Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 8 December 2016 [1]

**Case C-527/15**

**Stichting Brein**
**v**
**Jack Frederik Wullems, acting under the name of Filmspeler**

(Request for a preliminary ruling from the Rechtbank Midden-Nederland (District Court, Central Netherlands, Netherlands))

(Copyright and related rights — Information society — Definition of 'communication to the public' — Reproduction right — Exceptions and limitations)

1. The right of authors to permit the communication to the public of their works, protected by Article 3 of Directive 2001/29/EC, [2] may be adversely affected by links that redirect users from one website to another, if the appropriate balance is not achieved between respect for intellectual property and the free development of the information society. In this context, hyperlinks [3] represent one of the fundamental elements of the internet; they are essential for navigation through webpages and websites but they may also facilitate breaches of copyright.

2. The Court, which had ruled on several occasions on the concept of communication to the public, [4] has very recently given a key judgment, [5] in which it determined whether there was communication to the public, within the meaning of Directive 2001/29, when a webpage included a hyperlink directing users to another page or site on which digital content [6] was posted without the authorisation of the right holder and which users accessed by simply clicking on the hyperlink.

3. The first and second questions referred by the Rechtbank Midden-Nederland (District Court, Central Netherlands) in these preliminary-ruling proceedings are, in some respects, the same as those which gave rise to the judgment in *GS Media*. The Netherlands referring court, hearing and determining the main proceedings in that case in which it made a reference to the Court of Justice, considered staying the proceedings before it pending the ruling in *GS Media*. However, the referring

1 — Original language: Spanish.

2 — **Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society** (OJ 2001 L 167, p. 10).

3 — The term 'hyperlink' is used as a synonym for 'link'. In the context of programming languages and documents in electronic format, both refer to the link established between different information segments so that, when they are activated, they interconnect nodes or blocks of text, images, audio or video.

4 — In particular, on links and the concept of communication to the public where the works concerned may be viewed on other websites, see the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76). The order of 21 October 2014, *BestWater International* (C-348/13, EU:C:2014:2315), applies the reasoning in that judgment to the technique known as 'framing' whereby users, when they click on a link, are redirected to a third party's portal on which the work appears, giving the impression that it is part of the content of that site.

5 — Judgment of 8 September 2016, *GS Media* (C-160/15, 'the judgment in *GS Media*' EU:C:2016:644).

6 — Although the current legislation on this subject uses the term 'works', I shall also use interchangeably the term 'digital content'; in this context, both terms refer to rights related to copyright.

court decided to request a preliminary ruling from the Court before judgment was given in *GS Media* because, in its own words,[7] there are certain differences between the two cases, the most notable being that 'in the present case no hyperlinks were posted on its own website, but add-ons with hyperlinks were installed in the mediaplayer offered by Wullems …'

4. If, as I propose, the judgment in *GS Media* were to be applied to the present case, it will be sufficient to refer to the case-law which supports this and then to analyse whether the sale of a multimedia player incorporating a type of software (with add-ons) which redirects the end user to webpages that distribute digital content without the right holder's consent also involves communication to the public.

5. The referring court has also expressed other uncertainties (the third and fourth questions) which concern not so much the technical means or playback device as copyright protection — and the correlated unlawfulness of acts contrary thereto — where the end user streams,[8] without the authorisation of the right holder, protected digital content which he accesses via the hyperlink.

## I – **Legislative framework** A –*Directive 2001/29*

6. Harmonisation of the laws of the Member States on intellectual property has been achieved mainly by means of Directive 93/98/EEC,[9] subsequently amended and then repealed by Directive 2006/116/EC,[10] which codifies the earlier versions. The purpose of one of those amendments was to govern the protection of copyright and related rights in the so-called information society by means of Directive 2001/29.

7. In accordance with recital 23:

'This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

8. Recital 27 states:

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

9. According to recital 31:

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

7 — Paragraph 6.14 of the order for reference.

8 — The streaming of digital (generally audio or video) content (that is, without saving or copying that content to the memory of a device but only to the data buffer) was the subject of the judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147).

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

10 — **Directive of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights** (OJ 2006 L 372, p. 12).

10. Recital 33 reads:

‘The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.’

11. Under the heading ‘Reproduction right’, Article 2 provides:

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

(a) for authors, of their works;

…’

12. Under the heading ‘Right of communication to the public of works and right of making available to the public other subject matter’, Article 3(1) of Directive 2001/29 provides:

‘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.’

13. Within the regulation of the ‘[e]xceptions and limitations’ (heading of the provision) to the reproduction right, the right of communication to the public and the distribution right, Article 5(1) and (5) is worded as follows:

‘1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

…

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

## II – **Background to the dispute and questions referred for a preliminary ruling**

14. Stichting Brein is a foundation involved in the protection of copyright and other related rights. Its patrons include associations of producers and importers of image and sound carriers, film producers, film distributors, multimedia producers and publishers.

15. Jack Frederik Wullems offered to the public, through various websites (including his own, www.filmspeler.nl), various models [11] of a multimedia player under the name '*filmspeler*'. The device acted as an instrument for connecting a source of image and/or sound signals to a television screen. The differences between the models are of a technical nature but their operation is essentially the same: if the multimedia player is connected to the internet, on the one hand, and to a user's screen (for example, a television screen), on the other, the user is able to stream the image and the sound from a web portal or website.

