

The CJEU's take on unauthorized framing of online content: (only) if technologically precluded, then prohibited

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Court of Justice of the European Union, 9 March 2021, Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (VG Bild-Kunst)*

Following several decisions on the interpretation of the right of communication to the public in the digital environment, the CJEU clarified that embedding a protected work in a website constitutes a copyright violation if it circumvents effective technological protection measures. The systematic and practical significance of the judgement in Case C-392/19, *VG Bild-Kunst* promises to bring legal certainty into the realm of online uses of creative content and its constant and future evolution.

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Keywords

copyright - Court of Justice - communication to the public – linking - framing

1. Introduction

In a recent popular interview, the Duchess of Sussex expressed her idea of privacy by giving an example: exhibiting a picture of someone's own child at the workplace or on social media – she argued – does not authorize co-workers or anyone else to access the whole photo gallery of family pictures.¹ Murmurs of appreciation have spread among privacy lawyers, who are ever busier showcasing the boundaries set by the fundamental protection of personal data, private and family life in the online environment. One may presume that copyright scholars were not equally satisfied with the example. The evolution of the discipline over the past two decades has mostly revolved around online uses of protected materials, thus emphasizing the question: what can Internet users do with the pictures that are made available to them?

¹ For a partial transcript of the interview, see C. Fernandez, *Meghan Markle says her family has a 'basic right to privacy'*, in *Insider*, 9 March 2021.

In broad brush, the dispute at stake in Case C-392/19 *VG Bild-Kunst*² places itself within the contours of this fundamental query. The decision issued by the Court of Justice of the European Union (CJEU) represents a milestone in the interpretation of EU copyright rules, which puts some order into the fluid and often problematic notion of communication to the public in the online environment.

2. Facts

The controversy arose between a cultural heritage institution and a collecting society, both based and operating in Germany. The dispute concerns the use of digitized pictures of artworks in the form of thumbnails. The Stiftung Preußischer Kulturbesitz (SPK) is a cultural heritage foundation, which runs the German Digital Library (DDB), a nation-wide project connecting cultural institutions to display and promote their digital collections on a single website. More precisely, the DDB shows thumbnail pictures of the artworks (reaching a maximum size of 800x600 pixels) and direct links to the original websites where the works were first made available online by the respective cultural institutions. VG Bild-Kunst is a collecting society managing copyrights over works of visual art, among which numerous works included in the DDB digital offer.

SPK sought permission from VG Bild-Kunst to use thumbnail pictures of the works included in its managed repertoire on the DDB website. VG Bild-Kunst showed willingness to conclude a license agreement, however under the condition that SPK implemented effective technological protection measures (TPMs) to prevent the framing of the thumbnail pictures by third parties on other websites. The *framing* (or inline linking) technique consists of embedding a work, which is accessible on one website, in another webpage. As a result, Internet users can access it independently from the original site where the content was first made available. This feature marks a fundamental difference between framing and *hyperlinking*, as the latter merely provides clickable links, which redirect the user to the original source of the published content.³ SPK holds that the deployment of TPMs on the DDB website would not only entail considerable costs, but also potentially be in contrast with the intention of many artists in favor of having their works displayed and framed over the web.⁴ In this light, SPK challenged the reasonable nature of the contractual clause advanced by VG Bild-Kunst and sought judicial enforcement of its obligation to grant the license without imposing the implementation of TPMs.

² Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (VG Bild-Kunst)* (2021).

³ A distinction that seemingly inspired Advocate General (AG) Szpunar, who in his Opinion theorized a different legal approach towards “clickable links” and “automatic non-clickable links”. See *VG Bild-Kunst*, AG Opinion, § 98.

⁴ See DDB, *Test Case German Digital Library vs VG Bild Kunst Press Release*, 10 March 2021.

