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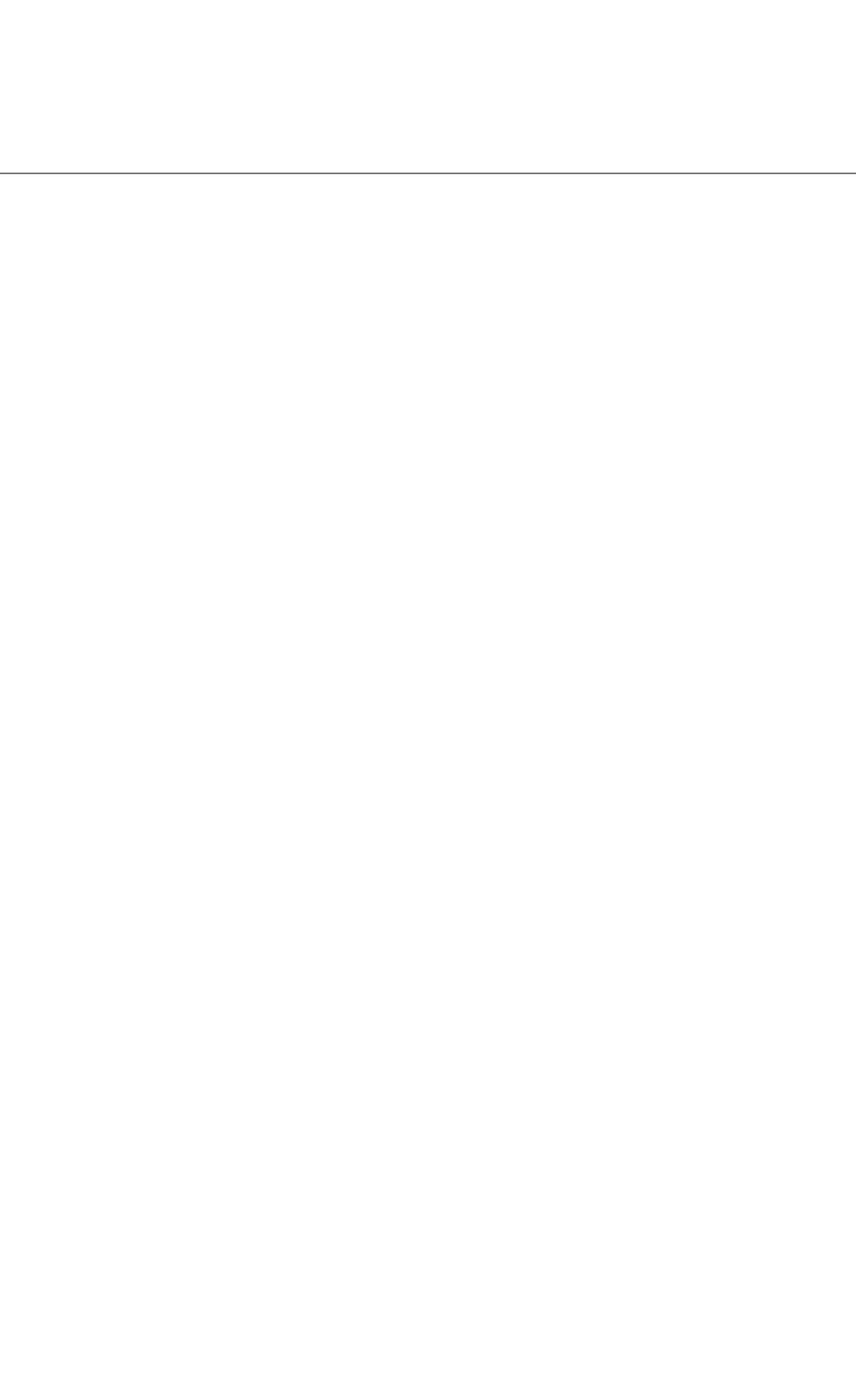
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The Renckhoff case and the reshaping of the non-for-profit use of material on the Internet**

The digital technology and the Internet created new technical possibilities concerning use and protection of copyrighted works, such as storage of work in digital format in memory of computer, search engines, social platforms, transmission on demand, various types of linking, website-blocking, electronic protection of copyrighted works or automated computational analysis of information in digital format. They make copyright law much more complex. The *Renckhoff* case is significant in the context of discussion whether law, including EU law provides the copyright holders and users with equitable sharing of the benefits derived from the new technical possibilities. The Court of the EU interpreted the right to communication and making a work available to the public. The Court's weighing and balancing of various involved factors looks problematic from the standpoint of the equitable sharing of benefits. The judgment might be understood as established a rebuttable presumption that all contents on the Internet are under the copyright protection and that the non-commercial user is obliged to investigate existence of the copyright protection. If such understanding were correct, *Renckhoff* might endanger the freedom of expression and information and other non-for-profit uses of the Internet.

Key words: Copyright, Internet, Communication, Making available, Public

Introduction

The functions and uses of the Internet¹ have been changing over the time. The early Internet served primarily to facilitate the public

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** The article transmits the lecture held at the Bar School of EU Law on 20 April 2019. The author published the paper concerning the *Renckhoff* case under title "The Relevance of Prior Knowledge on the Existence of Copyright in Balancing Freedom of Expression and Copyright Integrity in *Renckhoff* (C-161/17)" in *Noua Revistă de Drepturile Omului*, 1/2019. The published paper is limited only to the designated issue. This paper considers also other relevant issues.

¹ The term Internet is used in this text with capital first letter, except in quotations. The word should be used as a proper noun., not as a common noun. However, the word is also used as the common noun. See https://en.wikipedia.org/wiki/Capitalization_of_Internet. For the time being the use of the word with capital I prevails. <https://blog.oxforddictionaries.com/2016/04/05/should-you-capitalize-internet/> That grammatical issue is not legally neutral here. Even it was created by man, the Internet should

access to information and to make easier private communication.² In the 1990s the commercial wave began to spread. Later, the Internet was used for creating a new form of sociability — on-line communities in which all participants can be reader or viewer and publisher simultaneously.³ “To maintain this structure, the community model requires the continued neutrality of the network so that non-professional, unprofitable and politically controversial communication will not be marginalized. It must be possible to introduce innovative designs for new forms of association without passing through bureaucratic or commercial gatekeepers”⁴