16. The hardware for the mediaplayer can be bought from various suppliers. Mr Wullems installed on his devices the open source software XBMC, which makes it possible to open files through a user-friendly graphic user interface via menu structures and which can be used by anyone. He also installed add-ons, separate software files created by third parties and freely available on the internet, which he integrated into the XBMC software user interface.

17. Those add-ons contain hyperlinks which, if clicked, redirect the user to streaming websites, controlled by third parties, on which films, television series and (live) sporting events can be enjoyed free of charge, with or without the authorisation of the right holders. The digital content starts playing automatically when the relevant hyperlink is clicked. [12]

18. In 14 of the add-ons [13] the links led to films, series and (live) sporting events *without* the authorisation of the holders of the reproduction rights. Others, however, linked to streaming websites whose digital content had been authorised by the right holders. [14]

19. Mr Wullems had no influence over the add-ons, nor did he alter them, and the user too can install the add-ons on his mediaplayer. On his portal (www.filmspeler.nl) and on other third-party sites, Mr Wullems advertised his products by means of the following promotional slogans:

'- Never again pay for films, series, sport, directly available without advertisements and waiting time. (no subscription fees, plug and play) Netflix is now past tense!

- Want to watch free films, series, sport without having to pay? Who doesn't?!

- Never have to go to the cinema again thanks to our optimised XBMC software. Free HD films and series, including films recently shown in cinemas, thanks to XBMC.'

20. On 22 May 2014, Stichting Brein called on Mr Wullems to stop selling the mediaplayers. On 1 July 2014, Stichting Brein commenced proceedings against Mr Wullems before the referring court, seeking an injunction prohibiting Mr Wullems from selling the devices and from offering the hyperlinks which provided users with unlawful access to copyright-protected works.

11 — Under the names Filmspeler X5 fully loaded; Filmspeler Compleet (Raspberry pi); Minix Neo X7; Filmspeler X90 fully loaded and Turbo Sd/usb configuratie.

12 — These are therefore, in computer jargon, so-called 'deep hyperlinks' and not merely links to the home pages of the destination websites.

13 — The add-ons concerned are 1Channel, Glow movies HD, Go Movies, Icefilms, Mashup, Much Movies, Much Movies HD, Istream, Simply Movies, Simply Player, Yify Movies HD, Ororo.tv, Teledunet.com and Go TV.

14 — Such as Youtube, Sports illustrated, uitzending gemist, Music video box, Vimeo, ESPN 3, RTLXL, SkyFM and Soundcloud.

21. The applicant claimed, in support of the form of order sought, that through the sale of the *filmspeler* player, Mr Wullems was carrying out a 'communication to the public' contrary to Articles 1 and 12 of the Auteurswet (Netherlands Law on copyright) and Articles 2, 6, 7a and 8 of the Wet op de Naburige Rechten (Law on related rights).

22. The Rechtbank Midden-Nederland (District Court, Central Netherlands) takes the view that the provisions of national law relied upon in the proceedings must be interpreted in the light of Article 3 of Directive 2001/29, transposed into Netherlands law by those provisions. Since the parties to the main proceedings disagree about whether the sale of Mr Wullems' multimedia player is intended to reach a 'new public' within the meaning of the case-law of the Court of Justice, the referring court considers that neither the judgment in *Svensson and Others*[15] nor the order in *BestWater International*[16] provides criteria sufficient for reaching a decision on that disagreement. Therefore, in the referring court's view, reasonable doubt remains as to whether or not there is a communication to the public if the work has been previously published but without the right holder's authorisation.

23. In the second place, the referring court is faced with the argument put forward by Mr Wullems, who contends that the streaming of copyright-protected works from an unlawful source comes within the exception in Article 13(a) of the Netherlands Law on copyright. As that provision must be interpreted in accordance with Article 5(1) of Directive 2001/29, the referring court observes that the Court has yet to rule on the meaning of the requirement of 'lawful use' laid down in Article 5 of the directive.

24. In those circumstances, the Rechtbank Midden-Nederland (District Court, Central Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(1) of the Copyright Directive be interpreted as meaning that there is "a communication to the public" within the meaning of that provision, when someone sells a product (mediaplayer) in which he has installed add-ons containing hyperlinks to websites on which copyright-protected works, such as films, series and live broadcasts are made directly accessible, without the authorisation of the right holders?

(2) Does it make any difference:

— whether the copyright-protected works as a whole have not previously been published on the internet or have been published only through subscriptions with the authorisation of the right holder?

— whether the add-ons containing hyperlinks to websites on which copyright-protected works are made directly accessible without the authorisation of the right holders are freely available and can also be installed in the mediaplayer by the users themselves?

— whether the websites and thus the copyright-protected works made accessible thereon — without the authorisation of the right holders — can also be accessed by the public without the mediaplayer?

15 — Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

16 — Order of 21 October 2014 (C-348/13, EU:C:2014:2315).

(3) Should Article 5 of the Copyright Directive (Directive 2001/29/EC) be interpreted as meaning that there is no "lawful use" within the meaning of Article 5(1)(b) of that Directive if a temporary reproduction is made by an end user during the streaming of a copyright-protected work from a third-party website where that copyright-protected work is offered without the authorisation of the right holder(s)?

