Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 3 September 2020[1]

Case C-637/19

BY
v
CX

(Request for a preliminary ruling from the Svea hovrätt, Patent- och marknadsöverdomstolen) (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm, Sweden))

(Reference for a preliminary ruling — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Right of communication to the public — Article 4(1) — Distribution right — Meaning of the term 'public' — Transmission to a court of a copy of a protected work as evidence — Charter of Fundamental Rights of the European Union — Article 47 — Right to an effective remedy and to a fair trial — Article 17(2) — Right to intellectual property)

I. Introduction

1. The present request for a preliminary ruling, which was lodged at the registry of the Court on 27 August 2019, arises out of a dispute between two private persons, BY and CX, in the course of civil proceedings[2] which have now come before the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm, Sweden) . It raises issues of some importance regarding the interaction of EU copyright legislation and national freedom of information, together with the right to an effective remedy and a fair trial (as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union; 'the Charter').

2. Specifically, does the disclosure in national court proceedings of a work protected by copyright (in this case a photograph) amount to a 'communication to the public' and/or a 'distribution to the public' within the meaning of Article 3(1) and Article 4(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?[3]

3. Before proceeding further, however, it is necessary first to set out the relevant legal framework.

1 Original language: English.

2 It might be noted that it is not clear from the request for a preliminary ruling what the nature of the civil proceedings in question actually is or whether the evidence in question is relevant in the context of those proceedings.

3 OJ 2001 L 167, p. 10.

II. Legal framework

A. International law

4. The World Intellectual Property Organisation (WIPO) adopted in Geneva on 20 December 1996 the WIPO Copyright Treaty ('the WCT'). The WCT was in turn approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000.[4]

5. Article 6 of the WCT, entitled 'Right of Distribution', states:

'(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

…'

B. EU law

6. Recitals 3, 9, 10, 15 and 31 of Directive 2001/29 state:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

…

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

…

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties

4 Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).

and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

…

(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. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

7. Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject-matter', 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.

…'

8. Article 4 of Directive 2001/29, entitled 'Distribution right', states:

'1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

…'

9. Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', provides in paragraph 3 thereof:

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

…

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

…'

C. National law

10. Article 2 of the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (upphovsrättslagen) (Law No 729 of 1960 on copyright in literary and artistic works; 'the Law on Copyright') provides:

'[(1)] Subject to the limitations laid down in this law, copyright includes the exclusive right to dispose of the work by reproducing it and by making it available to the public, whether in its original form or in modified form, in translation, in adaptation into another literary or artistic form or using another technique.

[(2)] Any direct or indirect, temporary or permanent reproduction of a work, by any means and in any form, in whole or in part, shall be considered as reproduction.

[(3)] The work is made available to the public in the following cases:

1. When the work is subject to a communication to the public. Communication to the public occurs when the work is made available to the public, by wire or wireless means, from a place other than that where the public can enjoy that work. It includes any communication carried out in such a way that members of the public may access the work from a place and at a time individually chosen by them.

…

4. When a reproduction of the work is offered for sale, rental or on loan or otherwise distributed to the public.

Any communication or performance of a work aimed at a large closed circle, in a professional context, shall be treated as a communication to the public or public performance, as the case may be.'

11. Article 49a of the Law on Copyright states:

'The author of a photograph has the exclusive right to reproduce that photograph and to make it available to the public. The right applies regardless of whether the image is used in its original form or in a modified form and irrespective of the technique used.'

12. Pursuant to Chapter 2, Article 1 of the tryckfrihetsförordningen (Law on the Freedom of the Press), the promotion of freedom of expression and pluralistic information entails the right for everyone to access public documents. The Law on the Freedom of the Press is one of four basic fundamental laws in Sweden which enjoys a particular and special status akin to that of a constitution in other Member States.

13. The Law on the Freedom of the Press also provides, inter alia, that any procedural document transmitted to a court, in any form, is a public document. Chapter 2, Article 1 of the Law on the Freedom of the Press therefore has the effect that anyone can ask for access to a procedural document transmitted to a court. That rule of principle is however subject to an exception relating to confidential information.

14. The principle is therefore that the right of access to documents also concerns documents covered by copyright and related rights.

