[NL] Dutch Supreme Court files a request for a preliminary ruling on copyright in the geoblocking context

IRIS 2025-1:1/12

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On 14 November 2024, the Dutch Supreme Court filed a request for a preliminary ruling from the Court of Justice of the European Union (CJEU). The questions concern the interpretation of the notion of "communication to the public" under Article 3(1) of the Copyright in the Information Society Directive (InfoSoc Directive) in the context of geo-blocking measures.

The request for a preliminary ruling has been made in the dispute between the Anne Frank Fund (the non-profit organisation based in Basel, Switzerland, which owns copyrights on Anne Frank's diary), and the Anne Frank Foundation (which owns the Anne Frank House in Amsterdam and acts as the guardian of the Anne Frank diaries), the Royal Netherlands Academy of Arts and Sciences (KNAW), and the Belgian Association for Research and Access to Historical Texts (VOOHT). For over ten years, the defendant organisations jointly carried out an extensive research project on Anne Frank's writings. The outcomes of this project, which include the original manuscripts of Anne Frank's diary as well as accompanying historical and comparative linguistic data, were published by VOOHT on the Belgian website www.annefrankmanuscripten.org in September 2021. While this website is accessible from the countries where copyrights on Anne Frank's writings have expired, including Belgium, access from the Netherlands, where part of her writings are copyright protected until 2037, is restricted via geo-blocking measures. Individuals who visit the website from Dutch IP addresses or declare, in an additional access check, that they are located in the Netherlands, are restricted from viewing its content. Nevertheless, Dutch users can still gain access to the website by using advanced VPN and proxy services. As a result, shortly after the publication of the research online, the Anne Frank Fund brought legal proceedings against the three organisations before the District Court of Amsterdam, claiming copyright infringement in the Netherlands given the possibility of circumventing the geo-blocking measures. In February 2022, the District Court of Amsterdam found no infringement of the Anne Frank Fund's copyrights since the organisations took all the necessary measures to prevent the publication of the manuscripts in the Netherlands. The ruling of the District Court of Amsterdam was confirmed by the Amsterdam Court of Appeal in March 2023. The Anne Frank Fund then lodged its appeal in the Dutch Supreme Court. As the dispute raises questions of the interpretation of EU law, the Dutch Supreme Court

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decided to stay the proceedings and refer the following questions to the CJEU.

1. Must Article 3(1) of the InfoSoc Directive be interpreted as meaning that the publication of a work on the Internet can only be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors should be taken into account in assessing this? 2. Can there be a communication to the public in a particular country if, by means of (state-of-the-art) geo-blocking, it has been ensured that the website on which the work is published can be reached by the public in that country only by circumventing the blocking measure using a VPN or similar service? Is the extent to which the eligible public in the blocked country is willing and able to access the website concerned via such a service of relevance? Does it make any difference to the answer to this question whether, in addition to the measure of geo-blocking, other measures have been taken to impede or discourage access to the website by the public in the blocked country? 3. If the possibility of circumventing the blocking measure entails communication of the work published on the Internet to the public in the blocked country within the meaning of Article 3(1) of the InfoSoc Directive, is that communication deemed to have been made by the person who published the work on the Internet, even though knowledge of that communication requires the intervention of the provider of the VPN or similar service concerned?

The preliminary ruling by the CJEU in *Anne Frank Fonds* will provide important guidance on the interpretation and application of the concept of communication to the public in the online environment.

C-788/24 - Anne Frank Fonds

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