

## **CJEU, C-392/19, AG's Opinion: embedding a work –available on a website with the copyright holder's consent – in a third party's site by "framing" is not a "communication to the public"**

According to the Opinion issued by Advocate General (AG) Maciej Szpunar on 10 September, the embedding of works by means of the framing technique<sup>1</sup> does not require the copyright holder's authorisation. Indeed, there is a presumption that the copyright holder already gave such consent when the work was initially made available. The same applies where such embedding circumvents technological protection measures against framing, adopted or imposed by the right holder.

### **Background to the case and parties of the dispute**

Stiftung Preußischer Kulturbesitz (SPK) is responsible for the Deutsche Digitale Bibliothek (DDB), which provides an online platform which links German cultural and scientific institutions.

On that online platform, electronic references (links) are used to retrieve digitised content stored on the web portals of participating institutions. As a "digital showcase", the DDB itself stores only preview images (also called, "thumbnails"), that is to say smaller version of the original images. DDB uses works with the authorization of the copyright holders.

Verwertungsgesellschaft Bild-Kunst (VG Bild-Kunst), a copyright collecting company for the visual arts in Germany, concluded with SPK a license agreement regarding the use of its repertory of works in the form of thumbnails conditional on the inclusion of a provision stating that the licensee undertakes, when using the works and subject matter to which the agreement relates, to apply effective technical measures to protect against the framing by third parties of the thumbnails of said works or subject matter displayed on its website.

Taking the view that the provision was unreasonable under copyright law<sup>2</sup>, SPK brought an action in Germany seeking a declaration that VG Bild-Kunst was required to grant the license to SPK without the abovementioned provision.

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<sup>1</sup> Framing is a technique that allows the screen to be divided into several parts, each of which can independently display a different webpage or internet resource. Thus, the original webpage may be displayed on one part of the screen, while a webpage or other resource from another website is displayed on the other part.

<sup>2</sup> Art. 16 (1) and (2), first subparagraph, of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, transposed into German law, provides as follows: "1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information. 2. Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years ...".

The Bundesgerichtshof (German Federal Court of Justice; referring court) decided to stay the proceedings and ask the CJEU whether the embedding of a work – which is available on a freely accessible website with the consent of the right holder - in the website of a third party by way of framing constitute communication to the public of that work within the meaning of Art. 3 (1) of the Directive 2001/29/EC (the Information Society Directive), where that embedding circumvents protection measures against framing taken or imposed by the copyright holder.

### The Advocate General's Opinion

Preliminarily, the AG recalls that the CJEU has consistently held that where a link leads to a work which has already been made freely available to the public with the authorisation of the copyright holder, that link is not considered to be a communication to the public within the meaning of Art. 3 (1) of the Directive, since such link is directed to a public which had already been taken into account by the copyright holder when the work was initially made available. As regards the definition of the public, the AG proposes that, in the light of all the relevant case-law of the CJEU, copyright holder takes into account the entire public, including the potential public, of the website on which the work was initially made available<sup>3</sup>.

In the light of the above, the AG opines that in the case of works protected by copyright made freely available to the public on the internet with the authorisation of the copyright holder, the public accessing such works by means of **clickable links using the framing technique** must be regarded as forming part of the public which was taken into account by that right holder when those works were initially made available. Hence, framing **does not require the copyright holder's authorisation**, as it has been given when the work was initially made available.

It should be noted that, although the the Bundesgerichtshof's referral only mentioned framing, the issue concerns all means of incorporating into a webpage a resource from another website. In particular, the AG also examines **inline linking**, consisting in embedding works protected by copyright (usually a graphics or audiovisual file) contained on other websites in a webpage, in such a way that those works are automatically displayed on that webpage, without any further action on the part of the user.

In this technique, also described as "**automatic links**", transmission from the original site of the work is initiated by means of the automatic process written into the site containing the link which thus gives rise to the communication. As a result, **its owner carries out an additional act of communication** (act of transmission), independent both from the making available of the work to

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However, pursuant to Art. 3 (1) and (3) of the Information Society Directive, "1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them (...). 3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article". Moreover, pursuant to Art. 6 (1) and (3): "1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective".

<sup>3</sup>The AG refers to the judgement of 13 February 2014 in *Svensson and Others* (C-466/12) and the judgement of 7 August 2018 in *Renckhoff* (C-161/17).

the public, which takes place on the original site, and from the act of giving direct access to that work, represented by the act of posting a link. **That additional act does require the authorisation of the copyright holder of the work in question.** Indeed, according to the AG, it cannot be presumed that the copyright holder took that public into account when authorising the initial making available of the work.

In the AG's view, such an interpretation would give copyright holders legal instruments to protect against unauthorised exploitation of their works on the internet. Accordingly, this would strengthen their negotiating position when licensing the use of those works.

However, the AG observes that, while the copyright holder's authorisation is in general required, certain automatic links to works made available on the internet would likely fall within one of the exceptions to the right of communication to the public, in particular, in cases of quotation, caricature, parody or pastiche.

Finally, as regards the circumvention of technological protection measures<sup>4</sup>, the AG observes that, in principle, Member States are obliged to ensure legal protection against it. However, according to the CJEU's case-law, that legal protection applies only as to protect the copyright holder against acts which require his or her authorisation. As a result, the AG suggests that the CJEU should rule that protection measures against the embedding of works from other websites by means of clickable links using the framing technique, though lawful, are not eligible for protection under the Directive.

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<sup>4</sup> Such measures limit the manner of displaying a work on a screen, neither the access to it nor a means of accessing it.