3. Legal context

The dispute pivots on three mandatory provisions of EU copyright law: Art. 3 InfoSoc Directive, which harmonizes the exclusive right of communication to the public; Art. 6(1) InfoSoc Directive, which enjoins Member States to introduce provisions against the circumvention of effective TPMs implemented by right holders to prevent or restrict access or use of works; and Art. 16 CRM Directive, which introduces the obligation for collecting societies and end-users to conduct licensing negotiations in good faith, based on objective and non-discriminatory criteria.⁵

The claim advanced by SPK was dismissed before the Court of first instance, and then upheld by the Court of Appeal. VG Bild-Kunst brought an appeal before the German Federal Supreme Court, which referred the case to the CJEU arguing that, according to relevant national case law, collecting societies can exceptionally refuse to grant a license if there is an objectively legitimate reason to do so. If the licensed use would enable the perpetuation of a copyright violation by third parties, this would represent a legitimate reason not to proceed with the authorization.

The leading question of the case thus becomes whether the framing of a picture, which is available online and on which the right holder has implemented effective TPMs, in a third-party website constitutes an act of communication to the public ex Art. 3 InfoSoc Directive. Even though reckoning with the fact that an answer in the negative would lead to a de facto exhaustion of the right of communication to the public, and thus should be avoided, the German Supreme Court decided to refer the question to the CJEU considering its existing case law on linking practices and their role in the protection of freedom of expression and information online.⁶

4. Analysis

As highlighted by Synodinou and Rosati,⁷ the CJEU has been particularly creative in recollecting prior decisions on the right of communication to the public online. Its consolidated interpretation foresees that the copyright owner's authorization is required for acts that (i) amount to a communication by the user, and (ii) are addressed to a "new" public, that is a fairly large number of people who had not been addressed by the first publication of the work by the right holder.⁸ Whereas the Court consist-

⁵ These provisions find transposition into the German copyright legal system in Section 19a German Copyright Act, protecting the exclusive right of making available to the public, and Section 34(1) Act on the Management of Copyright and Related Rights by Collecting Societies, which sets an obligation to collecting societies to grant a reasonable license to any user requesting to use a work.

⁶ See also *VG Kunst-Bild*, AG Opinion, § 54, where AG Szpunar highlighted how the linking to unauthorized content needs to be permitted to preserve the smooth functioning of the Internet and safeguard users' fundamental rights.

⁷ T. Synodinou, *Framing' the right of communication to the public: the CJEU's decision on the VG Kunst case*, in *Kluwer Copyright Blog*, 15 March 2021; E. Rosati, *CJEU rules that linking can be restricted by contract, though only by using effective technological measures*, in *The IPKat*, 9 March 2021.

⁸ See e.g., Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* (2014) (*Svensson*), § 24; Case

ently holds linking practices to amount to acts of communication,⁹ the interpretation of the notion of new public remains more controversial.

The existing case law outlines a spectrum of digital uses of content available online, which the CJEU already reviewed to assert whether the user addresses a different or, rather, the same audience that the right holder wanted to reach in the first place. The spectrum ranges from the act of *posting* a work on another website, which is deemed by the Court a fully-fledged communication to a new public,¹⁰ to the practice of *hyperlinking*, which instead fails to reach a different audience and hence does not require authorization.¹¹ In *VG Bild-Kunst*, the CJEU's reasoning tackles the practice of *framing*, which represents a middle ground between the two digital uses mentioned above.

The Court argues that the framing in one's own website of someone else's work that is already and lawfully available online is an act of communication, but not to a new public.¹² However, this applies only if the work was made available by the right holder without implementing TPMs, thus addressing from the outset all Internet users.¹³ Conversely, the deployment of TPMs by the copyright owner signals his/her manifest intent to restrict access to the work to a certain public.¹⁴ Framing the work in another website by circumventing such restrictions would make it available to a broader Internet audience, thus requires specific authorization.¹⁵

Even though without particular emphasis on the notion of fair balance of rights and interests, the decision highlights the need to protect both right holders and Internet users. On the one hand, the Court stresses that copyright owners shall be able to decide on each online use of their works and limit access to them by way of contractual restrictions, should they wish so at any point in time.¹⁶ On the other hand, it is

C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch* (2014) (*BestWater*), § 14; Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018) (*Renckhoff*), § 19; *VG Bild-Kunst*, § 32. Specific subjective requirements have been, at times, added in the construing of Art. 3 InfoSoc Directive, such as the for-profit commercial purpose of the user, and his/her awareness of the lawful nature of the content used. See Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others* (2016) (*GS Media*), §§ 35-38.