The Internet has become the broadest worldwide forum of meeting all various people, ideas and interests. The protection of copyrighted works is one interest among many other important interests. The specific technical characteristics of digitalization and the Internet have opened various possibilities of the factual and legal regulation of plurality of the rights and underlying interests. In the last two decades the legal regulation of the use of the Internet has been expanding. Justice and reasonableness require that the legal regulation takes into account all various and frequently competing interests, attributes appropriate importance to each of them and establishes a fair balance among them. Justice and the principle of equality require also that new technical possibilities, created by digitalization and the Internet brings equal benefits to all various users of the Internet. It seems, however, that some disbalances have occurred in respect to interest of the copyright holders and users. “Many users feel that restrictions on use of copyrighted material on the internet are at odds with established practices of non-commercial ‘sharing’ and reusing of content, often done to create something new — a phenomenon sometimes referred to as the ‘remix culture’ — a form of which is user-generated content.”⁵

The *Renckhoff* case⁶ is a good illustration of the problem. Different possible interpretations of the key provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001

be treated in legal terms as unique entity, such as the Sea. Thus, the Internet should be treated as *res communis omnium*. The users of the Internet are already named “internauts”. See E. Arezzo, *Hyperlinks and Making Available Right in the European Union — What Future for the Internet After Swensson*, *International Review of Intellectual Property and Competition Law*, 2014, p. 525.

² A. Feenberg, Introduction, *Toward a Critical Theory of Internet*, in *(Re)Inventing of the Internet, Critical Case Studies*, ed. A. Feenberg and N. Friesen, Rotterdam, Sense Publishers, 2012 e-book, ISBN: 978-94-6091-734-9, p. 11.

³ *Ibid.*, p. 12.

⁴ *Ibid.*

⁵ D. J. Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, *University of Ottawa Law & Technology Journal*, 1/2008, p. 11.

⁶ Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckhoff*, judgment of 7 August 2018.

on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter: the InfoSoc Directive) and guiding motives underlying the different interpretation illustrate different possibilities of sharing benefits brought by digitalization and the Internet. The case demonstrates different visions of the fair balance between copyright and other fundamental rights.

The main issue was whether a school pupil infringed the right of communication and making available of a work to the public by downloading of a photo from the website of a travel magazine and uploading the photo to the website of her school. The Advocate General Campos Sánchez-Bordona proposed to the Court of the European Union (hereinafter: the CJEU or the Court) to reply that there was no infringement, but the Court replied contrary. Interested parties, participating in the proceedings before the CJEU, the Commission, Italy and France took also different positions. The Advocate General began his Opinion by an observation that it had been established practice not very long ago that the pupils illustrated their school projects with photos and drawings published in books and magazines, then that they presented them in school and that the authors of the used images did not claim royalties. He observed further that the pupils are doing the same today but in digital format and by using the Internet for searching for images and for displaying their homework.⁷ Thus, he noted that the case was of the importance “to the daily lives of millions of pupils in Europe”.⁸

The *Renckhoff* case is of relevance for the copyright holders and users and it might affect interest of members of the groups on the social platforms such as Facebook or Twitter, as well as members of the public. The case is focused on the interpretation of the right to communication and making available of a work to the public as laid down in Article 3 (1) of the InfoSoc Directive, but the fundamental issue underlying the case is how the public interest address the protection of copyright in the Internet environment. The text will show two approaches. First, traditional approach according to which the high protection of copyright stimulates investment in creativity and increases competitiveness of the society. And second, the new one, that the protection of copyright should not obstacle the process of development of new unlicensed creativity on the Internet and should be proportional to protection of other fundamental rights such as the freedom of expression and information and the right to education. The freedom of expression includes also the expression by photos.⁹

The analysis of the interpretation of the right to communication and making available of a work to the public in *Renckhoff* requires

⁷ Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckhoff*, Opinion of the Advocate General of 25 April 2018, paras 1 and 2.

⁸ *Ibid.*, para 52.

⁹ *Von Hannover v. Germany* (No 2), App. Nos. 40660/08 and 60641/08, judgment of 7 February 2012, para 103.

the exploration of more issues including the meaning of the term public, relevance of knowledge about the existence of copyright in the work, significance of for-profit or non-for-profit motive of transmission, distribution of burden of the copyright protection between the right-holder and the user and weighing and balancing of interests protected by competing fundamental rights. The judgment in *Renckhoff* might endanger some established non-commercial uses of the Internet not only of millions of pupils but also many others.

The paper begins with exposition of the facts of the case and the question referred to the CJEU. It continues by presenting the applicable law and the interpretation of the Court. Then, the paper considers striking of a fair balance between competing rights, analyzes the consequences of the judgment and investigates different motives underlying the judgment and the opinion of the Advocate General.

The facts of the case and the question referred to the CJEU

A pupil of a school in the Land of North Rhine-Westphalia found a photograph of the Spanish city Cordoba on an internet portal of an on-line travel magazine. She inserted the photo in a school project and indicated the travel magazine portal as a source. The name of the photographer was not stated on the travel portal.¹⁰ There were no restrictive measures preventing the downloading, uploading and thus reproducing of the photo on a new web site. The school project was a Spanish language work and the image was inserted in the project only as a suitable illustration. With the assistance of a teacher, the project with the inserted photo was then posted on the school website.

The author of the photograph, a professional photographer Mr. Renckhoff initiated a judicial proceeding and claimed removal of the image from the school portal and damages, arguing that the image had been posted on the school website without his consent and it was violating his copyright. The national court of the first instance ordered the Land of North Rhine-Westphalia, which was liable for the acts of the school, to remove the photo from the school website and to pay 300 euros.¹¹ The national court of the second instance confirmed that the reproduction right and the right to make available the work to the public had been infringed.¹²

Acting under an appeal on the legal issues, the national court of the final instance, the German Federal Court considered that an

¹⁰ The Advocate General informs that the photographer stated at the hearing that the “impressum” for the online travel magazine contains a copyright information but that the facts of the order for reference do not include such information. The Opinion, f. 13. He gave the Opinion under the assumption of the absence of the copyright notice in the online travel magazine.

¹¹ *Renckhoff*, Opinion., paras. 6–9.

