take positive action in order to ensure copyright protection, for example by imposing effective penalties against anyone infringing the protection conferred on that right.

34. In the present case, as is apparent from the order for reference, the defendants in the main proceedings have set up geo-blocking for the website in question, described as being ‘state of the art’, together with an alert system that, when the website is accessed from a public domain country, requires the user to confirm that he or she is accessing the website from one of the public domain countries.³¹

35. In that respect, although it is for the referring court to determine, in the light of the foregoing, the effectiveness of the technical measures implemented by the defendants in the main proceedings, it is appropriate for the Court to provide some useful indications in that regard to enable the referring court to decide the case before it.³²

36. In the first place, I note, first of all, that a *geo-blocking measure*, such as that adopted in the present case, is, in principle, the only mechanism currently capable of restricting access to a website on a territorial basis. Since it is ‘state of the art’, it is an appropriate measure to ensure, as far as possible, copyright protection for the applicant in the main proceedings.³³ At the same time, however, it is important to note that, as I explained in point 31 of this Opinion, no technology is infallible, hence the need – and the corresponding obligation for the website owner – to regularly assess new circumvention risks and, if necessary, adopt additional measures to prevent such circumvention.³⁴

³⁰ See footnote 29 of this Opinion. See, also, on the standards to ensure effective geo-blocking, Trimble, M., *The EU Geo-Blocking Regulation: A Commentary*, Edward Elgar Publishing, 2024, pp. 26 to 30.

³¹ See point 9 of this Opinion.

³² See, inter alia, the judgment in *GEMA* (paragraph 32 and the case-law cited).

³³ According to the observations made by the defendants in the main proceedings at the hearing, and subject to verification by the referring court, the geo-blocking measure adopted in the present case is also able to prevent access by many of the VPN services available on the market.

³⁴ In any event, and in accordance with the old adage ‘*ad impossibilia nemo tenetur*’ (‘no one is held to the impossible’), an impossible or disproportionate obligation cannot be imposed on the

37. In addition, the *willingness of users to circumvent geo-blocking* in order to access the website in question, mentioned by the referring court in the second question referred, is not, in my view, a decisive criterion for assessing the effectiveness of the measures taken by the defendants in the main proceedings, on account of its subjective nature. By contrast, the easy use of unlawful means or conduct to enable users to circumvent geo-blocking is a relevant factor to be taken into consideration, since, other than implementing effective protection measures, the defendants in the main proceedings cannot be held liable for the unlawful conduct of third parties.

38. Lastly, the *implementation of additional measures* intended to impede or discourage public access to the website in the blocked country, such as those taken in the present case,³⁵ although secondary, is a relevant factor in assessing the deterrent effect of all the measures on the public in that country.³⁶

39. In the second place, I am unconvinced by the arguments put forward by the applicant in the main proceedings. First, the fact that *the website is in Dutch* is not, in itself, an indication of the intention of the defendants in the main proceedings to address the public of the Netherlands, since it is the original language of Anne Frank's diary (and not a translation) and one of the official languages of the Kingdom of Belgium, which is where the defendants in the main proceedings are established.

40. Second, the choice of a *generic domain name* ('.org') for the website URL, rather than a national domain name ('.be'), is not a decisive criterion either. On the one hand, the domain name '.org' is frequently used by organisations such as the defendants in the main proceedings and, on the other hand, the publication is not limited to a Belgian public, but is aimed at all public domain countries.³⁷

41. Lastly, I am of the view that the *alternative measures* envisaged by the applicant in the main proceedings in its written and oral observations are not likely to be imposed in the circumstances of the present case. Aside from the radical solution of abstaining from the publication of the work (or only partially disseminating the protected documents), which evidently cannot be considered a proportionate measure, the applicant in the main proceedings proposed, inter alia, access similar to that of library computer terminals, or offering subscriber-only

person responsible for the publication of the work on the internet, having regard to the exercise of his or her right to freedom of information.

³⁵ See point 9 of this Opinion.

³⁶ In that regard, it might also be useful, as the Commission suggested in its written observations, for the copyright owner in the country where the work remains protected to be informed in advance of the publication and the protection measures in place, so that it may take a view on the matter.

³⁷ In addition, the use of a '.org' or a '.be' domain does not affect access to the content from a country other than that where the content at issue was published.

access by means of a login protected by a username and password. Those measures could be additional and highly effective means of restricting access to protected documents. However, their adoption would entail a ‘closed’ publication model, rather than the more open model legitimately chosen by the defendants in the main proceedings, thereby considerably limiting their freedom of information in public domain countries.³⁸ The solution suggested in this Opinion, although it provides less stringent copyright protection, thus seems the only proportionate and conceivable one, given the particularly restrictive nature of the measures proposed by the applicant in the main proceedings.