III. The facts of the main proceedings and the request for a preliminary ruling

15. BY and CX are both natural persons each of whom operates a website. In the course of a prior dispute before the civil courts, CX sent a copy of a page of text, including a photograph, from BY's website as evidence in the underlying court proceedings. The photograph accordingly forms part of the documentary record in the proceedings.

16. BY claims to hold the copyright to that photograph and asks that CX be ordered to pay damages, first, for infringement of copyright and, second, for infringement of the special protection conferred on photographs by Article 49a of the Law on Copyright. CX contests any obligation to pay damages and maintains that the disclosure of the material for the purposes of the court proceedings did not amount to a copyright violation.

17. At first instance, the Patent- och marknadsdomstolen (Patent and Commercial Court, Sweden) held that the photograph was protected by rights related to copyright, that is to say, by the special protection conferred on photographs. That court found, however, that because the photograph was transmitted to it as a procedural document, any third party may request communication of the photograph in accordance with the applicable provisions of Swedish constitutional law on access to documents. Although the Patent- och marknadsdomstolen (Patent and Commercial Court) concluded that CX had distributed that photograph to the public within the meaning of the Law on Copyright, it considered that it had not been established that BY had suffered damage and, accordingly, dismissed its application.

18. BY appealed that judgment to the referring court.

19. The referring court considers that it must rule in particular on the question of whether the forwarding of a copy of that photograph to a court as a procedural step constitutes an unlawful making available of the work within the meaning of the relevant national copyright legislation, either as a distribution to the public or as a communication to the public.

20. It is not in dispute that the photograph was sent electronically (by email) to the court hearing the dispute between the parties in the form of an electronic copy. The national court is also seeking to ascertain whether a court may be regarded as falling within the concept of 'public' for these purposes.

21. The referring court points out that there is uncertainty as to the interpretation in Union law of the concepts of 'communication to the public' and 'distribution to the public' in the case of a transmission to a court in the course of civil proceedings of a copyright-protected work. This raises the question of, first, whether a court may be regarded as falling within the concept of 'the public' within the meaning of Directive 2001/29 and, second, whether the term 'public' must be given the same meaning in the context of the application of Articles 3(1) and 4(1) of Directive 2001/29.

22. In that regard, the referring court notes that the Court has held that the concept of 'public' refers to an indeterminate number of potential addressees and involves, moreover, a fairly large number of persons. It further emphasised that the aim is to make a work perceptible in any manner appropriate to 'persons in general', as opposed to specific persons belonging to a private group. [5]

5 See judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraphs 41 and 42 and the case-law cited).

23. It is also apparent from the case-law of the Court that the concept of 'distribution', within the meaning of Article 4(1) of Directive 2001/29, has the same meaning as the expression 'making available to the public … by sale' within the meaning of Article 6(1) of the WCT. It would appear, however, from the judgment of 13 May 2015, *Dimensione Direct Sales and Labianca* (C-516/13, EU:C:2015:315), that for there to be 'distribution to the public' it is sufficient that the protected work has been delivered to a member of the public.

24. It is also necessary to ascertain whether, where a procedural document is transmitted to a court, either in the form of a physical (paper) document or as an attachment to an electronic mail, it is a 'communication to the public' or a 'distribution to the public', since such transmission produces the same effects and has the same purpose in both cases.

25. The referring court considers that neither that court itself nor the members of its staff could be regarded as constituting the 'public' in the general sense of the term. They could not, however, be regarded as belonging to a private group.

26. Moreover, according to the referring court, while the number of persons who, following transmission, have access to the work is certainly limited to the court's staff alone, that number would necessarily be variable and should be regarded from the outset as high. Finally, national law provides that anyone has a right of access to documents received by a court.

27. In those circumstances, the referring court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the term "public" in Articles 3(1) and 4(1) of Directive [2001/29] have a uniform meaning?

(2) If question 1 is answered in the affirmative, is a court to be regarded as falling within the scope of the term "public" within the meaning of those provisions?

(3) If question 1 is answered in the negative:

   (a) in the event of communication of a protected work to a court, can that court fall within the scope of the term "public"?