(4) If the answer to the third question is in the negative, is the making of a temporary reproduction by an end user during the streaming of a copyright-protected work from a website where that copyright-protected work is offered without the authorisation of the right holder(s) then contrary to the "three-step test" referred to in Article 5(5) of the Copyright Directive (Directive 2001/29/EC)?'

## III – **Procedure before the Court and submissions of the parties**

### A – *Procedure*

25. The order for reference was received at the Registry of the Court of Justice on 5 October 2015.

26. The parties to the main proceedings, the French, Italian, Portuguese and Spanish Governments and the European Commission lodged written observations within the period stipulated in the second paragraph of Article 23 of the Statute of the Court of Justice.

27. At the hearing, held on 29 September 2016, oral argument was presented by the representatives of Stichting Brein, Mr Wullems, the Spanish Government and the European Commission.

### B – *Submissions*

#### 1. The first and second questions

28. Stichting Brein and the French, Italian, Portuguese and Spanish Governments propose that the first question should be answered in the affirmative and submit that the criteria mentioned in the three indents of the second question are irrelevant. They submit that, in this case, the two conditions required cumulatively by the case-law of the Court are satisfied, namely: that there must be 'an act of communication' and a 'public'. [17]

29. Since that case-law stressed the need for a broad interpretation of the concept of 'act of communication', [18] Stichting Brein and the Governments in question submit that the *filmspeler* device has the effect of 'making available' works to the public and, consequently, of an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29. The Court has held that the provision, on a website, of clickable links to protected works, published without any access restrictions on another site, affords users of the first site direct access to those works, [19] irrespective of whether they avail themselves of that opportunity. [20]

17 — Judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraphs 21 and 31).

18 — Judgments of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 36), and of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 186).

19 — Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 18).

20 — Ibid., paragraph 19 and the case-law cited.

30. For Stichting Brein it is immaterial that it was not Mr Wullems himself, but the operator providing the separate software files, who made the hyperlinks available to the public. The French Government makes two points: (a) the public to which the protected works originally communicated were directed consisted only of subscribers to the television channels authorised to broadcast the programmes concerned and (b) the website on which the works at issue were posted was protected by a number of access restrictions, according to the order for reference. In the same connection, the Spanish Government points out the necessity of taking into account potential, current and future users. [21]

31. As regards the 'new' public (the public which the authors of the protected work did not have in mind when they authorised the communication to the original public), [22] Stichting Brein draws attention to the importance of the authorisation granted by right holders for the initial communication by hyperlink. The Portuguese Government adds that, inasmuch as the act of communication represents the making available of protected works by means of a specific technical process which differs from the original process, it is, according to the case-law, unnecessary to examine the condition relating to the 'new public', for every new transmission must be authorised individually and separately by the authors concerned. [23]

32. However, Mr Wullems and the Commission submit that, in this case, there is no 'act of communication'. Mr Wullems focuses in his reasoning on the fact that the add-ons with hyperlinks are not installed in the device when it is sold to the end user. Mr Wullems further contends that a hyperlink cannot in itself constitute an act of communication to the public.

33. The Commission submits that the *filmspeler* marketed by Mr Wullems comes within the concept of 'physical facility' (in recital 27 of Directive 2001/29) in that it enables, but is not in itself, a communication. If installing a program in a facility were to lead to the latter losing its status as such, recital 27 of Directive 2001/29 would lack practical effect, for it would apply to only a very limited number of cases. If the opposite view were accepted, the provisions of Chapter III of Directive 2001/29 would be rendered meaningless.

34. In short, the Commission fears that an excessively broad interpretation of the concept of 'communication to the public' would alter and jeopardise the fair balance between the rights and interests of all the parties involved, which it considers to be a general objective inherent in Directive 2001/29.

2. The third and fourth questions

35. Stichting Brein and the French and Spanish Governments deny that the exception in Article 5 of Directive 2001/29 is applicable to the streaming of a copyright-protected work from the third-party website on which it is offered. They submit that Article 5(1) concerns only temporary reproductions that are transient or incidental, qualities lacking in the reproductions provided by the *filmspeler*, since these are not 'an integral and essential part of a technological process … whose sole purpose is to enable … a lawful use of a work or other subject matter to be made', as required by Article 5(1), in particular subparagraph (b) thereof.

21 — Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraphs 37 to 39).

22 — Judgments of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 37), and of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 197).

23 — By reference to the judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraphs 22 to 26 and 39).

36. Further, in response to the fourth question, Stichting Brein and the Spanish Government [24] observe that the Court's reasoning in relation to the interpretation of the so-called 'private copying exception' in Article 5(2)(b) of Directive 2001/29 [25] may be extended to the authorisation of streaming from an unlawful source. For want of authorisation by the rightholders, that method of reproduction from unlawful sources is, in their view, clearly contrary to the three cumulative steps provided for in Article 5(5) of Directive 2001/29 and the Berne Convention. [26]

37. Along the same lines, Stichting Brein and the Spanish Government point out that the possible mass use of streaming from unlawful sources means that the exception is not to be applied in 'certain special cases' only and, moreover, that such use threatens the 'normal exploitation' of the protected works with the consequent damage to the legitimate interests of the holders of copyright and related rights.

