

# The fight for frames (round 2) - BGH referral VG Bild-Kunst

Kluwer Copyright Blog  
August 7, 2019

Prof. Dr. Benjamin Raue (University Trier)

Please refer to this post as: Prof. Dr. Benjamin Raue, 'The fight for frames (round 2) - BGH referral VG Bild-Kunst', Kluwer Copyright Blog, August 7, 2019, <http://copyrightblog.kluweriplaw.com/2019/08/07/the-fight-for-frames-round-2-bgh-referral-vg-bild-kunst/>

## Introduction and background



Most internet pages are put together from different elements and can include text, pictures or videos which are originally displayed on websites and stored on servers of third parties. Visitors to the internet page usually cannot distinguish between content that is stored on servers controlled by the webpage owner and that stored on third-party servers. In the context of copyright law, this referencing technique of embedding third-party content on a website is called "framing".

The ECJ and the German federal court (BGH) have taken different approaches to the embedding of copyrighted material using framing technology. In an earlier referral, the BGH distinguished between linking and framing. The court held the opinion that framing of copyrighted material is a communication to the public (article 3 paragraph 1 InfoSoc Directive), whereas a simple link is not copyright relevant. The German court was of the view that a simple link to a third-party website directs the user traffic (and hence the economic potential) from its own website to the third-party website. In contrast, the use of framing technology enables the website operator to draw direct profit from the copyrighted material because the embedding saves him making the content available to the public on his own server.

The ECJ, however, did not follow the BGH and decided to treat linking and framing alike. If the copyrighted material is freely available online with the approval of the right holder any website operator may reference that content on its own website no matter which technology they use. Still, the reference may not circumvent restrictions put in place by the website operator who has published the referenced material (ECJ Svensson paragraph 31).

The German collective management organisation VG Bild-Kunst grants licences for creative visual works. VG Bild-Kunst insists on a contractual clause that requires the licensees to apply effective technical measures against framing when posting licensed content online. The Deutsche Digitale Bibliothek (German Digital Library, short: DDB) wants to use the licensed pictures as thumbnails with a resolution of 800x600 pixels without the demanded technical restrictions. Collective management organisations are required to conduct negotiations for the licensing of rights in good faith and their licensing terms shall be based on objective and non-discriminatory criteria (sec. 34 Act on the Management of Copyright and Related Rights by Collecting Societies; Art. 16 directive 2014/26/EU). Under German law, collective management organisations are obliged to grant a licence unless legitimate interests of the right holder prevail. DDB has filed for a declaratory judgment that VG Bild-Kunst is therefore obliged to license the rights without the obligation to use technical protection measures. The library has been successful at the Higher Regional Court of Berlin. The BGH wants to reverse the judgments but is unsure whether union law dictates otherwise.

## The referral

According to the BGH, the obligation to use technical measures to prevent third-party framing imposed by VG Bild-Kunst is only justified by the legitimate interest of the copyright holders when the circumvention of those technical measures constitutes an infringement of the right of communication to the public (article 3 InfoSoc Directive).

According to the ECJ in Svensson, for a 'communication to the public' to occur a

*"protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work"* (para 24).

As the displaying of works previously published online on another website does not use different technical means, the crucial question is whether the circumvention of restricting technical means creates a "new public". The ECJ decided in the Svensson case that users must be deemed as a "new public" if the link

*"circumvent[s] restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted"* (para 31).

The question now put forward by the BGH is whether the same applies to technical measures that restrict only the framing of the content on third-party websites but not the access to the works (as the website of the DDB is open to the public).

The BGH's view is that this question should be answered in the affirmative. By using restricting technical measures the right holder would express "in the language of the internet" that his approval of the making available to the public is limited to the public which actually visits the licensed website. As this is expressed by technical measures the reservation is machine-readable and thus clearly comprehensible for all internet users. As those measures have to be circumvented intentionally by other internet users it does not restrict the freedom of expression and of information disproportionately. If copyright law does not recognise this reservation by machine-readable means, any making available of copyright protected content online would de facto lead to an exhaustion of the right. The right holder would therefore be virtually unable to exercise control over his work online and to participate in the economic use of his works.

## Comments

It is likely that the ECJ will follow the BGH's suggested interpretation of article 3 InfoSoc Directive. The ECJ cases Svensson, Best Water and GS Media were aimed at balancing the good functioning and the referencing culture of the internet with the legitimate interests of right holders. If right holders use or approve of the unrestricted use of their works online they (or the licensed website) profit from the referencing of other websites due to increased visibility, attention and therefore traffic. In this case it is appropriate that no referencing in any form infringes their right to communication to the public. On the other hand, if right holders limit the referencing possibility by machine-readable means (which has disadvantages for them as this limits visibility on third-party platforms) they leave that referencing system. As the restriction is clearly comprehensible for other internet users it is no longer justified by the functioning of the internet to restrict the "high level of [copyright] protection" (recital 9 InfoSoc Directive).

That would leave open another highly relevant follow up question which the BGH has failed to ask: Whether the duty of good faith negotiations obliges collective management organisations to offer licences without the requirement of technical protection measures (for which they would, of course, have to charge higher fees as this would impair their ability for further licensing).