   (b) in the event of distribution of a protected work to a court, can that court fall within the scope of the term "public"?

(4) Does the fact that national legislation lays down a general principle of access to public documents in accordance with which any person who makes a request can access procedural documents transmitted to a court, except where they contain confidential information, affect the assessment of whether transmission to a court of a protected work amounts to a "communication to the public" or a "distribution to the public"?'

IV. Procedure before the Court

28. Written observations were submitted by the European Commission.

29. A number of written questions were addressed by the Court to the Swedish Government. The Swedish Government responded to those questions on 6 May 2020.

V. Analysis

A. First question

30. By its first question the referring court inquires whether the term 'public' in Articles 3(1) and 4(1) of Directive 2001/29 has a uniform meaning.[6]

31. In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it having extracted from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of Union law which require interpretation in view of the subject matter of the dispute in the main proceedings.[7]

32. In my view, it is not necessary for the Court to answer the first question and the other questions must thus be reformulated. In that regard, it is clear from paragraphs 3 and 6 of the request for a preliminary ruling that the protected photograph,[8] which is the subject of the proceedings before the referring court, was sent by email as evidence to the civil courts in the course of the proceedings before them.

33. Pursuant to Article 3(1) of Directive 2001/29, authors have 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. Moreover, Article 4(1) of that directive provides that authors have, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. Article 4(2) of Directive 2001/29 further provides that this right is exhausted where the first sale or other transfer of ownership in the European Union of the original or of a copy of the work is made by the rightholder or with his or her consent.[9]

34. It is clear, inter alia, from paragraphs 39 to 45 and 51 and 52 of the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:111), that in order for there to be a 'distribution to the public' pursuant to Article 4(1) of Directive 2001/29, the work must be put into circulation as physical copies, material items or tangible objects.[10] That particular requirement of Article 4(1) of Directive 2001/29 is not met when transmitting a work in intangible form by email.[11]

6 The term 'public' is not defined in Directive 2001/29.

7 See, by analogy, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 31 and 32 and the case-law cited).

8 See, by analogy, paragraph 14 of the judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634), in which the Court recalled that a photograph may be protected by copyright, provided that it is the intellectual creation of the author reflecting his or her personality and expressing his or her free and creative choices in the production of that photograph.

9 Judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 35 and 36).

10 I use these terms interchangeably for illustrative purposes only. I consider however that a 'distribution to the public' takes place in the 'real' rather than the 'virtual' world and thus requires the circulation of a physical or tangible object.

11 In addition, in paragraphs 22 and 26 of judgment of 19 December 2018, *Syed* (C-572/17, EU:C:2018:1033), the Court stated that distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. In addition, an act prior to the actual sale of a work or a copy thereof protected by copyright, which takes place without the rightholder's consent and with the objective of making such a sale, may infringe the distribution right as defined in Article 4(1) of Directive 2001/29. It is clear in the file before the Court that the transmission of the photograph as evidence in the course of judicial proceedings does not constitute a sale of that work or the transfer of ownership thereof or indeed a preparation of the sale of that work.

35. The transmission of a work by email instead constitutes, in my view, an act of communication or the making available of the work, by wire or wireless means, which may be accessed by the recipient from a place and at a time individually chosen by him or her in accordance with Article 3(1) of Directive 2001/29. The key question in the present proceedings however is whether that transmission is a communication or the making available to the 'public' for the purposes of Article 3(1) of Directive 2001/29. [12]

36. I therefore consider that it is unnecessary for the Court to give an interpretation of Article 4(1) of Directive 2001/29 in the present proceedings.

37. In any event, irrespective of whether Article 3(1) or indeed Article 4(1) of Directive 2001/29 may be applicable to the facts in the main proceedings, as the judgment of 13 May 2015, *Dimensione Direct Sales and Labianca* (C-516/13, EU:C:2015:315, paragraph 34), illustrates, Directive 2001/29 must be interpreted in a manner which secures effective and rigorous protection for the copyright holder.

38. This stringent requirement is further underscored by Article 17(2) of the Charter, which provides that intellectual property 'shall be protected'. [13]

39. It is in the light of these requirements that I propose now to address the other questions of the referring court, subject to the necessary reformulations.