38. Mr Wullems merely asserts that streaming is a temporary act that is transient or incidental and an integral and essential part of a technological process. The Portuguese Government and the Commission, which puts forward this argument only in the alternative, [27] start from the same premiss and add that the mere reception of transmissions (of protected works) by the method at issue does not amount to unlawful use for the purposes of Article 5(1) of the directive. The Portuguese Government and Commission state that their position is supported by the case-law [28] according to which cached copies and on-screen copies satisfied the cumulative conditions laid down in Article 5(1) and (5) of Directive 2001/29.

39. The Portuguese Government points out that the temporary acts of reproduction by streaming create no economic advantage additional to that derived from the mere reception of the works. Lastly, the Portuguese Government submits that it follows from certain case-law of the Court that, when acts of reproduction satisfy the conditions laid down in Article 5(1) of Directive 2001/29, they satisfy the conditions applicable under Article 5(5) too. [29]

## IV – **Analysis of the questions referred for a preliminary ruling**

### A – *The first and second questions*

40. I believe that, in view of their close connection, the first two questions should be examined together. The reply to both is, in large part, influenced by certain factors that delimit the subject matter of the dispute as follows: (a) Mr Wullems sells (for profit) a multimedia player in which he has installed hyperlinks to websites offering unrestricted access, free of charge, to digital content protected by copyright; [30] (b) the holders of that copyright either did not authorise communication to the public

24 — The French Government did not submit any observations on the fourth question, which is in the alternative to the third question, in view of the answer it suggested to the latter question.

25 — Judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 37 and 39).

26 — Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886, (Paris Act of 24 July 1971), as amended on 28 September 1979.

27 — The Commission doubts that it is necessary to answer the third and fourth questions, since: a) they do not concern the sale of the *filmspeler* but the streaming technology, and b) they do not refer to the conduct of the person who sells the multimedia player but to that of the end user.

28 — Judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195).

29 — Order of 17 January 2012, *Infopaq International* (C-302/10, EU:C:2012:16, paragraph 57), and judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 181).

30 — The same unrestricted, free-of-charge access is provided to other content which has not been authorised for distribution to the public by the person who originally retransmitted it either, but which is not protected by copyright in the strict sense. That is the case, for example, of the live retransmission of certain sporting events which are not by their nature original works for the purposes of Directive 2001/29 (although reproduction rights awarded through exclusive licences to certain television operators may come under the protection of other provisions). The Court has already ruled on this issue in the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 98), stating that 'sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive'.

of the digital content or did so only in relation to certain sites which are accessed by membership fee or subscription; (c) users can purchase for themselves the add-ons which include the hyperlinks to the websites on which unrestricted access is provided to protected works without the right holders' consent, and (d) those websites are available on the internet without need of a mediaplayer of the kind offered by Mr Wullems.

41. While I am tempted to explain at length the development of the case-law, composed of a substantial line of judgments, on the interpretation of Article 3(1) of Directive 2001/29, it does not seem to me to be necessary to repeat the analysis of the expression 'communication to the public' or of the two individual elements of that expression: the 'act of communication' of a work and the 'public' to which it is directed. I prefer to refer to the points made by the Court in the judgment in *GS Media*, and to mention the precedents for that judgment.[31] The requirement of certainty in the application of the law obliges the court, if not to apply the *stare decisis* in absolute terms, then to take care to follow the decisions it has itself, after mature reflection, previously adopted in relation to a given legal problem. To my mind, that is what must happen with regard to the case-law laid down (or confirmed) in the judgment in *GS Media* regarding the relationship between hyperlinks and communication to the public in the context of Directive 2001/29.

42. Accordingly, I shall adopt as the basis for my arguments the propositions previously set down by the Court, namely: (a) the provision of clickable links to protected works must be considered to be 'making available' and, therefore, such conduct is an 'act of communication';[32] (b) that concept refers to any transmission of the protected works, irrespective of the technical means or process used,[33] and (c) there is a rebuttable presumption that the posting of a hyperlink to a work unlawfully published (without the authorisation of the right holders) on the internet amounts to a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/79, if it is done in pursuit of profit.

43. In the same vein, the Court has held that the concept of communication to the public of a protected work requires either the communication to be made by a specific method different from those used before or, failing this, the work to be distributed to a 'new public', deemed to be a public which the right holders did not take into account when they authorised the original (limited) distribution of the work.[34]

44. From an analysis of the facts of the case in the light of the propositions I have just listed, it is not difficult to conclude that the case-law laid down in the judgment in *GS Media*, regarding the relationship between hyperlinks and the concept of communication to the public, is applicable to those facts, and this, in large measure, determines the tenor of the reply to the first two questions.

31 — Judgment in *GS Media*, in particular paragraph 32 and the case-law cited. After that judgment was given, articles — some critical of it and some praising it — began to appear in the specialist media, as is logical and usual. See, for example, among those closest in time to the judgment, the article in the *European Law Blog* of 20 September 2016, 'Saving the Internet or linking limbo? CJEU clarifies legality of hyperlinking (C-160/15, Gs Media v Sanoma)'; or the debate in the plenary session of 20 September 2016 of the 47th World Congress of the International Association for the Protection of Intellectual Property (AIPPI) on *The CJEU case law on hyperlinking* and the earlier report of the working group on the subject of *Linking and making available on the Internet*.

