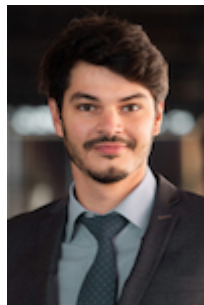


Hyperlinking and copyright law: effective technological measures are the key



Mr. Peter Blomme

Associate

peter.blomme@altius.com

The Court of Justice of the European Union has given a welcome answer to the question of under what circumstances embedding, by means of the technique of framing, should be regarded as a communication to the public that requires the copyright holder's prior authorisation. In doing so, it has decided not to follow Advocate General Szpunar's proposed approach (discussed here). The Court of Justice has clarified that the deciding factor is whether the right holder has established or imposed effective technological measures to prevent access to the right holder's work via third party websites or by means of framing.

Factual background

Without repeating our prior blog post too much, it is interesting to briefly recall the factual background to this case.

VG Bild-Kunst, a copyright collecting society for the visual arts in Germany, licenses the use of its catalogue of works in the form of thumbnails to SPK, which operates a digital library devoted to culture and knowledge. In the context of negotiations, VG Bild-Kunst required that SPK would implement effective technological measures against third parties framing thumbnails of the protected works in the digital library. SPK considered such a requirement as contrary to copyright law and initiated legal proceedings in Germany, which ended up before the Bundesgerichtshof (Supreme Court).

The Bundesgerichtshof referred the following question to the Court of Justice of the European Union (the "CJEU") (which the author has slightly reformulated):

Is there a communication to the public when one embeds, by means of the technique of framing, in a third party website, a copyrighted work – which is made freely accessible to the public with authorisation of the copyright holder on another website – if this circumvents protection measures against framing adopted or imposed by the right holder?

Advocate General Szpunar’s Opinion

In our previous post, we already discussed the conditions that must be fulfilled for an act to constitute a ‘communication to the public’ under copyright law. We also set out the lessons learned from the CJEU’s prior case law regarding hyperlinks, such as Svensson (13 February 2014, C-466/12, EU:C:2014:76), BestWater (21 October 2014, C-348/13, EU:C:2014:2315) and GS Media (8 September 2016, C-160/15, EU:C:2016:644). We will not repeat those points here. In brief, it can be said that there is an act of communication to the public when a link communicates a copyrighted work to a new public, being a public not taken into account when the right holder authorised the initial publication of his or her work.

In his Opinion (Opinion of 10 September 2020, in case C-392/19, EU:C:2020:696), Advocate General Szpunar (the “AG”) proposed assessing the question of whether or not a certain hyperlink constitutes a communication to the public on the basis of the technical nature of this hyperlink.

According to the AG, automatic links to copyrighted works (i.e. links that automatically display the works on the website linking to them, without any further action having to be taken by the web user visiting this website) would require the right holder’s consent, as the public targeted by this link (the public of the second website) is different from the public targeted by the initial communication by the copyright holder (being, according to the AG, and contrary to the CJEU’s prior case law, the public of the first website). This means that the link targets a new public. In the case of automatic links, according to the AG, technical measures taken to prevent automatic linking may not be circumvented.

Clickable links while using framing would not require the right holder’s consent, if the linked works have been made freely available to the public on the linked website with the copyright holder’s consent, even if technological protection measures against the use of framing have been circumvented. In such a case, according to the AG there is no new public as the public of the linking website also visits the initial website.

The CJEU’s analysis

The CJEU has decided not to follow the AG's approach, which focused on the nature of the link. Instead, the CJEU has put the emphasis on the question of whether or not the right holder has established or imposed restrictive measures when making the initial communication to the public (Judgment of 9 March 2021, C-392/19, EU:C:2021:181).

According to the CJEU, where the right holder communicates its work to the public without making use of technological measures that restrict access to that work from other websites, the right holder must be deemed to have authorised the communication of that work to all internet users. In that case, a later framing of the work would not reach a new public, and thus would not require the authorisation by the right holder.

If, on the other hand, the right holder does establish or impose (upon its licensee) restrictive measures that limit access to the works that the right holder has made freely accessible on certain websites with the right holder's authorisation, and the link allows circumvention of these restrictions, then the link does reach a new public. Such communication to the public would require the right holder's authorisation.

The CJEU has stated that if the embedding, by means of framing, would not be considered to be a communication to the public, even though the right holder has adopted or imposed technical measures to prevent framing, an exhaustion rule regarding the right to the communication to the public would be created, which would be contrary to Article 3(3) of Directive 2001/29.

It is important to note that the only means for the right holder to limit the public from the holder's work's initial communication on the internet is by means of effective technological measures within the meaning of Article 6(1) and (3) of Directive 2001/29. Without such technical measures, it would be too difficult for users, especially individual users, to know whether or not the right holder is opposed to framing.

Conclusion

The CJEU's proposed approach seems to be rather technology neutral, and clear and understandable for all parties involved.

In any case, more than ever, it will be advisable for right holders to communicate their works online only while establishing or imposing effective technological measures restricting access to their works via third party websites (unless if they would wish to communicate their works to all internet users without distinction, including those accessing their works via links). Other restrictive measures, such as prohibitions on framing provided for in the right holder's legal terms and conditions, will not be sufficient.