B. Second, third and fourth questions

40. While the second, third and fourth questions posed by the referring court overlap, they essentially seek to ascertain whether, and if so, in what circumstances, the disclosure to a court by email of copyright material as evidence in the course of proceedings could amount to a communication to the public for the purposes of Article 3(1) of Directive 2001/29. I will first discuss these general issues and then conclude by answering the specific questions posed.

41. At the heart of the protection conferred by Article 3(1) of Directive 2001/29 lies the idea that the copyright holder is entitled to protection against the communication or the making available of the copyrighted material to the 'public'. [14] Thus, subject to the exceptions and limitations laid down in Article 5 of Directive 2001/29, all acts of communication to the public of a work by a third party require the prior consent of its author.

12 It is settled case-law that the concept of 'communication to the public' pursuant to Article 3(1) of Directive 2001/29 includes two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public'. As regards the first of those elements, that is, the existence of an 'act of communication', as is clear from Article 3(1) of Directive 2001/29, for there to be such an act it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether or not they avail themselves of that opportunity. So far as concerns the second of the abovementioned criteria, that is, that the protected work must in fact be communicated to a 'public', it follows from the case-law of the Court that the concept of 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. See judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraphs 19, 20 and 22 and the case-law cited). In paragraph 68 of the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111), the Court recalled that the concept of 'public' involves a certain *de minimis* threshold, which excludes from that concept a group of persons concerned that is too small, and, second, that in order to determine that number, the cumulative effect of making a protected work available, by downloading, to potential recipients should be taken into consideration. Account should therefore be taken, in particular, of the number of persons able to access the work at the same time, but also of how many of them may access it in succession.

13 In paragraph 18 of the judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634), the Court recalled that it follows from recitals 4, 9 and 10 of Directive 2001/29 that the latter's principal objective is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' must be interpreted broadly, as recital 23 of the directive expressly states.

14 The Commission considers that the term 'public' refers to physical persons and thus does not refer to institutions or jurisdictions. I do not, however, agree that the term 'public' is limited to physical persons, as I believe it could also encompass legal persons such as companies.

42. While the communication of the protected material to third parties performing administrative or judicial functions may very well surpass 'a certain *de minimis* threshold' given the number of people potentially involved,[15] it would not normally, in my view, constitute a 'communication to the public' in the sense envisaged by Article 3(1) of Directive 2001/29, precisely because those persons, while not a private group[16] per se, would nonetheless be constrained by the nature of their official functions. In particular, they would not be entitled to treat the copyrighted material as being free from copyright protection.

43. The communication, for example, of such material by a litigant in the course of judicial proceedings to court officials or judicial office holders, aside from the fact that it does not have any independent economic significance,[17] would not enable the recipients of that material to do with it as they pleased. After all, in this example the material would have been communicated to such persons in their administrative or, as the case may be, judicial capacities and the further reproduction, communication or distribution of such material by them would be subject to certain express or implied legal and ethical restrictions, including copyright law, provided for by national law.

44. Despite the potentially high number of court officials involved, the communication would thus not be directed at an indeterminate number of potential recipients as required by the Court in paragraph 37 of its judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764). The communication would instead be aimed at a clearly defined and limited or closed group of people who exercise their functions in the public interest and who are, subject to verification by the referring court, bound by legal and ethical rules concerning, inter alia, the use and disclosure of information and evidence received in the course of court proceedings.

45. In my view, the communication of material protected by copyright to a court as evidence in the context of judicial proceedings does not, in principle, undermine the exclusive rights of the copyright holder of that material by, for example, depriving the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work. The ability to submit copyrighted material as evidence in civil proceedings rather serves to ensure the right to an effective remedy and the right to a fair trial as guaranteed by Article 47 of the Charter. The rights of defence of a litigant would be seriously compromised if he or she were unable to submit evidence to a court in the event that another party to those proceedings or indeed a third party invoked copyright protection in respect of that evidence.[18]

46. In that regard, it must be stressed that the intellectual property rights enshrined in Article 17(2) of the Charter are not absolute rights but must be balanced or weighted against other rights guaranteed by the Charter.[19]

47. The substance of these rights are not compromised by reason of a national law or practice which enables litigants to make use of or to refer to copyrighted material in court proceedings, not least given that copyright protection is not thereby lost simply because it is so referred to in those proceedings.