⁹ See *VG Kunst-Bild*, AG Opinion, § 51. Interestingly, this view was contested by AG Whatelet vis-à-vis hyperlinking in *GS Media*, AG Opinion, § 60 («I consider that hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an 'act of communication' (...) since the intervention of the operator of the website which posts the hyperlink (...) is not indispensable to the making available of the photographs in question to users (...)).»).

¹⁰ *Renckhoff*, cit., § 35.

¹¹ *GS Media*, cit., § 42.

¹² *VG Kunst-Bild*, cit., § 36.

¹³ Ivi, §§ 37-38 with reference to *Svensson*, cit., *BestWater*, cit., and Case C-301/15, *Marc Soulier and Sara Doko v Premier ministre and Ministre de la Culture et de la Communication* (2016) (*Soulier*), all cases regarding uses of works that were freely available online without TPMs implemented.

¹⁴ *VG Kunst-Bild*, cit., §§ 44-45.

¹⁵ Ivi, §§ 39-40.

¹⁶ According to E. Rosati, *CJEU rules that linking can be restricted by contract, though only by using effective technological measures*, cit., this interpretation has been implicitly part of the Court's interpretation since *Svensson*.

important that end-users can clearly ascertain the intentions of the right holder, thus leading the CJEU to assert that the *only* way right holders can prohibit framing is by way of effective TPMs.¹⁷

5. Systematic and practical significance of the decision

By clarifying that the framing of pictures that are protected by TPMs amounts to an act of communication to the public, the CJEU's decision in *VG Bild-Kunst* not only entails a considerable practical impact over online uses of creative content, but also adds systematic consistency to the existing case law. In particular, it touches upon three core aspects of EU copyright law: the high level of protection of right holders, legal certainty, and the notion of new public.

5.1. The protection of right holders online

As it glaringly emerged in the *Renckhoff* decision,¹⁸ the main driver of the Court's reasoning is the will to effectively ensure the right holder's control over the work online. In this vein, the CJEU consolidates the centrality of the exclusive right of communication to the public as a key prerogative to retain control over digital works.¹⁹ The interpretation of such right, which is preventive in nature and inexhaustible,²⁰ shall be broad and align with the pursued objective of protection of right holders.²¹ Interestingly, the CJEU departs from prior judgments in the choice of wording: instead of insisting on the notion of high level of protection of *right holders*, it emphasizes the need to safeguard *authors*, embracing a markedly economic rationale and stressing the need to enable them to get appropriate reward from their works.²² No reference is made to any broader justifications relating, for instance, to the protection of the author's reputation.²³

¹⁷ *VG Kunst-Bild*, cit., § 46.

¹⁸ *Renckhoff*, cit., §§ 30-35.

¹⁹ See also T. Synodinou, 'Framing' the right of communication to the public: the CJEU's decision on the *VG Kunst* case, cit. («by omitting any assessment of the possible cumulative application of the right of reproduction, the CJEU seems to indirectly affirm the all-encompassing character of the right of communication as the dominant legal prerogative of controlling access to digital content»).

²⁰ Art. 3(3) InfoSoc Directive. See also e.g., *VG Bild-Kunst*, cit., § 21, § 28; *VG Bild-Kunst*, AG Opinion, § 57.

²¹ E.g., recitals 4 and 23 InfoSoc Directive; *Renckhoff*, cit., §§ 18, 29; *VG Bild-Kunst*, §§ 26, 50-53.

²² *VG Bild-Kunst*, cit., § 27 («the principal objective of that [InfoSoc] directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place»).

²³ See Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (2014) (*Deckmyn*), §§ 30-31. See also S. Dusollier, *Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere* in B.P. Hugenholtz (ed.), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, Alphen aan den Rijn, 2018, 163 ss.