¹² *Ibid.*, para 10.

interpretation of the terms “communication to the public” in Article 3 (1) of the InfoSoc Directive was of decisive importance for the settlement of the case and asked the CJEU to clarify the meaning of the clause. The Federal Court referred the following question: “Does the inclusion of a work — which is freely accessible to all internet users on a third-party website with the consent of the copyright holder — on a person’s own publicly accessible website constitute a making available of that work to the public within the meaning of 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?”¹³

The law applicable to the case

The right to communication and making available to the public as laid down in Article 3 (1) of the InfoSoc Directive

The right to communication and making available of a work to the public is a right from copyright set, one of the most lucrative author’s rights. Copyright was born at the beginning of XVIII century and recognized by the Statute of Anne of 1710 in England as the property right of writers serving to safeguard their economic interest against printers, booksellers and other persons who print, reprint and publish books and other writings without consent of authors or other proprietors of such books and writings.¹⁴ Copyright was thus envisaged to govern the relationship between the author and economic actors who benefited from the work. One of the purposes of the Statute was, however, to encourage “learned men to compose and write useful books”, which might be qualified as the public interest. An economic analysis summarizes the economic approach to copyright law observing that “[F]or copyright law to promote economic efficiency its principal legal doctrines must, at least approximately maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”¹⁵

Victor Hugo contributed a lot to elaboration of copyright as a natural right in the framework of public interest concerning fostering creativity.¹⁶ The public interest requires that the protection of copyright does not unreasonably obstacle creation of new works.¹⁷ The original minimalistic normativity of the 1886 Berne Convention for the Protection of Literary and Artistic Works (hereinafter: the Berne Convention) was leading by such understanding. Over the time, the

¹³ *Ibid.*, para 34.

¹⁴ <https://www.copyrighthistory.com/anne.html> visited 15 May 2019.

¹⁵ W. M. Landes, R. A. Posner, An Economic Analysis of Copyright Law, *Journal of Legal Studies* 2/1989 p. 326, quoted by D. J. Gervais, *op. cit.*, p. 6.

¹⁶ D. J. Gervais, *op. cit.*, p. 5.

¹⁷ *Ibid.*

set of copyright authorizations has been expanded by amendments to the Berne Convention and new treaties.

The rights of communication of a work to the public were established as the specific rights under the Bern Convention. They cover the performances of dramatic, dramatic-musical and musical works, recitations of literary works in respect to all communications; all literal and artistic works in respect to broadcasting and other wireless diffusion and rebroadcasting by a new organization; the cinematographic adaptation of the works in respect to transmission by wire.¹⁸ The Berne Convention includes also the terms “made available to the public.” They do not denote, however, a specific right of the author but they signify the fact that the work has become accessible to the public.

The specific rights of communication, as established by the Bern Convention, do not satisfy new communicative possibilities and needs created by digital technology and the Internet.¹⁹ These new possibilities and needs were addressed by the 1996 WIPO Copyright Treaty at international level. New possibilities include *inter alia* the possibility that the Internet user can access any work stored in memory of the remote computer at any time and from any place at the Internet, which has become known as a “communication on demand”. The right of communication to the public was adapted to new circumstances and formulated in a general way in Article 8 of the WIPO Copyright Treaty which states:

“...authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them.”

Article 3 (1) of the InfoSoc Directive transposed Article 8 of the WIPO Copyright Treaty in EU law in the following way:

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

.....

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

¹⁸ P. B. Hugenholtz, S. C. van Velze, Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”, *International Review of Intellectual Property and Competition Law*, 7/2016, p. 799. See overview of the revision conferences and adopted amendments to the Bern Convention at Daniel J. Gervais, *op. cit.*, p. 8.

¹⁹ I. H. Bath, Right of Communication to the Public in Digital Environment, *International Journal of Engineering Science Invention*, 4/2013, p. 2319.

By transposing the text, the EU legislator inserted the new term “to prohibit” in the text. Thus, under Article 8 of the WIPO Copyright Treaty the author has exclusive right to authorize the communication and under Article 3 (1) of the Directive the author has exclusive right to authorize and also to prohibit the communication. The EU legislator desired, most probably, to strengthen the author’s entitlement of control over the communication. It seems that the intent played a significant role in *Renckhoff*.

In Article 3 (1), the making available to the public of a work appears as a component of the wider right of authors to communication to the public.²⁰ It exists in Article 3 (2) as a specific separate right of the neighboring right-holders (performers, phonogram producers, film producers and broadcasting organizations).

Case law of the CJEU relevant for the interpretation of the right

Case law informs on the meanings which the CJEU attributed to terms “act of communication” and “the public” as well as that the Court considered some other issues such as the knowledge on the legality of communication and for-profit or non-for-profit motive of activity as relevant for the interpretation.

In *Svensson and Others* and *Soulier and Doke*, the CJEU created the concept of the general internet public. The Court noted in *Svensson and Others* that when access to the work on the website was not restricted by any measure, the public consisted of all potential visitors to the website since all of them had free access to the work.²¹ That was noted concerning hyperlink which had been installed on a new website and which enabled the visitors to the new website an access to the work posted on the original website.²² The public of the new website was not a new internet public but a part of the internet public addressed by the original website. In *Renckhoff*, the CJEU referred to *Svensson and Others* and qualified its finding on the sameness of the public by stressing the role of hyperlink. The Court, however, did not repeat its explanation as given in *Svensson and Others*.

²⁰ See, however, the difference between “communication to the public” and “making available to the public” in pp. E. Arezzo, *Hyperlinks and Making Available Right in the European Union — What Future for the Internet After Swensson*, *International Review of Intellectual Property and Competition Law*, 2014, pp. 539 and 540.

²¹ Case C-466/12, *Svensson and Others*, judgment, 13 February 2014, para 26.

²² See views of professional associations on legality of the use of various types of hyperlinks in Ch. L. Saw, *Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty*, *International Review of Intellectual Property and Competition Law*, 5/2018, p 539. See also critique of the restrictive approach of the Court concerning legality of linking in E. Arezzo, *op. cit.*, p. 547.

The understanding of the internet public in *Svensson and Others* was repeated in *Soulier and Doke*, but in another factual context. A prior, explicit and unreserved authorization for posting of the work to the website without using of technological measures which restrict access to the work means the authorization for the communication of the work to the general internet public.²³ In *Renckhoff*, the CJEU invoked *Soulier and Doke* to underline the preventive nature of the right of communication, but the Court did not repeat its finding on the general internet public.

The Court considered in *GS Media* the relevance of the existence of knowledge of illegality of the posting the work on the original website and took into account nature of activity — for-profit or not-for-profit — for the qualification of an act as the act of communication in sense of Article 3 (1) of the InfoSoc Directive. The work was posted on the website without consent of the author and then it was presented on the new website via hyperlink. The issue in *GS Media*²⁴ was whether the posting of the work on the new website in such circumstance could be treated as an act of communication to the public in sense of Article 3(1) of the InfoSoc Directive. The Court was of the opinion that the assessment of the existence of an act of communication required “to take account of the fact that that person does not know and cannot reasonably know, that the work had been published on the internet without the consent of the copyright holder.”²⁵ Thus, knowledge or the existence of reasonable grounds enabling knowledge concerning the copyright protection was relevant for the assessment of the existence of an act of communication in circumstances as in *GS Media*.

