

Court of Justice of the European Union: Online publication of a photograph is a new communication to the public

IRIS 2018-9:1/4

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On 7 August 2018, the Court of Justice of the European Union (CJEU) ruled in the dispute between Land Nordrhein-Westfalen, a state of Germany, and Dirk Renckhoff, a photographer. The case concerned the publication of a photograph taken by Mr Renckhoff on a freely accessible school website. The photograph had been downloaded from an online travel portal and subsequently used by a pupil as a means of illustration for his/her workshop presentation. Below the photograph, the pupil had made reference to the online travel portal, which did not have any restrictive measures in place to prevent the photograph from being downloaded.

Mr Renckhoff claimed that his copyright, and more particularly his reproduction right and his right of making available to the public, had been infringed by Land Nordrhein-Westfalen, which is responsible for the educational supervision of the school. Mr Renckhoff argued that he had given a right of use exclusively to the operators of the online travel portal but not to the subsequent school website. The Appeal Court (Higher Regional Court of Hamburg) had doubts as to whether the requirement of 'new' public, implied from case law in the act of communication to the public, had been met. The question referred to the CJEU therefore concerned the interpretation of Article 3(1) of Directive 2001/29/EC.

In order to answer this question, the Court started by recalling that a photograph may be protected by copyright in case it amounts to an intellectual creation which reflects the author's personality and expresses the latter's free and creative choices. Concerning the author's exclusive right of communication to the public, the Court pointed out that 'any use of work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work' and that such an exclusive right must be interpreted broadly. However, in order for an author to claim infringement of his right, two cumulative criteria must be met. First, there must be an 'act of communication' of a work and, secondly, communication of that work must be made to a 'public'. Whereas the Court found the first requirement to be met, the second requirement formed the main obstacle.

Taking into account that both the initial communication of the photograph on the online travel portal and its subsequent communication on the school portal were made with the same technical means, the Court turned to the question of whether the communication was made to a 'new public'. Having regard to the 'preventive' nature of authors' rights, the Court held that authors would be deprived of their effective rights if it did not recognise that the posting on one website of a work previously posted on another website with the consent of the copyright holder constituted a communication to a new public.

According to case law, the author should retain control over his works and thereby also be able to put an end to the exercise, by a third party, of previously authorised exploitation rights. Moreover, the Court pointed out that no exhaustion rule applies to the act of communication to the public. Not recognising, in the present case, that a communication to the public had occurred would deprive the copyright holder of his/her opportunity to claim an appropriate reward for the use of his/her work. In light of all these elements, the Court concluded that a communication to the public had taken place.

It is important to note that the Court deemed it irrelevant that the copyright holder did not limit the ways in which Internet users could use the photograph. Furthermore, the Court drew important distinctions between the present case and the Svensson case (See IRIS 2014-4/3), which concerned the use of hyperlinks. First, hyperlinks contribute to a greater extent than in the present case to the sound operation of the Internet. Consequently, it is important to recognise that a communication to the public took place in order to guarantee that a fair balance is struck between, on the one hand, the intellectual property rights of rightsholders and, on the other hand, the right to freedom of expression of Internet users, as well as the question of public interest. The right to education was not at stake when determining whether a right to communication had occurred. Secondly, unlike in the present case, the preventive nature of the rights of the holder are preserved in the context of hyperlinks. Removal of the work from the initial website would render all subsequent hyperlinks obsolete. Lastly, in the present case, the user played a decisive role in communicating the work to a public. He first had to reproduce the photograph on a private server and then post it on a website other than that on which the work had been initially communicated. In the case of hyperlinks, users are more passive. In light of all the foregoing considerations, the Court concluded that a communication to the public had occurred and that consent of the rightsholder was required for publication of the photo on the subsequent school website.

Case C-161/17, Land Nordrhein-Westfalen v. Dirk Renckhoff, Judgment of the Court of Justice of the European Union (Second Chamber), 7 August 2018

<http://curia.europa.eu/juris/document/document.jsf?docid=204738&doclang=EN>