32 — Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 20). In that case, it was ultimately found out that there had not been a communication to a 'new' public because the persons targeted by the initial communication were internet users in general, since the links took users to protected works published without any access restrictions on another website (paragraphs 18, 25 and 26).

33 — Judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 38).

34 — According to paragraph 31 of the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76), '… where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public.' The order of 21 October 2014, *BestWater International* (C-348/13, EU:C:2014:2315, paragraph 14), elaborated on that view. It is decisive that the persons forming the public may access the digital content, not that those persons actually make use of that possibility, as indicated in the judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 43).

45. As I have already pointed out, Mr Wullems installed on the user interface of the XBMC software add-ons with hyperlinks to websites providing unrestricted access to copyright-protected works. In addition to providing the hyperlink, Mr Wullems was — or ought to have been — aware that 14 of those add-ons included links to digital content uploaded to the internet without the authorisation of the copyright holders or with authorisation conditional on only certain persons being entitled to access that content through membership fee, subscription or another pay-per-view method. It goes without saying that Mr Wullems was operating in pursuit of a profit, given that he was selling his multimedia player.

46. Therefore, the dispute turns on the importance to be attached to one additional factor, not present in *GS Media*, to which Mr Wullems and the Commission refer in their observations, when they point out that the case concerns the sale of a multimedia player and not the provision of hyperlinks. Both Mr Wullems and the Commission submit that the sale of the player and the installation of hyperlinks on a website cannot be likened to one another and that, even if the concept of 'communication to the public' is interpreted broadly, it cannot be extended without limit so that it encompasses the sale of a multimedia player as well. [35]

47. At the hearing, Mr Wullems and the Commission pointed out that Mr Wullems' intervention was 'not crucial' and that he merely 'enabled' the public to have access to content that can be downloaded from other websites. The *filmspeler* is not, therefore, an essential part of the process connecting the website on which protected content is made available unlawfully and the end user. In the same vein, the sale of Mr Wullems' device does not provide direct but indirect access to that content, so that the link or connection between Mr Wullems and the making available to the public of the protected works is tenuous and forms part of a more extensive chain of broadcasting.

48. The argument put forward by Mr Wullems and the Commission is, initially, persuasive. The sale, as a contract to supply a multimedia player in exchange for the price paid, would appear 'neutral', that is to say, it would have no direct connection to the transmission of protected works. Moreover, the Commission states that there must be some limit to the widening of the definition of 'communication to the public'. [36]

49. However, in my opinion, that argument is, in fact, too reductionist. Marketing of the *filmspeler* goes beyond the mere sale of a technical accessory which, according to the Commission, fits the definition of 'physical facilities for enabling or making a communication', the provision of which 'does not in itself amount to communication within the meaning of this Directive'. [37]

50. In that device, Mr Wullems provides, inseparably, the necessary hardware and software which are aimed directly at [38] enabling purchasers to access copyright-protected works on the internet without the consent of right holders. Provision of that immediate access to an unspecified public is part of the added value of the service supplied by Mr Wullems, for which he receives the price paid — or at least a substantial part thereof — in return for the mediaplayer.

35 — The Commission draws attention to the fact that the present case is concerned specifically with the 'sale' of the *filmspeler* multimedia player, which, in its submission, comes within the concept of 'physical facility', referred to in recital 27 of Directive 2001/29. The Commission states that the *filmspeler*, enables but is not equivalent to communication.

36 — After acknowledging at the hearing that it was not satisfied with the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76), and the judgment in *GS Media*, the Commission warned that that approach in case-law could lead to legal uncertainty. From other quarters, various voices have complained that, through its rulings in this area, the Court is creating law rather than interpreting the existing law. I do not agree with the latter criticism, for the Court has confined itself to drawing attention to the potential effects, hitherto insufficiently recognised, of an imprecisely defined legal concept ('communication to the public'), and has adapted the application of that concept to the development of the rapidly evolving technology which is used at any given time to make copyright-protected works available to the public.

37 — Recital 27 of Directive 2001/29.

38 — Viewing and listening to protected works is made possible by the add-ons with hyperlinks to the websites concerned, which Mr Wullems installed in the XBMC software. As a result of the menus installed on the XBMC software interface with the add-ons which take him to those sites, a television viewer who uses the *filmspeler* becomes an internet user who is able to visit those sites.

51. I believe that there is no significant difference between posting hyperlinks to protected works on a website [39] and, as in the present case, installing hyperlinks in a multimedia device designed specifically for use with the internet (in particular, so that, through it, users are able to access straightforwardly, directly and immediately, digital content made available without the consent of the authors). The provision of links to that protected content, the making available of that content to the public, is a feature common to both types of conduct, and its apparently incidental or ancillary nature cannot conceal the fact that the activities concerned are aimed at ensuring that anyone may, merely by clicking on the hyperlink, enjoy the protected works. [40]

52. Whatever the method or technical process by which they are installed, hyperlinks serve to enable third parties to access digital content which has already been uploaded — in this case, unlawfully — to the internet. The significant aspect of the communication to the public which takes place through those hyperlinks is the fact that it increases the range of potential users who, I repeat, are provided with a functionality involving the prior selection of websites that allow digital content to be viewed free of charge.