In *GS Media*, the CJEU differentiated situations when the act had been undertaken for profit motive and when that was not the case. If the act was undertaken for gaining profit, the user was obliged to check whether copyright of the author was respected by posting the work on the original website.²⁶ If the act was performed for non-profit purpose, the user did not have such obligation. The judgment in *Renckhoff* does not inform that the CJEU considered the issues of the existence of knowledge and nature of the acts of the pupil and teacher.

Looking at recitals 9 and 10 of the preamble of the InfoSoc Directive, in the *Stichting Brein II* case²⁷ the CJEU distinguishes a high level of the protection for authors as the principle objective of the Directive that enables the authors to be rewarded for the use of their works, including in the event of communication to the public. The Court considers that this objective implies a broad interpretation of

²³ Case C-301/15, *Soulier and Doke*, judgment of 16 November 2016, para 36.

²⁴ Case C-160/15, *GS Media*, judgment 8 September 2016.

²⁵ *Ibid.*, para 47.

²⁶ *Ibid.*, para 51.

²⁷ C-610/15, *Stichting Brein*, judgment of 14 June 2017.

the concept of “communication to the public,” as it is explicitly stated in recital 23 of the preamble.²⁸ It finds that the concept includes two cumulative criteria — an “act of communication” and a “public”.²⁹ According to the CJEU the existence of the communication to the public should be assessed against a few criteria. The first two are “the indispensable role played by the user” and “the deliberate nature of his intervention.”³⁰ That means that without of an act of the user the work would not be available to customers or it would be available but only with difficulty and that the user knows the consequences of his intervention. “The public” indicates “an indeterminate number of potential viewers”.³¹ An act of the communication to the public exists when new means of communication has been used or when a new public has been addressed. The new public means a public that has not already been taken into account by the copyright holders when they authorized an initial communication.³² The Court also confirmed a relevance of the issue whether a communication was of the profit-making nature or not.³³ It has been specified by the Court that the concept of “communication to the public” necessitates an individual assessment.³⁴ Some findings in *Stichting Brein II* played important role in *Renckhoff*.

The Interpretation of the right to communication in Renckhoff

In *Renckhoff*, the CJEU separates the public by websites in sense that each website has its own public. When consenting to the communication of the work on the website, the author has in view the public of that website.³⁵ Thus, according to the Court, when Mr Renckhoff authorized the on-line travel magazine to post on its website the photo of Cordoba, he had in mind the public of that website, not the public of the school website, which was another public.

The issue of knowledge was discussed in the opinion of Advocate General in *Renckhoff*. The referring German court asserted that the pupil and her teacher had been doing in full knowledge of the illegal consequences of their acts.³⁶ The Land of North Rhine-Westphalia and the Italian Government expressed the contrary opinion. The Commission thought also that the Court should take into account

²⁸ *Ibid.*, para 22.

²⁹ *Ibid.*, para 24.

³⁰ *Ibid.*, para 26.

³¹ *Ibid.*, para 27.

³² *Ibid.*, para 28.

³³ *Ibid.*, para 29.

³⁴ *Ibid.*, para 23.

³⁵ *Renckhoff*, para 35.

³⁶ *Renckhoff*, Opinion, para 28.

aspects concerning knowledge of the pupil.³⁷ The Advocate General understood the case law of the Court related to determination of the existence of an act of communication as including the consideration of knowledge of intervening person of the consequences of her/his action.³⁸ He disagreed with the referring court concerning the existence of knowledge of the pupil and her teacher. The judgment in *Renckhoff* does not inform that the Court explored that issue.

It was very obvious in *Renckhoff* that the behavior of the pupil and her teacher was not motivated by profit. The Court did not attribute any importance to the fact but, quite contrary, emphasized the importance of payment of an appropriate reward to the author for each use of the protected work.³⁹ It alleged that if the posting of the photo on the school's website were not treated as an act of communication to the public, that would exhaust the right of the author contrary to Article 3 (3) of the InfoSoc Directive and leave the author without remuneration.⁴⁰

It seems that the argument submitted by Mr. Renckhoff and France during the hearings and the Commission in written pleadings had decisive importance in the reasoning of the Court. They emphasized the difference in fact between this case and previous cases related to presentation of the work by hyperlink. The absence of hyperlink in this case deprives the copyright holder of "his power of control over the initial communication of that work".⁴¹ The Court accepted the argument and stated: "Such a posting on a website other than that on which it was initially posted might make it impossible or at least much more difficult for the holder of a right of a preventive nature to require the cessation of that communication, *if necessary by removing the work from the website* on which it was posted with his consent or by revoking the consent previously given to a third party."⁴² (Italic is added.) Before the acceptance of the argument, the Court reminded on its interpretation in previous cases concerning inevitability of the prior consent of the authors for any act of communication and the preventive nature of the right.⁴³ The preventive nature of the right allows the authors to intervene between possible users of their works and the communication to the public to prohibit such communication.⁴⁴ The right of communication of such preventive nature would become ineffective if the replacing of a work from one website to another website without using hyperlink were

³⁷ *Ibid.*, para 45.

³⁸ *Ibid.*, para 62.

³⁹ *Renckhoff*, para 34.

⁴⁰ *Ibid.*, para 33.

⁴¹ *Ibid.*, para 28.

⁴² *Ibid.*, 30.

⁴³ *Ibid.*, para 29.

⁴⁴ *Ibid.*

not treated as a communication to a new public.⁴⁵ Thus, the principle of effectiveness requires such interpretation.