However, the exclusive rights granted by copyright law are not limitless. The Court evokes only once the notion of fair balance to emphasize how the circumvention of TPMs would determine a disequilibrium in favor of end-users.²⁴ What remains unexplored are the boundaries of copyright protection – i.e., its limited duration, subject matter, and scope – and the potential abuses or misuses of rights by copyright owners. *VG Bild-Kunst* seems to encourage those who want to retain control over their works online to deploy TPMs. Yet, questions related to the risk of capture effect by such measures that may prevent the framing of works belonging to the public domain and fail to effectively protect copyright exceptions and limitations remain unaddressed.²⁵

5.2. Legal certainty and TPMs

The prohibition of circumventing TPMs represents the gist of the decision. TPMs represent, on the one side, the right holder's manifest expression to retain control over any communication to the public, and, on the other side, the possibility to showcase his/her authorization to frame the work in other websites. In fact, in light of the *VG Bild-Kunst* decision, the absence of TPMs corresponds to either a presumption of the right holder's consent to authorize the framing of the work or, at least, a lawful basis for third parties to do so.²⁶

This prompts the question: why TPMs? The factual background of the case leads the CJEU to assess that private contractual clauses, mostly hidden from Internet users, could not be effective in restricting access and use of a work online. According to the Court, *only* TPMs can guarantee legal certainty in the digital environment and the smooth functioning of the Internet. This has three main implications.

First, the implementation of effective TPMs as a technical pre-condition to copyright protection could be considered to amount to a formality, thus being incompatible with Art. 5(2) Berne Convention.²⁷ Second, the CJEU seems to suggest that any implicit or tacit intention by the copyright holder to prohibit framing is to be deemed insufficient. However, drawing the conclusion that only TPMs can effectively showcase the right holder's intent, the CJEU overlooks other forms of explicit contractual restrictions, such as written indications by the right holder clearly displayed on the work (e.g., “all rights reserved”, “confidential do not use or disseminate without author's

²⁴ *VG Bild-Kunst*, cit., § 54.

²⁵ On the point see also P. Mézei-B.J. Jütte, *CJEU clarifies that framing infringes copyright if TPMs are circumvented*, forthcoming in *JIPLP* («It will be especially interesting to see how potential preventive framing-blockers will interact with copyright exceptions, which Article 6(4) InfoSoc Directive already anticipates»); E. Rosati, *CJEU rules that linking can be restricted by contract, though only by using effective technological measures*, cit. («Article 4 of the DSM Directive allows rightholders to reserve the doing of text and data mining activities in relation to their content. The *VG Bild-Kunst* judgment may serve to clarify further, beyond the language of that directive, how such reservation is to be done»).

²⁶ See T. Synodinou, *'Framing' the right of communication to the public: the CJEU's decision on the VG Kunst case*, cit. («It is noteworthy that this approach appears to implicitly confirm a trend towards the recognition of the absence of technological restrictions on access to online content as a basis for lawful access»).

²⁷ See also E. Rosati, *CJEU rules that linking can be restricted by contract, though only by using effective technological measures*, cit.

consent”) or explicit references to licensing terms (e.g., Creative Commons licenses). Third and last, not to underestimate is the strong reliance on a purely technological element (the TPMs), which is de facto considered a normative component in the digital copyright scenario, namely a feature that regulates Internet users’ behaviors. This approach has to do with a peculiar understanding of EU copyright rules that is on the rise in the recent CJEU case law, which accounts for legal as well as technological rules governing the Internet, giving shape to a composite idea of legality.²⁸

5.3. The partitioning of the Internet public

The *VG Bild-Kunst* decision has the great virtue of settling the controversial interpretation of the notion of “new public” vis-à-vis acts of communication online. Avoiding excessive technicisms, the CJEU rejects the differentiation suggested by AG Szpunar between clickable and unclickable links,²⁹ preferring an all-encompassing approach for all linking practices.