53. It is therefore possible to refer to the indispensable role, within the meaning of the case-law, [41] played by Mr Wullems in the communication to the public of protected works; his intervention is performed deliberately and with full knowledge of the consequences entailed. That is clear, in particular, from the examples of the advertising he uses to promote his device. [42]

54. In short, the *filmspeler* cannot be regarded as a mere 'physical facility' within the meaning of recital 27 of Directive 2001/29, but rather as a type of communication to the public of copyright-protected works that have previously been unlawfully uploaded to the internet. Mr Wullems' conduct involving the installation of hyperlinks to those works in his devices, which he clearly does in pursuit of a profit and in awareness of its unlawfulness, assists purchasers of the *filmspeler* to avoid the consideration payable for lawful access to those works, that is, payment of the remuneration due to the right holders which usually takes the form of a membership fee, subscription or another pay-per-view method.

55. Having established that the *filmspeler* carries out a communication to the public under Article 3(1) of the directive, [43] it remains to be ascertained whether that public warrants the description 'new', as interpreted to date.

56. According to the case-law of the Court, the requirement of a 'new public' must be satisfied where the communication of the protected work is *not* made *by means of a specific method which differs from the methods used up to that time.* [44] Although that finding of fact falls to the national court, the method used by Mr Wullems does not appear to involve any new features but is rather a combination of other, pre-existing methods. In order to simplify the debate, it could therefore be accepted that, in this case, there is no 'specific, different method', for the purposes of the case-law, which would lead to an analysis of whether potential purchasers of the *filmspeler* can be classified as a 'new public'.

39 — As was the case of the facts which led to the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76), the judgment in *GS Media* and the order of 21 October 2014, *BestWater International* (C-348/13, EU:C:2014:2315).

40 — From another perspective, Mr Wullems' conduct is similar but not identical to that at issue in the judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764). The signal distributed by the hotel by means of the television sets available in the rooms constituted communication to the public under Directive 2001/29.

41 — Judgment in *GS Media*, paragraph 35 and the case-law cited.

42 — See point 19 of this Opinion.

43 — Judgment in *GS Media*, paragraph 51.

44 — Order of 21 October 2014, *BestWater International* (C-348/13, EU:C:2014:2315, paragraph 14 and the case-law cited).

57. According to the case file, and the French Government rightly draws attention to this, the protected works were either distributed on the internet without the authorisation of the right holders or that authorisation was granted only for subscription sites, in other words, restricted access sites. Hence, the multimedia player sold by Mr Wullems widens the pool of users beyond that intended by the authors of those works, inasmuch as it links both to websites distributing such digital content without authorisation and to sites containing protected works and making them available only to certain users who have to pay for access.

58. Moreover, notwithstanding the possibility of finding the add-ons on the market and the hyperlinks free of charge on the internet, the *filmspeler* entails an undeniable advantage for a significant portion of that public: persons not particularly skilled at using the internet to find illegal sites for watching films and televisions series, amongst other digital content. That portion of the public might prefer the user-friendly menu which the *filmspeler* displays on its screen to the sometimes laborious search for websites offering such content.

59. Be that as it may, the distribution of protected works which Mr Wullems facilitates is directed to a public which the right holders did not take into account when they authorised access to those works or did so only on payment circuits, from which it follows that the condition of a 'new public' is satisfied. [45]

60. I propose, therefore, that the reply to the first two questions referred for a preliminary ruling by the Rechtbank Midden-Nederland (District Court, Central Netherlands) should be that the sale of a multimedia player in which the seller has installed hyperlinks enabling direct access to protected works, such as films, series and live programmes, available on other websites without the authorisation of the copyright holder, constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

B – *The third and fourth questions*

61. By these two questions, the referring court raises two uncertainties which, as I have pointed out, do not concern the multimedia device but rather the compatibility with Directive 2001/29 of the conduct of an end user who, by means of that device, makes a 'temporary reproduction … during the streaming of a copyright-protected work from a third-party website where that copyright-protected work is offered without the authorisation of the right holder(s)'. In particular, the referring court seeks to ascertain whether this type of conduct could be covered by Article 5(1) and (5) of that directive.

62. In view of that wording, the two questions were the subject of a number of pleas of inadmissibility because they appear to go beyond the boundaries of the case between Stichting Brein and Mr Wullems. However, following the explanations of the referring court, those pleas must be dismissed, for one of the heads of claim put forward by Stichting Brein in the main proceedings is that Mr Wullems should be found to have created misleading advertising and carried on unfair commercial practices, because in his advertisements, as a claim intended to increase sales, he stated that the mere streaming of works from unlawful sources (unlike the downloading of such works) is lawful. That is why the referring court, called upon to rule on that specific head of claim, needs the Court's answer as to the interpretation of Article 5 of Directive 2001/29.

63. The considerations I shall set out below must be taken to refer to the facts of the main proceedings in the context of the main head of claim to which I have just referred, and to the application of Article 5 of Directive 2001/29.

45 — However, it must be made clear that only the distribution of protected works to end users which the *filmspeler* enables through the hyperlinks grouped on the 14 add-ons, which connect specifically to websites on which protected works may be streamed without the consent of the right holders, satisfies the definition of 'communication to the public' as interpreted by the Court. As regards the links to films, series and sports competitions authorised by those right holders, which are not subject to any restriction, access is unrestricted and the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 25 and 26), is applicable.