The Court again amplified the preventive nature of the right in the following way:

“As regards the act of communication constituted by the posting on a website of a hyperlink which leads to a work previously communicated with the authorisation of the copyright holder, the preventive nature of the rights of the holder are preserved, since it is open to the author, if he no longer wishes to communicate his work on the website concerned, to remove it from the website on which it was initially communicated, rendering obsolete any hyperlink leading to it. However, in circumstances such as those at issue in the main proceedings, the posting on another website of a work gives rise to a new communication, independent of the communication initially authorised. As a consequence of that posting, such a work may remain available on the latter website, irrespective of the prior consent of the author and despite an action by which the right-holder decides no longer to communicate his work on the website on which it was initially communicated with his consent.”⁴⁶

In connection with that, the CJEU observed a new factual difference between *Svensson and Others* and *Renckhoff* which related to the effect of involvement of the administrator of the new website. In *Svensson and Others*, the installation of the clickable link on the new website was not treated as any involvement of the administrator of the site in the communication of the work to the public. Contrary to this, in *Renckhoff* the downloading to server of the pupil and uploading on the school website was treated as the involvement of the administrator of the school website of decisive importance.⁴⁷

The exception for education

Article 5 (3) of the InfoSoc Directive empowers the Member States to provide for exceptions or limitations to the rights guaranteed by Articles 2 and 3 of the Directive in the enumerated cases. The exception laid down in point (a) of the paragraph relates to the use “for the sole purpose of illustration for teaching ...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.” Article 5 (5) qualifies the exceptions and limitations stating that they “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 right-holder.”

⁴⁵ *Ibid.*, para 30.

⁴⁶ *Ibid.*, para 44.

⁴⁷ *Ibid.*, paras 45, 46.

The teaching exception has its origin in Article 10 (2) of the Bern Convention, as it was formulated on the Revision Brussels Conference in 1948.⁴⁸ The exception reads:

“It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”

The qualification in Article 5 (5) of the InfoSoc Directive, known as “the three-step test” was transplanted from Article 10 (2) of the WIPO Copyright Treaty. The last sentence of the agreed statement of the Contracting Parties attached to Article 10 informs that the three-step test “neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” The problem is that the scope of applicability is not precisely defined in the Bern Convention. Rather, as it is visible in the above quoted text of Article 10 (2) of the Berne Convention the issue of the scope of applicability was left to be determined by the Contracting Parties. It was already noted in literature that the Contracting Parties were successful in precise determination of the rights but that determination of exceptions remained vague.⁴⁹

In previous cases the CJEU saw exceptions as providing for a fair balance between the author’s rights and fundamental rights of the user and interpreted them strictly but preserving their effectiveness.⁵⁰ In *Renckhoff*, the Court neglected the principle of effectiveness in respect to the exception. It applied the principle only in the interpretation of the right.

The Italian Government and the Commission referred in *Renckhoff* to the possible application of the exception related to education as it is formulated in Article 5 (3) (a) of the InfoSoc Directive. The Land of North Rhine-Westphalia claimed that the exercise of the pupil and her teacher was justified by the exception. The Court disagreed. The text of the judgment indicated the conviction of the Court that the posting of the photo to the school website went beyond the border of the exception. The Court observed: “it suffices to state that the findings set out in paragraph 35 of the present judgment, relating to the concept of ‘new public’, are not based on whether the illustration used by the pupil for her school presentation is educational in nature, but on the fact that the posting of that work on the school website made it accessible to all the visitors to

⁴⁸ D. J. Gervais, *op. cit.*, p. 8.

⁴⁹ *Ibid.*, p. 9.

⁵⁰ Joined Cases C-403/08 and C-429/08, *Football Association Premier League*, judgment of 4 October 2001, paras 162, 163; Case C-145/10, *Painer*, judgment of 1 December 2011, paras 133, 134; Case C-201/13 *Deckmyn*, judgment of 3 September 2014, para 22, 23.

that website.”⁵¹ The text might be understood to mean that if the pupil were use the photo preparing the homework in analogue format or in digital format but without posting it on the school website, there would not exist the prohibited act of communication. It might be too restrictive and non-contextual interpretation that might endanger on-line public teaching courses. Recital (42) of the preamble of the InfoSoc Directive attributed the proper weight to the non-commercial nature of the teaching. It speaks on the exception for non-commercial education and scientific research, including distance learning and states that the non-commercial nature of the activity should be determined.

A fair balance of competing rights and interests

Considering the issue of the balance of copyright and other fundamental rights in *Renckhoff*, the Court referred to recitals 3 and 31 of the preamble of the InfoSoc Directive. The third recital connects the Directive with the four freedoms of the internal market, the fundamental principles of law, including intellectual property, freedom of expression and the public interest. Recital 32 requires the safeguarding a fair balance of rights and interests between the different categories of right-holders, as well as of different categories of right-holders and users. In connection with that, the recital elaborates on the need of reassessment of the existing limitations and exceptions in the light of the new electronic environment and on necessity of their harmonization in the context of the internal market.

In *GS Media*, the Court underlined importance of the Internet to the freedom of expression and information declaring that “the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterized by the availability of immense amounts of information”.⁵² In *Renckhoff*, the Court invoked *GS Media*, but restricted its invocation just to the role of hyperlinks in the sound operation of the informative service of the Internet and avoided its general observation on importance of the Internet to the freedom of expression and information. Contrary to the beneficial effect of hyperlink to the performance of the informative service, the Court observed “the publication on a website of a work without the authorisation of the copyright holder ... does not contribute, to the same extent, to that objective.”⁵³ In *GS Media*, however, under condition that hyperlink was installed for-non-profit

⁵¹ *Ibid.*, para 42.

⁵² *Ibid.* para. 45.

⁵³ *Renckhoff*, para 40.

purpose, presence or absence of the consent of the copyright holder for the communication of a work on an original website was not considered as diminishing an informative function of the Internet. Accordingly, it is not easy to understand how absence of the authorization of the copyright holder for transmission of the work to a new portal affects the informative function.

The CJEU thought that its interpretation satisfied the fair balance between the interests of the copyright holders, based on intellectual property, as guaranteed by Art. 17 (2) of the Charter of Fundamental Rights of the EU and interest of the users as protected by fundamental rights and in particular the freedom of expression and information laid down in Art. 11 of the Charter and the public interest.⁵⁴

The Advocate General considers also that his quite contrary interpretation strikes the fair balance. Considering the division of a burden of the safeguarding of the respect for copyright, the Advocate General argued that it would be disproportional to require that a “normal” Internet user is more diligent than the right-holder and that the user investigates the existence of copyright.⁵⁵ He stated: “To do otherwise would be to restrict the use of information which is provided in huge quantities by the internet. Such a restriction could undermine the freedom of expression and of information enshrined in Article 11 of the Charter. In the present case, it would also prejudice the right to education in Article 14 (1) of the Charter.”⁵⁶ Obviously, the Court and the Advocate General attributed the different weight to the freedom of expression and information and to copyright.