15 Such a group may not be small or insignificant but may well encompass a fairly large group of people. See judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 43).

16 See judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 42 and the case-law cited).

17 See, by analogy, Article 5(1) of Directive 2001/29.

18 In paragraph 71 of the judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684), the Court stated that the principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his or her case, including his or her evidence, under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent. Indeed, I consider that the avoidance of such a risk is the very function of the optional exception or limitation to copyright protection for uses in administrative and judicial proceedings provided by Article 5(3)(e) of Directive 2001/29. It must, however, be underscored that the referring court specifically stated in paragraph 6 of its request for a preliminary ruling that the questions posed by it do not relate to the application of Article 5(3)(e) of Directive 2001/29.

19 See, by analogy, judgment of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624, paragraphs 33 and 34). See, also, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 72).

48. By its fourth question, the referring court asks, in essence, whether this assessment is altered by the fact that Swedish legislation lays down a general principle of access to public documents in accordance with which any person who makes a request can access procedural documents transmitted to a court, except where they contain confidential information.[20] In my view, and as indicated by both the Commission[21] and the Swedish Government,[22] the communication of copyrighted material by a litigant to a court in such circumstances does not constitute a communication to the public *by the litigant* given that it is ultimately the court itself (or court officials) that may eventually grant access to the material under national freedom of information or transparency rules.[23]

49. In that regard, there is no indication in the file before the Court that the courts or court officials in Sweden have in fact granted access to the copyrighted material in question or indeed that such access has been requested.

50. The referring court merely indicated in its request for a preliminary ruling that national freedom of information law permits the general public *to access* this material as of right.[24] That, after all, is the general object of freedom of information legislation at both national and Union level.[25] Indeed, this concept is at the heart of the Swedish Law on the Freedom of the Press[26] — itself the inspiration for freedom of information legislation in so many other Member States and at Union level — in that, by virtue of Chapter 2, Article 1 of that law, court documents are *generally* accessible by members of the public as of right.[27] The Swedish Government also indicated that copyright is protected by the Swedish Constitution in accordance with the rules laid down in the Law on Copyright. Article 26b(1) of the Law on Copyright provides, however, that notwithstanding copyright rules, public documents shall be communicated to the public under the conditions set out in Chapter 2 of the Law on the Freedom of the Press.

20 While it is unclear from the file before the Court, what is perhaps at the heart of this question is the risk that judicial proceedings could be instrumentalised by reason of the opportunistic exhibiting in those proceedings of copyrighted material in order to enable the public to have access to copyrighted material under freedom of information or transparency rules, thereby undermining the exclusive rights of authors.

21 See paragraph 20 of the observations of the Commission.

22 See paragraph 25 of the response of the Swedish Government of 6 May 2020 to the written questions of the Court.

23 See Article 9 of Directive 2001/29, which provides that that directive shall be without prejudice to provisions concerning, inter alia, access to *public documents*. The Swedish Government indicated that in accordance with Swedish legislation, documents furnished by a party to proceedings to a court are public documents and are thus, in principle, accessible to the public. In paragraph 26 of the judgment of 1 March 2017, *ITV Broadcasting and Others* (C-275/15, EU:C:2017:144), the Court stated that Article 9 of Directive 2001/29, read in the light of recital 60 of that directive, is intended to maintain the provisions applicable in areas other than that harmonised by the directive.

24 See paragraph 18 of the request for a preliminary ruling.

25 See Article 15(3) TFEU.

26 The Swedish government indicated that public access to pleadings and evidence transmitted to a court are dealt with by the *offentlighets — och sekretesslag* (2009:400) (Law No 400 of 2009 on the transparency and confidentiality of public documents; 'the OSL') and Chapter 2 of the Law on the Freedom of the Press.

27 The Swedish Government indicated that while everyone who requests access to a public document also has a right to a copy of that document upon payment of administrative costs, the public administration is, in principle, not obliged to communicate that document by electronic means. See paragraph 37 of the response of the Swedish Government. This would therefore seem to ensure, subject to verification by the referring court, that copyrighted material is not, in principle, communicated to the public by the courts.

