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THE CJEU ADVOCATE GENERAL'S OPINION IN CASE-392/19 – A STEP INTO SUPPLEMENTING EUROPEAN JURISPRUDENCE ON WEB LINKING

1. Introduction

On September 10, 2020, Advocate General Maciej Szpunar delivered his Opinion in Case C-392/19 VG Bild-Kunst v Stiftung Preußischer Kulturbesitzrequest.

The case concerns a conflict between Verwertungsgesellschaft Bild-Kunst ('**VG Bild-Kunst**'), a copyright collecting society for the visual arts in Germany and Stiftung Preußischer Kulturbesitz ('**SPK**'), a foundation registered under German law.

In order for SPK to use VG Bild-Kunst's catalogue of works in the form of thumbnails in its digital library, Deutsche Digitale Bibliothek ("**DDB**"), VG Bild-Kunst imposed in the license agreement the obligation for SPK to use technical measures in order to prevent third parties from framing the thumbnails of the protected works or subject matter displayed on the DDB website. SPK deemed these conditions to be burdensome, and a legal dispute was brought before the German courts.

The Bundesgerichtshof (Federal Court of Justice, Germany) decided, on May 21, 2019 to refer the question to the Court of Justice of the European Union ("**CJEU**") for a preliminary ruling of whether the embedding of a work — which is available on a freely accessible website with the consent of the rightholder — in the website of a third party by way of framing constitutes communication to the public of that work within the meaning of Article 3 paragraph (1) of Directive 2001/29/EC where it occurs through circumvention of protection measures against framing taken or instigated by the rightholder.

2. The technical background

Advocate General Szpunar begins his opinion with an analogy between the heroes of George Lucas' Star Wars that were able to travel through "hyperspace" faster than the speed of light using a "hyperdrive" and the internet users, that, in a similar manner, can travel" through "cyberspace" using hyperlinks. He also stresses out that although those

links do not defy the laws of physics, as did the hyperdrives of the spacecraft in Star Wars, they nonetheless present a number of challenges from the point of view of the law, in particular copyright law.

He then continues his opinion by explaining the state of the art in website framing. He describes in detail the notion of "inline framing", that is the latest development in displaying the contents of a website on a different website. Unlike links, which uses URLs (i.e. "uniform resource locators", which function as a kind of "web address") of a third-party website which when activated (clicked-on) display the relevant resources on the respective third-party's website, embedding allows a resource from an external website (image, text, video etc.) to be displayed on the web page in question in a frame freely chosen by the author of such web page.

From a user perspective, the main difference between clickable links using the framing technique, including inline frames and embedding is that, while in the former case the user knows that he or she is being redirected to a different website, in the latter, the user may have the impression that he or she is accessing only one website.

3. Legal analysis of the proposed question

3.1. Legal basis

According to Article 3 paragraphs (1) and (3) of Directive 2001/29 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 ("**Directive 2001/29**") provides that authors have the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including making their works available to the public in such a way that members of the public may access such works from a place and at a time individually chosen by them. The right is not exhausted by any act of communication to the public or of making it available to the public.

In other word, each and every time there is a new (form) of communication to the public of his or her work, the author must give his or her consent for the same.

3.2. Status of the jurisprudence

In a judgement dated February 13, 2014, in the Case C-466/12 *Svensson and Others*, the CJEU found that hyperlinking to a work found on a freely-accessible website is a communication to the same public as the one intended by the author of the hyperlinked page, namely all the users of the Internet. Therefore, the CJEU concluded that posting a hyperlink to the respective website does not require the authorisation of the holder of the copyright in that work.

In subsequent jurisprudence, the CJEU brought some nuances to its previous ruling, by stating that the work would have to be made available on the Internet with the consent of the copyright holder[1].

At the same time, the CJEU[2] ruled that downloading a protected work from a website on which it had been made available to the public with the authorisation of the copyright holder and posting the same on another website infringes the rights of that rightholder[3].

3.3. The Advocate General's analysis

Advocate General Szpunar proposes that the CJEU remains constant in its assessment that simple links (clickable links) to the home page or to the pages of the website that contain protected work remains outside the scope of the rights granted to rightholders.

In his view, "*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, including inline frames, must be regarded as forming part of the public which was taken into account by that rightholder when those works were initially made available*".

However, the Advocate General deems that the situation is different in the case of embedding where the "*works protected by copyright contained on other websites are embedded in a webpage in such a way that those works are automatically displayed on that webpage as soon as it is opened, without any further action on the part of the user (inline links)*". These inline links are referred to as "automatic links" in the Opinion.

In the Advocate General's view, the main difference consists in the fact that from a user perspective, there is no difference between an image embedded in a webpage from the same server and one embedded from another website[4].

The Advocate General states that in the case of an automatic link, the public which enjoys the work can under no circumstances be regarded as constituting the public of the original site of that work. Indeed, for the public, there is no longer any link with the original site: everything takes place on the site containing the link. It is therefore the public of the latter site which benefits from the work[5].

The Advocate General further argues that, while the copyright holder is theoretically in control of removing the original work, which would invalidate the links embedded through automated links, this is an extreme position, in which the copyright holder would be forced to choose between tolerating the infringement or not using his or her own work, which runs counter to the idea of copyright.

[1] Case C-160/15, EU:C:2016:644, GS Media, Judgment of September 8, 2016, paragraph 43.
[2] Case C-161/17, EU:C:2018:634, Judgment of August 7, 2018, *Renckhoff.*
[3] Opinion of the Advocate General, paragraph 72.
[4] Opinion of the Advocate General, paragraph 93.
[5] Opinion of the Advocate General, paragraph 95.

Moreover, content embedded through automatic links facilitates user access to content pertaining to many websites from a single source or a small number of sources, controlled by a number of companies, which runs counter to the purpose of dissemination of information, noticed by the CJEU in previous jurisprudence.

With respect to circumvention of technological protection measures, the Advocate General deems that measures of protection against accessing works posted on a website through clickable links are outside the scope of protection of the Directive 2001/29, since the author of such works has given his or her consent for accessing by the public when the work was first published.

By contrast, the Advocate General is of the opinion that automatic links should require the copyright holder's authorization. Therefore, technological measures to prevent circumvention of such authorization should fall within the protection of Directive 2001/29.

4. Conclusions

At the moment, the automatic links are very pervasive in the Internet landscape. Such an interpretation will have an important impact on the negotiation process regarding the conclusion of licence agreements, because it gives the copyright holder a new tool of negotiation when licensing his or her content.

However, the Advocate General's Opinion is not binding on the CJEU.

In this sense, it will be interesting to see whether the CJEU will follow the reasoning of the Advocate General or if will stay faithful to the principles already established in its previous jurisprudence.

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