The practice of the European Court of Human Rights (hereinafter: the ECtHR) is not irrelevant for the matter. Some factors and methods for measuring the relative weight of the rights when they are competing might be derived from the practice. The established factors and methods for determination of the breadth of a margin of appreciation might be relevant for measuring of the weight of the rights when they are competing. The concept of the margin of appreciation manifests belief of the ECtHR that national authorities are better situated than it is to resolve “the inherent conflicts between individual rights and national interests...”⁵⁷ The text of the European Convention on Human Rights (hereinafter: the ECHR) does not include the clause “margin of appreciation.” When Protocol No. 15 will enter into force, the clause will be implanted in the preamble of the Convention⁵⁸ The concept originates from domestic

⁵⁴ *Ibid.*, para. 41.

⁵⁵ *Ibid.*, para 78.

⁵⁶ *Ibid.*, para 79.

⁵⁷ E. Benvenisti, Margin of Appreciation, Consensus and General Standards, *Journal of International Law and Politics*, 1998–1999, p. 843.

⁵⁸ Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 24 June 2013.

law and has been used for the interpretation of the ECHR.⁵⁹ The margin of appreciation is in fact free space left by the ECtHR to the Contracting States to articulate competing interests and rights according to their national expectations. The space which is left to a Contracting State is not the same in all cases and its width depends on some factors which the ECtHR identified. In *Ashby Donald* the ECtHR found that the breadth of a margin of appreciation left to a Contracting Party to strike a fair balance between copyright and the freedom of expression depends on character of speech. If it is commercial speech, the margin is wider; if it is a speech in public interest, the margin is narrow.⁶⁰ That might implicate that non-commercial speech has more weight in competing with copyright than commercial speech.

Analysis of the consequences of the judgment in Renckhoff

The CJEU had three reasonable interpretative outcomes at its disposal. First, the Court could have found, as that was proposed by the Advocate General, that the disputed act could not be qualified as an act of communication or making available of a work to the public. Second, the Court could have found that the disputed act had characteristics of an act as envisaged in Article 3 (1) of the InfoSoc Directive, but that it was excused by the exemption related to education. Third, the Court could have established that the disputed act was an act foreseen in Article 3 (1) of the InfoSoc Directive which was not justified by the exemption. The Court chose the third option. Such interpretation is not unreasonable, but it is not free of some difficulties.

The judgment might bring uncertainty to the non-commercial users of the Internet and discourage the pupils to use of the publicly accessible websites for their school projects and present their works by the Internet. There are a few points which might be problematic. The division of the internet public by websites in sense that each website has its own public might cause confusion in respect to publicly accessible websites. Underestimation of the issue of the existence of knowledge on the copyright protection and for-profit or non-for-profit motive of activity replaces the burden of the copyright protection from the right-holders to non-commercial users. It might disbalance the involved rights and interests and seriously undermine the freedom of expression and information via the Internet. All problematic points flow from the overestimation of importance of physical control of the right-holder over the communication.

⁵⁹ E. Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996, p. 242.

⁶⁰ *Ashby Donald and Others v. France* App No. 36769/08, judgment of 10 January 2013, para 39.

The Court based the judgment on the effectiveness of preventive nature of the right to communication, respectively on conviction that the physical control over the communication, which exists in circumstances of the link, serves best preventive nature. In connection with that, the Court did not, however, consider the relationship between two entitlements flowing from the right: to authorize and to prevent the act of communication. The issue is whether an unauthorized communication can be legally disrupted by author's prevention of an authorized communication? If the pupil used link instead of downloading and uploading, whether the photographer could use his entitlement to prevent communication by asking the travel magazine to move the photo from the portal? It might be an intervention in the contractual relationship between the photographer and the travel magazine.

The Court abandoned its explanation in *Svensson and Others* and *Soulier* that when the access to the work on the original website was not restricted by any measure, the public consisted of all potential visitors to the original website including visitors of the new website who by hyperlink could visit the work posted on the original website. The Court also left its finding in *Soulier and Doke*, according to which a prior, explicit and unreserved authorization for posting of the work to the website without using technological measures which restricted access to the work implicated the authorization for the communication of the work to the general internet public. In *Renckhoff*, the existence of hyperlink became decisive for the assessment whether there was an original or new public.⁶¹ Thus, if the photo were presented to the school website via hyperlink, the public of the school website would not be a new public. The public of the school website is in physical sense, in sense of the members the same in both cases. It is not easy to see why the presence or absence of the hyperlink changes the legal qualification of the public. The hyperlink is an element of physical control over the communication in sense that by removing of the work from the original website the hyperlink is disabled and the access to the work via new website is not possible. Thus, the control is over the communication, not over the public. The control over the public in sense of the access to the website could be difficult to imagine in respect to publicly accessible websites, as it was the website of the travel magazine. It might be possible probably only by creating closed networks and sending passwords to the chosen members of the public. However, such a venture would be senseless in the case of websites like the travel magazine website, whose purpose is to attract attention of the broadest public.

It might be said, and it is one of the arguments of the Court, that the treatment of the public of the school website as an original public deprives the right to communication and making available

⁶¹ See critique of the concept of a "new public" in general by P. B. Hugenholtz, S. C. van Velze, *op. cit.*, pp. 797–816.

of a work to the public of its unexhaustive character as that is determined in Article 3 (3) of the InfoSoc Directive. The argument is not very sustainable. In *Svensson and Others*, the Court interpreted that the public was consisted of all potential visitors to the website but only under condition that the access to the work was not restricted by any measure. If the access to the work is restricted and the hyperlink circumvents the technical measures of protection and thus enables the access to the public of the hyperlinked site which they would not have otherwise, the public of the hyperlinking site is a new public. The digital technology enables technical measures (cryptography technic),⁶² paywall or a password protection by which the author can restrict the use of the work. Article 6 of the InfoSoc Directive obliges the Member States to provide legal protection against the circumvention of technical measures. Using technical measures enables the author to prevent the presentation of the work on another website by hyperlink or by downloading and uploading. Another measure at disposal of the author is the electronic rights-management information by which the author can inform on the terms and conditions of use of the work. The Member States are obliged under Article 7 of the InfoSoc Directive to extend the legal protection against the removal or change of the rights-management information. The authors have at their disposal measures by which they can technically or legally prevent presentation of their works on other websites and thus provide themselves with benefit of the unexhaustive character of the right.

That issue is closely connected with the issue of the relevance of knowledge on the existence of copyright in the work and of nature of activity — commercial or non-commercial. The issue might have indirect effect to interpretation of the communication and making available right. The indirect effect may come as the consequence of consideration of the role of knowledge in establishment of liability for a copyright infringement.⁶³ If liability cannot be established, there is no the infringement of copyright. The substance of the issue is who is obliged to carry burden of the copyright protection: the copyright holder or user?