51. To this general principle of transparency there are, however, exceptions. While this is ultimately a matter for the national court to verify, the Court has been informed by the Swedish Government in response to a written question posed by the Court that Article 23 of Chapter 31 of the OSL [28] contains a saver for copyrighted material. The effect of this saver would therefore appear to be — again, subject to verification by the referring court — that information contained in material which is subject to copyright is deemed, under certain conditions, confidential and cannot be divulged in the absence of a specific provision to the contrary. [29]

52. Moreover and perhaps more importantly, the Swedish Government stated that while Article 26b(1) of the Law on Copyright regulates the disclosure of public documents *it does not grant a right to use such documents*. According to that government, 'anyone who has been furnished a copy of the work pursuant to this provision may not therefore dispose of it in violation of the [Law on Copyright]. Any further use requires the permission of the author or must be based on one of the exceptions to copyright protection provided by the [Law on Copyright]'.

53. It would thus appear that copyrighted material does not thereby enter the public domain via the freedom of information provisions of the Law on the Freedom of the Press *simply* because it has been disclosed or exhibited or otherwise made available in evidence during the course of court proceedings.

54. Put another way, the disclosure of such copyrighted material under transparency rules does not have the substantive effect such that that material loses its status as copyright protected and thereby enters the public domain.

55. It is thus clear, subject, of course, to ultimate verification by the national court, that Swedish law does not envisage or permit copyright protection to be lost *merely* because one of the parties has exhibited that material in the course of civil proceedings and a third party can subsequently gain access to that material by virtue of Swedish freedom of information law.

56. One might observe in conclusion that if that law were indeed otherwise and copyright could thereby be effectively lost through the simple expedient of exhibiting the copyrighted document in civil proceedings, then in my view the Kingdom of Sweden would plainly have failed properly to transpose the requirements of Directive 2001/29 and, for that matter, failed to comply with the requirements of Article 17(2) of the Charter with regard to the effective protection of intellectual property. Such a state of affairs would plainly compromise the substance of the required level of copyright protection which rightholders are guaranteed by Directive 2001/29 (and, for that matter, by Article 17(2) of the Charter), as they would be left without effective protection to prevent the loss of copyright in this manner.

57. Since, however, subject to verification by the referring court, this is plainly not the case, it is unnecessary to address this issue any further.

28 According to that provision:
'Information contained in a work protected by copyright and which cannot be presumed to have no commercial interest shall be confidential, unless it is clear that such information can be disclosed without prejudice to the rightholders, and
(1) that there are good reasons to believe that the work has not already been made public within the meaning of [the Law on Copyright];
(2) that there are good reasons to believe that the work has been communicated to the administration without the consent of the owner of the rights; and
(3) that the disclosure of the information constitutes making available within the meaning of copyright.
For the purposes of the first paragraph, a work communicated under Chapter 2 of the [the Law on the Freedom of the Press] or transmitted by one public administration to another shall not be considered to have been made public.'

29 See Article 1 of Chapter 8 of the OSL.

58. I therefore consider that the electronic transmission by a litigant or a party to proceedings of copyrighted material as evidence to a court does not constitute a 'communication to the public' or a 'distribution to the public' in accordance with Article 3(1) and Article 4(1) of Directive 2001/29. The mere fact that such evidence is considered a public document and that the public may thus, in principle, have access to the copyrighted material in question in accordance with national freedom of information or transparency rules does not entail that it enters the public domain and is free from copyright protection.

VI. Conclusion

59. In view of all the foregoing considerations, I consider that the Court should answer the questions referred by the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm, Sweden) as follows:

'The electronic transmission by a litigant or a party to proceedings of copyrighted material as evidence to a court does not constitute a "communication to the public" or a "distribution to the public" in accordance with Article 3(1) and Article 4(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The mere fact that such evidence is considered a public document and that the public may thus, in principle, have access to the copyrighted material in question in accordance with national freedom of information or transparency rules does not entail that it enters the public domain and is free from copyright protection.'