The Court clarifies that, as long as a work is lawfully and freely available online, the presumption is that the right holder meant to reach all Internet users.³⁰ However, the presence of a “new” public – and hence the need to seek specific authorization – emerges along with one of the following conditions: (i) the lack of authorization to first publication,³¹ (ii) the implementation of TPMs,³² or (iii) the “disconnection” between the page where the work is originally hosted (e.g., via posting).³³

Despite the attempt to give a comprehensive and consistent interpretation of Art. 3 InfoSoc Directive, on a practical note the take of the Court results quite neatly differentiated between hyperlinking, framing, and posting practices. Worth noting is the fact that in the eyes of the CJEU the framing of works circumventing TPMs more closely resembles posting,³⁴ while, if TPMs are absent, it seems to correspond to an act of hyperlinking.³⁵ This confirms that the right holder’s power to effectively retain control

²⁸ See G. Priora, *Dall’armonizzazione all’interlegalità: la tutela dell’utente finale nella disciplina europea del diritto d’autore*, in E. Chiti-A. Di Martino-G. Palombella (eds.), *L’età dell’interlegalità*, forthcoming.

²⁹ *VG Bild-Kunst*, AG Opinion, § 98.

³⁰ By doing so, it appeases diverging interpretations based on the view that the online publication of a work addresses only in theory all Internet users, but in practice – due to the vastness of the Internet – reaches a specific segment of audience. See e.g., *VG Bild-Kunst*, AG Opinion, §§ 56, 84.

³¹ *GS Media*, cit., § 41.

³² *VG Bild-Kunst*, cit., § 43.

³³ *Renckhoff*, cit., § 30.

³⁴ *VG Bild-Kunst*, cit., § 47 drawing an analogy with *Renckhoff*, cit. § 35 («In such circumstances (...) the public which was taken into consideration by the copyright holder when he or she authorised the communication of his or her work on the website on which that work was initially published consists solely of the users of that site, and not the users of the website on which the work has been subsequently framed without the authorisation of the copyright holder, nor other internet users»).

³⁵ Fully rolling out its reasoning, one could have expected the Court to draw an analogy also with *GS Media*, asserting that the public addressed by the right holder who did not implement TPMs and the user framing his/her work was the same audience. See *GS Media*, cit., § 42 («as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered

over the work is the most decisive element in the reasoning.

5. Conclusion

The CJEU's interpretation in *VG Bild-Kunst* shows several points of strengths and a valuable potential in providing consistency in the Court's interpretation of the right of communication to the public online. Protecting TPMs and the right holder's intention when sharing a work is not only a sound exegesis of EU copyright law, but also a conscious outcome in today's everyday life. Suffice to think of the materials we make available on a daily basis to work colleagues, students, and friends, using TPMs to allocate different privileges of access and use. However, among the aspects that remain unaddressed, the most impelling question seems to be the effective protection of copyright exceptions and limitations in view of a growing TPM-based model of digital cultural consumption.

The case is now pending before the German Federal Supreme Court, who will decide in the merits. Bound by the CJEU's interpretation, one may expect the national Court to embrace a broad understanding of Art. 3 InfoSoc Directive and deem the request for the implementation of TPMs by *VG Bild-Kunst* to be legitimate. However, it cannot be excluded that the German judges will take the opportunity to give additional insights on aspects that were left uncovered, such as the potential clashes of intention to implement TPMs between individual authors and the collecting society,³⁶ the relevance of the notion of fair balance of rights in the teleological balancing exercise between copyright protection and access to culture, the qualification of the publication of thumbnail pictures as an act of communication to the public,³⁷ or even the opportunity to seek a license agreement between SPK and *VG Bild-Kunst* if the pictures DDB wishes to display were made available in the first place with the consent of the right holders and without effective TPMs.

that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public»).

³⁶ See the claimant's remarks on its press release, stating that «DDB and its digital offer are expressly welcomed by a large number of authors. A distinction will therefore have to be drawn between the individual rights holder who wants his works to be made available to the public “with reservations” on the one hand, and a CMO that demands the blanket implementation of technical measures for all the authors and artists it represents on the other hand. For, according to DDB's perception, the opinion among authors is not so unanimous»: DDB, *Test Case German Digital Library vs VG Bild Kunst Press Release*, cit.

³⁷ Even though none of the parties seems to have included this legal question in the proceedings. On the point, the CJEU asserts that the alteration of size or quality should not affect the assessment as long as the work is perceptible (*VG Bild-Kunst*, cit., § 25); however, German copyright law explicitly relies on the small-scale size of works to carve out room for copyright exceptions and limitations. See Section 60a(2) German Copyright Act.