1. The exception in Article 5(1) of Directive 2001/29

64. Article 5(1) of Directive 2001/29 includes in the list of exceptions to the reproduction right '[t]emporary acts of reproduction … which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable … a lawful use of a work or other subject matter to be made'. The exception applies also to the end user and not only to online service providers or intermediaries, as a reading of recital 33 of Directive 2001/29 appears to suggest. [46]

65. I do not believe that, for the purposes of this case, it is essential to determine whether or not the streaming of a work via the hyperlinks on the *filmspeler* has the transient and incidental nature to which the directive refers. [47] A decision one way or the other on the dispute would first of all require a highly technical assessment (relating to buffering and making copies in the cache or on-screen memory), [48] which I do not consider it necessary to make, [49]when, in my opinion, one of the other main requirements for the exemption is not satisfied: that of enabling 'lawful use' of the protected work.

66. It cannot be said that there is 'lawful use' of protected works when the end user has access to those works in the circumstances at issue in the present case; that is to say, when the holders of the relevant copyright have refused to allow or have restricted the distribution of the digital content concerned and have not authorised unrestricted communication to the public of that content on websites to which the hyperlinks installed in the *filmspeler* connect.

67. It is not, therefore, a question of forming a general view on streaming, but of assessing, in the light of the provision cited above, the conduct of a user who, in the circumstances of this case, uses that method to play protected films and series on his screen.

68. The development of telecommunications (among other factors, the extension of fibre-optic networks which provide very high connection speeds) has meant that illegal downloading onto data carriers — which received a lot of attention until a few years ago — is gradually being superseded, if not replaced, by the reproduction of digital content through streaming, to such a point that this has become one of the most sought-after methods of reproduction. Streaming from payment platforms presents no significant difficulties from the point of view of intellectual property, nor do difficulties arise where a user views or listens to digital content not subject to access restrictions on websites that provide such content lawfully and free of charge.

46 — That can be deduced implicitly from the judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195).

47 — It is significant in this respect that the English and German versions use the words 'transient' and 'flüchtig', which suggest a fleeting or brief period. The Dutch version uses the term 'voorbijgaande' and the Spanish version uses 'transitorio', which are more consistent with the idea of an act being temporary.

48 — Cached copies and on-screen copies satisfy the conditions laid down in Article 5(1) and (5) of Directive 2001/29, according to the judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195, paragraphs 26 and 27).

49 — With this type of reproduction, in which file copying is replaced by storage of the streamed content in the user's buffer, the user 'consumes' the product in parallel with viewing it, thereby avoiding the problems arising from the fact that it is slower to download files. It could be argued that although such a reproduction is not fixed on a specific data carrier and appears only on-screen, it is (in the case of films and television series, for example) too long in duration to be classified as transient. In the same vein, if it is accepted hypothetically that reproduction by streaming is transient, it will be debatable whether it forms 'an integral and essential part of a technological process', which is another of the essential conditions for the exemption laid down in Article 5(1) of Directive 2001/29.

69. However, the situation changes when account is taken of websites that make pirated versions [50] of such content available to users. The Court's ruling in the judgment in *GS Media* concerned a person who posted a hyperlink to protected content on the internet without a licence from the right holder. The conduct of one who acts in that way must be assessed by reference, first, to whether that person pursues a profit (if he does, there is a rebuttable presumption that that person is aware that the work has been unlawfully posted on the internet) and, second, to whether he did not know, and could not reasonably have known, that publication of the work on the internet has not been authorised. [51]

70. In my opinion, if the key factor, in the case of a person who inserts a hyperlink without pursuing a profit, is knowledge — at least the reasonable possibility of knowledge — that the protected work is available on the internet unlawfully, it would be difficult not to extend that criterion to a person who merely makes use of that hyperlink, also without pursuing a profit. [52]

71. However, I believe that the subjective component is more appropriate for excluding personal liability than for deciding on objective unlawfulness and, as the case may be, the classification of the conduct. To enable a proper interpretation of Article 5(1) of Directive 2001/29, it must be borne in mind that, in accordance with recital 33 thereof, lawfulness, in objective terms, depends rather on the authorisation of the right holder or his licensee. [53] Excusable ignorance or reasonable lack of knowledge, on the part of the end user, of the fact that no such authorisation exists could, undoubtedly, exempt the user from liability, [54] but it does not exclude — I repeat, in strictly objective terms — the unlawfulness of the 'use' referred to in Article 5(1) of Directive 2001/29.

72. As it is clear from the case file that the protected works to which the hyperlinks installed on Mr Wullems' *filmspeler* lead were not authorised by the copyright holders, or the holders of the reproduction right provided for in Article 2 of Directive 2001/29, streaming by an end user by means of that device is not consistent with 'lawful use' for the purposes of Article 5(1)(b) of that directive.

### 2. The application of Article 5(5) of Directive 2001/29

73. If, purely for the sake of argument, use of Mr Wullems' *filmspeler* might be covered by the exception in Article 5(1) of Directive 2001/29, it would still have to pass the test in Article 5(5), in relation to which the referring court has formulated its fourth question. It will therefore have to be determined whether, in this case, the conditions laid down in Article 5(5) of that directive are satisfied. [55]

50 — The terms 'piracy' and 'pirate' in this context are not merely evocative but have become widely accepted in the legal terminology of copyright. The Court referred to 'pirated works' which adversely affect the normal exploitation of copyright-protected works, in accordance with Directive 2001/29, in the judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 39).