In *GS Media*, the CJEU replied that the answer depends on the motive of the transmission of the work from the original website to the new website. If the transmission is motivated by earning profit, the user is obliged to explore whether the work is under the copyright protection. Consequently, the non-commercial users are not obliged to investigate whether the work is under the copyright protection.

⁶² P. Kumik, Digital Rights Management, *Legal Information Management*, 2/2001, p. 21.

⁶³ C. L. Saw, *op. cit.* pp. 549–553. See further on the relevance of knowledge in R. Etinski, The Relevance of Prior Knowledge on the Existence of Copyright in Balancing Freedom of Expression and Copyright Integrity in Renckhoff (C-161/17), *Noua Revistă de Drepturile Omului*, 1/2019, pp. 9–22.

One of the points of the CJEU was the character of involvement of the pupil in transmission of the photo to the public. Contrary to *Svensson and Others* where the establishment of hyperlink was not treated as the involvement in the communication, the Court qualified the uploading of the photo to the school portal as the involvement of decisive importance. The position of the Court concerning character of involvement of transmitter in the assessment of the communication to the public was discussed in literature. It was proposed that the involvement of an administrator of website becomes the act of communication or making available only if without that involvement the work would not be accessible to the public.⁶⁴ The proposal is in line with the position of the Court in *Svensson and Others*. Thus, the relevant question in *Renckhoff* might have been whether the photo on the travel magazine portal was accessible to the public without the transfer to the school portal? The answer depends on the clarification of the meaning of the term “public”. If the visitors of the school portal are members of the general internet public, they have already had access to the photo on the magazine site. If they are, however, the new public, the separate public of the school portal, as the Court treated them, then the uploading of the photo to that portal provided them with the access. Thus, the finding of the Court on character of the involvement of the pupil and the teacher cannot be a self-standing argument.

In *Renckhoff*, it is not quite clear whether copyright in the photo was displayed on the travel magazine website. The Advocate General informs that Mr. Renckhoff’s representative stated at the hearing that the ‘impressum’ for the online travel magazine contained a copyright notice for the magazine’s contents. However, the Advocate General noted that the facts in the order for reference of the referring court do not include such information.⁶⁵ The judgment does not extend any information on the issue and the Court satisfied itself by repeating its observation from *Soulier and Doke* that the exercise of the right to the communication to the public was not subject to any formality under the Berne Convention. Article 15 of the Berne Convention, however, states that appearance of the name of the author on the work suffices that the author is, in the absence of proof to contrary, recognized as such and entitled to institute infringement proceedings. The Court did not mention this provision.

The issue whether copyright in the photo was indicated in on-line travel magazine is of importance. If there was no any adequate electronic rights-management information displayed on the website, the judgment in *Renckhoff* might implicate conclusion that there is a rebuttable presumption that all photos and other contents on the Internet are under the copyright protection and each user, including the non-commercial user, is obliged to check the existence of copyright

⁶⁴ C. L. Saw, *op. cit.* pp. 541 and 542.

⁶⁵ *Renckhoff*, Opinion, f. 13.

before downloading and uploading the work. If such conclusion were getting general validity, that would reshape the established non-commercial uses of the Internet. The Advocate General argued that shifting the burden of the copyright protection on the non-commercial users could undermine the freedom of expression and information and prejudice the right to education.⁶⁶ Besides, copyright should not be imposed against the will of the author. The author is an owner of his/her work and s/he should be free to dispose of it. The author is free to benefit from copyright or to relinquish it. Thus, if the author wants to benefit from copyright, s/he should indicate that.

If copyright in the photo was indicated, the use of the photo might be justified by the exception of education. The position of the Court that the posting of the photo, as an illustration inserted in the school project, on the school website goes beyond educational nature of the activity might underestimate the significance of the internet presentation of school projects (homework) in educational process of building of personality in information society.

Various versions of balance between authors' rights and users' rights have been advocated in international copyright law.⁶⁷ It looks, however, that methods of searching for the balance might be of importance. The CJUE and the ECtHR used different methods. The CJEU considers the matter in the framework of exceptions and limitations to copyright or in respect to specific copyright measures, specific forms of enforcement.⁶⁸ In the first case, the effect of fundamental rights of users is expressed by the exceptions and limitations themselves. In the second case, fundamental rights appear as an autonomous ground, but their effect is limited to the specific forms of enforcement of copyright. In *Ashby Donald* the ECtHR treats the enforcement measures, such as the criminal conviction for the breach of copyright or the award of damages as interference with the right of freedom of expressions and information⁶⁹ and makes the difference between the relative weight of commercial speech and non-commercial speech in balancing with copyright. The focus of the CJEU is on EU copyright law and the focus of the ECtHR is on the ECHR. Besides, the specific facts of a case might be more important in the method used by the ECtHR. It seems that in *Renckhoff* the CJEU opined that the balance between copyright and competing rights of users have been already established by the InfoSoc Directive itself and that the task of the Court was to come to the balance by interpreting only the Directive.

⁶⁶ *Renckhoff*, Opinion, paras 78 and 79.

⁶⁷ S. Al-Sharieh, Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law, *Utrecht Journal of International and European Law*, 22016, pp. 11, 15, 16.

⁶⁸ S. van Deursen, T. Snijder, The Court of Justice at the Crossroad: Clarifying the Role of Fundamental Rights in the EU copyright Framework, *International Review of Intellectual Property and Competition Law*, 9/2018, pp. 1088 and 1089.

⁶⁹ *Ibid.*

The motives underlying the judgment and the opinion

The reasoning of the Court and the Advocate General is usually inspired by their understanding of the best interest of the EU in specific circumstances of each case. It seems that the Advocate General and the Court did not understand in the same way what was the best interest of the Union in the specific circumstances of the *Renckhoff* case.

The motive of the Court might be indicated in paragraph 34 of the judgment where the Court emphasized that the specific purpose of the intellectual property was the protection of commercial exploitation of the work which enabled an appropriate reward for each use of the work. Here the Court referred to recital 10 of the preamble of the InfoSoc Directive which explained that the adequate legal protection of intellectual property was necessary to enable satisfactory returns of the investments spent in financing creativity and in particular production of phonograms, films or multimedia products. Recital 4 of the preamble discloses the intent of the EU legislator that by increased legal certainty and a high level of protection of intellectual property foster substantial investments in creativity and innovation and thus secure the growth and increased competitiveness of European industry. It could have led the Court to underline importance of the remuneration of the author for each use of the work.

