



**Where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of that technique, constitutes making available that work to a new public**

*That communication to the public must, consequently, be authorised by the copyright holder*

Stiftung Preußischer Kulturbesitz ('SPK'), a German foundation, is the operator of 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 Deutsche Digitale Bibliothek itself stores only thumbnails, that is to say smaller versions of original images.

VG Bild-Kunst, a visual arts copyright collecting society in Germany, maintains that the conclusion with SPK of a licence agreement for the use of its catalogue of works in the form of thumbnails should be subject to the condition that the agreement include a provision whereby SPK undertakes, when using the works covered by the agreement, to implement effective technological measures against the framing,<sup>1</sup> by third parties, of the thumbnails of such works on the website of the Deutsche Digitale Bibliothek.

SPK considers that such a term in the agreement is not reasonable in the light of copyright, and brought an action before the German courts seeking a declaration that VG Bild-Kunst is required to grant SPK that licence without any condition requiring the implementation of such measures to prevent framing.<sup>2</sup>

Against that background, the Bundesgerichtshof (Federal Court of Justice, Germany) asks the Court for a determination of whether that framing must be held to be a communication to the public within the meaning of Directive 2001/29,<sup>3</sup> which, if that is the case, would permit VG Bild-Kunst to require SPK to implement such measures.

The Grand Chamber of the Court holds that the embedding by means of framing, in a website page of a third party, of works protected by copyright and made freely accessible to the public with the authorisation of the copyright holder on another website constitutes a communication to the public where that embedding circumvents protection measures against framing adopted or imposed by the copyright holder.

#### Findings of the Court

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<sup>1</sup> The technique of framing consists in dividing a website page into several frames and posting within one of them, by means of a clickable link or an embedded internet link (*inline linking*), an element coming from another site in order to hide from the users of that site the original environment to which that element belongs.

<sup>2</sup> Under German law, collecting societies are obliged to grant to any person who so requests, on reasonable terms, a licence to use the rights whose management is entrusted to them. However, according to German case-law, collecting societies could, exceptionally, depart from that obligation and refuse to grant a licence for the use of the rights whose management was entrusted to them, provided that that refusal was not an abuse of monopoly power and that the licence application was objectionable by reference to overriding legitimate interests.

<sup>3</sup> Under Article 3(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 (OJ 2001 L 167, p. 10), Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

First, the Court states that the alteration in the size of the works in framing is not a factor in the assessment of whether there is an act of communication to the public, so long as the original elements of those works are perceptible.

Next, the Court states that the technique of framing constitutes an act of communication to a public, since the effect of that technique is to make the posted element available to all the potential users of a website. Further, the Court states that, provided that the technical means used by the technique of framing are the same as those previously used to communicate the protected work to the public on the original website, namely the Internet, that communication does not satisfy the condition of being made to a new public and that communication accordingly does not fall within the scope of a communication 'to the public', within the meaning of Directive 2001/29.

However, the Court adds that that consideration is applicable only in a situation where access to the works concerned on the original website is not subject to any restrictive measure. In that situation, the right holder has authorised from the outset the communication of his or her works to all internet users.

Conversely, the Court states that, where the right holder has established or imposed from the outset restrictive measures linked to the publication of his or her works, he or she has not agreed to third parties being able to communicate his or her works freely to the public. On the contrary, his or her intention was to restrict the public having access to his or her works solely to the users of a particular website.

Consequently, the Court holds that, where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of the technique of framing, constitutes an act of 'making available that work to a new public'. That communication to the public must, therefore, be authorised by the right holders concerned.

The opposite approach would amount to creating a rule on exhaustion of the right of communication. Such a rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work. Accordingly, the consequence of such an approach would be that the need to safeguard a fair balance in the digital environment, between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, and, on the other, the protection of the interests and fundamental rights of users of protected subject matter, would be disregarded.

Last, the Court makes clear that a copyright holder may not limit his or her consent to framing by means other than effective technological measures. In the absence of such measures, it might prove difficult to ascertain whether that right holder intended to oppose the framing of his or her works.

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**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 judgment is published on the CURIA website on the day of delivery.

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