42. In the light of all the foregoing, I propose to answer the second question to the effect that Article 3(1) of the Copyright Directive must be interpreted as meaning that the publication of content on a website does not constitute ‘communication to the public’ in a country where that content is protected by copyright and in which that website is subject to effective geo-blocking, possibly accompanied by other non-technical measures intended to impede or discourage access and having a deterrent effect in the blocked country, considering the circumstances of the case and, in particular, the ability of users in the blocked country to circumvent such measures using a VPN or similar service, and that service providers in the public domain country cannot be subject to unreasonable requirements.

The third question

43. By its third question, the referring court asks, in essence, whether, if the possibility of circumventing the geo-blocking measure entails the communication to the public of the work published online in the blocked country, within the meaning of Article 3(1) of the Copyright Directive, that communication is made by the party who published the work online, even though knowledge of that communication requires the intervention of the provider of the VPN service in question or of a similar service.

44. As a preliminary point, I consider that, in view of the answer proposed to the second question referred for a preliminary ruling, it is not necessary to answer the third question, which is based on the premiss that the publication of the documents protected in the present case constitutes a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive in the blocked country, given the possibility of circumventing the geo-blocking measure by means of a VPN or similar services. That being the case, I will provide some clarification in the following points on whether, in the present case, the communication to the public – which cannot be attributed to the author of the online publication in the blocked territory – may still be considered as the act of the provider of the VPN or similar service.

³⁸ Such radical solutions could, in my opinion, only be envisaged if the protection measures adopted by the defendants in the main proceedings prove wholly ineffective, which is not established in the present case and, in any event, is for the referring court alone to assess.

45. In the main proceedings, the applicant raised the risk that users could circumvent the geo-blocking measure by accessing the website using VPN services.

46. In that regard, I note that, while VPN service providers act as intermediaries in the present case, their intervention does not involve the communication of copyrighted works, but is limited to internet access.³⁹ Indeed, as the Commission points out in its observations, VPN services are legally accessible technical services which users may, however, use for unlawful purposes. The mere fact that those or similar services may be used for such purposes is not sufficient to establish that the service providers themselves communicate the protected work to the public.⁴⁰ It would be different if those service providers actively encouraged the unlawful use of their services. In that case, the service providers could be regarded as playing an essential role in making the works in question available,⁴¹ which the referring court would have to assess in the light of the circumstances of the case.

47. Thus, in the event that the possibility of circumventing the geo-blocking measure leads to communication to the public of the work published on the internet in the blocked country, within the meaning of Article 3(1) of the Copyright Directive – which I am inclined to rule out in the light of the arguments set out in the context of the second question – the provider of the VPN or similar services could not be considered the author of that communication to the public.

48. Accordingly, I propose to answer the third question that Article 3(1) of the Copyright Directive must be interpreted as meaning that, if, taking into account the possibility of circumventing geo-blocking measures, the publication of content on a website were to be regarded as communication to the public of the work in the country concerned, that provision precludes a provider of VPN or similar services from being held liable for the acts of a user in a country where access to the work is blocked, when that user makes use of those services in order to circumvent the geo-blocking measures, unless the service provider actively encourages such unlawful use to access the protected work in that country.

Conclusion

49. In the light of the foregoing considerations, I propose that the Court of Justice should answer the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

³⁹ See, to that effect, the Opinion in the case *Grand Production* (point 41).

⁴⁰ In addition, according to recital 27 of the Copyright Directive, the provision of physical facilities for enabling or making a communication does not in itself amount to ‘communication’ within the meaning of that directive.

⁴¹ See, to that effect, judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 37).

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

must be interpreted as meaning that:

- (1) it does not require the publication of a work on a website to be addressed to the public of a particular country in order to be regarded as communication to the public in that country;
- (2) the publication of content on a website does not constitute a ‘communication to the public’ within the meaning of that provision in a country where such content is protected by copyright and in which that website is subject to effective geo-blocking, as well as any other non-technical measures aimed at impeding or discouraging access alongside the geo-blocking measure and having a deterrent effect in the blocked country, taking into account the circumstances of the case and, in particular, the ability of users in the blocked country to circumvent such measures using a virtual private network (VPN) or similar service and that service providers in the public domain country cannot be subject to unreasonable requirements;
- (3) if, taking into account the possibility of circumventing geo-blocking measures, the publication of content on a website were to be regarded as communication to the public of the work in the country concerned, that provision precludes a provider of VPN or similar services from being held liable for the acts of a user in a country where access to the work is blocked, when that user makes use of those services in order to circumvent the geo-blocking measures, unless the service provider actively encourages such unlawful use to access the protected work in that country.