51 — The justification for that position is that it is difficult to ascertain whether the website to which the hyperlinks lead provides access to works which are protected and whether the copyright holders of those works have consented to their posting on the internet. That may be deduced from paragraphs 46, 47 and 48 of the judgment in *GS Media*.

52 — As internet users become more aware of the need to respect the rights of content creators and the provision of content by platforms which lawfully make such works available to users simultaneously increases, it will be more difficult to rely on ignorance of the lack of authorisation by copyright holders to justify the reproduction of pirated works using hyperlinks.

53 — The statement of reasons in C**ommon Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society** (OJ 2000 C 344, p. 1) states: '… In recital 33, the Council has added a *definition* of the term "lawful use" …'Emphasis added.

54 — These would refer to 'acts carried out by end-consumers acting in good faith' within the meaning of recital 14 of Directive 2004/48/EC **of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights**.

55 — According to the judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195, paragraph 53), '… in order for it to be possible to rely on the exception laid down in that provision [Article 5(1) of Directive 2001/29], as interpreted in paragraph 52 above, those copies must also satisfy the conditions laid down in Article 5(5) of [that] Directive …'.

74. That provision states that the exception provided for in, inter alia, paragraph 1, regarding temporary acts of reproduction, 'shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder'.

75. In my view, none of the three conditions is satisfied in this case. In the first place, the device sold by Mr Wullems will give rise to countless downloads of films, series, sporting events and other types of broadcasts without the consent of the holders of the reproduction rights. Therefore, as Stichting Brein and the Spanish Government contend, it cannot be argued that these proceedings are simply concerned with 'special cases' as the provision at issue requires.

76. In the second place, from a technical point of view, the conduct of a person who surfs the internet and visits websites cannot be likened to that of a person who streams protected films and series. In the first type of conduct, the temporary copy which must be made as a result of the technological process may involve normal exploitation of the works, which enables internet users to avail themselves of the communication to the public carried out by the publisher of the website concerned.[56] However, the situation in which an internet user views protected works on his screen through streaming does not involve 'normal exploitation' of the work, necessitated by the technology required to navigate the internet, but rather an 'abnormal' act in legal terms, which reflects the user's deliberate aim of accessing digital content without payment of any financial consideration, with the assistance of the *filmspeler*.

77. In those circumstances, it would run counter to Directive 2001/29 to allow indiscriminate or widespread reproductions from unlawful sources, or reproductions made by circumventing the access limits. Accepting the validity of such reproductions would be tantamount to promoting the circulation of pirated digital content and, to that extent, would seriously prejudice the protection of copyright and create favourable conditions for unlawful methods of distribution, to the detriment of the proper functioning of the internal market.[57]

78. In the third place, the reproduction right having, according to the case file, been granted only for circuits where the end user must pay for access (either through subscription, membership fee or other similar methods), the immeasurable amount of streaming without any financial consideration for the right holder means that there will necessarily be a simultaneous reduction in the number of subscribers to such circuits, with the resulting adverse effect on the normal exploitation of the protected works, to echo the terms used in the judgment in *ACI Adam and Others*.[58]

79. The considerations set out by the Court in *ACI Adam and Others* are indeed appropriate here; in that judgment, the Court held, when interpreting the conditions laid down in Article 5(5) of Directive 2001/29, that 'to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected'.[59] The sale of the *filmspeler* therefore conflicts with the 'legitimate interests of the rightholder', who has not authorised the unrestricted publication of his works.

80. In short, I believe that the streaming of protected digital content without the permission of the copyright holders does not satisfy the conditions laid down in Article 5(5) of Directive 2001/29, for it does not constitute a special case, it conflicts with the normal exploitation of the work, and it unreasonably prejudices the legitimate interests of the right holders.

56 — Ibid., paragraph 61.

57 — Judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 35 and 36).

58 — Ibid., paragraph 39.

59 — Ibid.

81. Taking account of the cumulative nature of the conditions set out above, to which the Court has referred,[60] the three-step exception to the exception, laid down in Article 5(5) of Directive 2001/29, is applicable to this case. Therefore, the exception to the reproduction right may not be relied upon.

82. Accordingly, I propose that the reply to the third and fourth questions referred for a preliminary ruling should be that, in the circumstances of the main proceedings, the streaming of a copyright-protected work cannot be covered by the exception laid down in Article 5(1) of Directive 2001/29, inasmuch as it does not fall within the definition of 'lawful use' in subparagraph (b) of that provision and, in any case, fails the three-step test laid down in Article 5(5) of that directive.

## V – **Conclusion**

83. In the light of the arguments set out, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Rechtbank Midden-Nederland (District Court, Central Netherlands):

The sale of a multimedia player of the kind at issue in the main proceedings, in which the seller has installed hyperlinks to websites that, without the authorisation of the copyright holder, offer unrestricted access to copyright-protected works, such as films, series and live programmes,

— constitutes 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; and

— cannot be covered by the exception laid down in Article 5(1) of Directive 2001/29, inasmuch as it does not fall within the definition of 'lawful use' in subparagraph (b) of that provision and, in any case, does not fulfil the conditions for application of Article 5(5) of that directive.

60 — Judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195, paragraph 53 and the case-law cited).