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Court of Justice of the European Union

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Advocate General's Opinion in Case C-392/19
VG Bild-Kunst v Stiftung Preußischer Kulturbesitz

According to Advocate General Szpunar, the embedding in a webpage of works from other websites by means of automatic links (inline linking) requires the authorisation of the holder of the rights in those works

However, embedding by means of clickable links using the framing technique does not require such authorisation, which is deemed to have been given by the rightholder when the work was initially made available. The same applies even where that embedding circumvents technological protection measures against framing adopted or imposed by the rightholder.

Stiftung Preußischer Kulturbesitz, a foundation under German law, operates the Deutsche Digitale Bibliothek, a digital library devoted to culture and knowledge, which networks German cultural and scientific institutions.

The website of that library contains links to digitised content stored on the internet portals of participating institutions. As a 'digital showcase', the library itself stocks only thumbnails, that is to say smaller versions of the original images.

Verwertungsgesellschaft Bild-Kunst ('VG Bild-Kunst'), a copyright collecting society for the visual arts in Germany, makes the conclusion with Stiftung Preußischer Kulturbesitz of a licence agreement for the use of its catalogue of works in the form of thumbnails conditional on the inclusion of a provision whereby the licensee undertakes, when using the protected works and subject matter covered by the agreement, to apply effective technological measures against the framing¹ by third parties of the thumbnails of the protected works or subject matter displayed on the Deutsche Digitale Bibliothek website.

Taking the view that such a contractual provision was unreasonable from the point of view of copyright, Stiftung Preußischer Kulturbesitz brought an action before the German courts seeking a declaration that VG Bild-Kunst was required² to grant the licence in question without making that licence conditional on the implementation of those technological measures.

In that context, the Bundesgerichtshof (Federal Court of Justice, Germany) asks the Court of Justice to interpret Directive 2001/29,³ according to which Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, 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.

In today's Opinion, **Advocate General Maciej Szpunar proposes that the Court rule that the embedding in a webpage of works from other websites** (where those works are made freely

¹ Framing consists in dividing the screen into several parts, each of which may display the content of another website.

² According to the German law transposing Directive 2014/26/EU of the European Parliament and of the Council 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 (OJ 2014 L 84, p. 72), collecting societies are required to grant to any person who so requests, on reasonable terms, a licence to use the rights entrusted to them for management. However, according to German case-law, collecting societies may, in exceptional cases, derogate from their obligation and refuse to grant a licence, provided that that refusal does not constitute an abuse of monopoly power and that it is possible to rely, in opposition to the licence application, on overriding legitimate interests.

³ 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 (OJ 2001 L 167, p. 10).

available to the public with the authorisation of the copyright holder) **by means of clickable links using the framing technique does not require the copyright holder's authorisation, since he or she is deemed to have given it when the work was initially made available.**

The same applies even where that embedding by way of framing circumvents technological protection measures against framing adopted or imposed by the copyright holder. Such measures restrict neither access to a work nor even a means of accessing it, but only a manner of displaying it on a screen. In those circumstances, there can be no question of a new public, because the public is always the same: the public of the website targeted by the link.

However, the embedding of such works by means of automatic links (inline linking, the works being displayed automatically on the webpage viewed as soon as it is opened, without any further action on the part of the user), normally used to embed graphics and audiovisual files, requires, according to the Advocate General, the authorisation of the holder of the rights in the works.

Where those automatic links lead to works protected by copyright, there is, from both a technical and a functional point of view, an act of communication of those works to a public which was not taken into account by the copyright holder when the works were initially made available, namely the public of a website other than that on which that initial making available of the works took place.⁴

The Advocate General notes in that regard that an automatic link makes a resource appear as an integral element of the webpage containing that link. For a user, there is therefore no difference between an image embedded in a webpage from the same server and one embedded from another website. For that user, there is no longer any link with the original site: everything takes place on the site containing the link. It cannot be presumed, according to the Advocate General, that the copyright holder took such users into account when authorising the initial making available of the work.

According to Advocate General Szpunar, the approach which he proposes 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.

He observes, however, that, while the copyright holder's authorisation is in principle necessary, it cannot be ruled out that some automatic links to works made available to the public on the internet fall within one of the exceptions to that authorisation, in particular for cases of quotation, caricature, parody or pastiche.

As regards the circumvention of technological protection measures, the Advocate General notes that Directive 2001/29 requires, in principle, Member States to ensure legal protection against such circumvention. However, according to the Court's case-law, that protection applies only in the light of protecting the copyright holder against acts which require his or her authorisation.

Since framing does not require such authorisation, technological protection measures against framing are not therefore eligible for the legal protection provided for by the directive.

By contrast, since inline linking requires the authorisation of the copyright holder, technological protection measures against inline linking are eligible for that legal protection.

⁴ In that regard, the Advocate General refers, by analogy, to the judgment of the Court of 7 August 2018 in *Renckhoff* (C-161/17; see Press Release No [123/18](#)). (68, 71)

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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