An alternative social approach has appeared that was reflected in the Opinion of the Advocate General. Paragraph 78 of the Opinion and references thereto might cast some light to the basic reason of the Advocate General. He discussed there sharing of burden of the copyright protection between the right-holders and the non-commercial users and stated: “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.” He found as he said “a forceful argument in favour of such a rebalancing” in the literature. Elkin-Koren, whose work the Advocate General referred to, turns attention to increased role of the users of copyright materials in creativity and to tension between such unlicensed creative material and growing restrictions on the freedom of the users to access, transform and share the copyrighted materials on the Internet. She argues that the recognition of the role of the creativity of the users in the promoting purpose of copyright law would require new approach to the copyright protection.⁷⁰

⁷⁰ In the footnote 57 of the Opinion the Advocate General referred to “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.”

Conclusions

Digitalization and the Internet have created new technical possibilities concerning the use and protection of copyrighted works. Justice and the first principle of justice, the principle of equality require that law and jurisprudence secure a fair sharing of benefits of the new technical possibilities between the copyright holders and users. In the legal frame the fair sharing of benefits can appear as the issue of striking a fair balance between copyright and other fundamental rights.

By attributing a proper weight to the technical possibility at the disposal of the authors to protect their works on websites by electronic measures on one hand and by taking into account importance of the Internet for the freedom of expression and information on the other hand the Court found the right balance between copyright and the freedom of expression in *Svensson and Others* and *GS Media*.

Such balance is lost in *Renckhoff*. By interpreting the right of communication and making available of a work to the public, as it is laid down in Article 3 (1) of the InfoSoc Directive, the Court overvalued importance of the physical control of the author over the act of communication and neglected factors such the possibility of electronic protection of the work, legal control over the act of communication, non-for-profit use of the Internet, knowledge on the existence of copyright in the work or the role of the Internet in education for the information society.

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The European Court of Human Rights, cases
Von Hannover v. Germany (No 2), App. Nos. 40660/08
 and 60641/08, judgment of 7 February 2012.
Ashby Donald and Others v. France App No.
 36769/08, judgment of 10 January 2013.

International treaties

The 1886 Bern Convention for the Protection of Literary and Artistic Works

The 1996 WIPO Copyright Treaty

EU legislation

Directive 2001/29/EC of the European Parliament and of the
 Council of 22 May 2001 on the harmonization of certain aspects
 of copyright and related rights in the information society.

SLUČAJ *RENCKHOFF* I PREOBLIKOVANJE
NEPROFITNOG KORIŠĆENJA INTERNETA

Rad istražuje kako je Sud Evropske unije tumačio pravo na komunikaciju i činjenje dostupnim publici autorskog dela u predmetu *Renckhoff*. Imajući u vidu konkretne okolnosti slučaja, raniju praksu tumačenja tog prava i moguće posledice tumačenja, autor je izneo stav da je Sud pridao preveliki značaj postojanju fizičke kontrole nad komunikacijom.

Učenica jedne škole, pripremajući zadatak iz španskog jezika, našla je sliku španskog grada Kordobe na portalu jedne putničke agencije, skinula je sliku na svoj kompjuter, ugradila je u svoj domaći zadatak koji je uz pomoć nastavnice postavila na školski internet portal. Ona je navela ime portala putničke agencije sa koga je pružila sliku. Ima autora fotografije nije bilo navedeno na putničkom portalu.

Pošto fotograf nije dao saglasnost da se njegova slika postavi na školski portal, on je tužio nemačku pokrajinu Severnu Rajnu Vestfaliju pred nadležnim nemačkim sudom navodeći da je njegovo pravo na komunikaciju autorskog rada povređeno, te je tražio da sud naredi da se slika skine sa portala i da mu se nadoknadi šteta. Pošto je stvar po žalbi došla do nemačkog Saveznog suda, ovaj je tražio tumačenje navedenog prava od Suda Evropske unije, odnosno preliminarnu odluku o tome da li se akti skidanja slike sa portala putničke agencije i postavljanje slike na portal škole mogu kvalifikovati kao akt komunikacije autorskog dela publici u smislu člana 3 (1) Direktive o harmonizaciji copyright-a u informacionom društvu. Opšti pravobranilac je predložio Sudu da odgovori negativno, ali Sud je odgovorio pozitivno.

Učenica najverovatnije nije znala da fotografija čini zaštićeno autorsko delo i pitanje je da li je to uopšte mogla da zna jer o postojanju naznake autorskih prava na materijalu putničke agencije postoje kontradiktorne informacije. Presuda Suda ne kaže o tome ništa. Sud je zanemario ovu činjenicu suprotno svojoj ranijoj praksi, koja znanje o postojanju zaštite autorskih prava čini relevantnom. Takođe, suprotno svojoj ranijoj praksi, Sud nije uzeo u obzir neprofitni karakter nove prezentacije slike. Navedene ranije stavove Sud je izneo u predmetima koji su se odnosili ne na skidanje dela sa portala i postavljanje na novi portal već na situacije kada je delo predstavljeno na novom portalu putem linka koji vodi do dela postavljenog na ranijem portalu. Sud je smatrao da link omogućava nosiocu autorskog prava stalnu fizičku kontrolu nad komunikacijom, jer ukljanjanjem dela sa ranijeg portala, autor čini link nedelotvornim. U slučaju skidanja dela i ponovnog postavljanja na novi portal fizička kontrola na komunikacijom je izgubljena i zato je reč o novom aktu komunikacije.

Sud je dao preveliki značaj fizičkoj kontroli zanemarujući značaj pravne kontrole nad komunikacijom, znanja o postojanju autorskih prava i neprofitnog karaktera akta. Sudska presuda može da se razume kao da je Sud njome ustanovio oborivu pretpostavku da je svaka fotografija ili drugi materijal na internetu pod zaštitom autorskih prava i da je svaki korisnik, uključujući i nekomercijalne korisnike dužan da ustanovi da li je sadržaj zaštićen pre nego što ga koristi za novo postavljanje na internetu. Ukoliko bi ovakvo razumevanje bilo ispravno, presuda bi značajno ograničila slobodu izražavanja i informisanja na internetu i ugrozila bi njegovo nekomercijalno korišćenje za druge svrhe.

Ključne riječi: autorsko pravo, internet, komunikacije, činjenje dostupnim

