“Framing” the right of communication to the public: the CJEU’s decision on the VG Kunst case

Kluwer Copyright Blog
March 15, 2021

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Please refer to this post as: Tatiana Synodinou, ‘“Framing” the right of communication to the public: the CJEU’s decision on the VG Kunst case’, Kluwer Copyright Blog, March 15 2021, http://copyrightblog.kluweriplaw.com/2021/03/15/framing-the-right-of-communication-to-the-public-the-cjeus-decision-on-the-vg-kunst-case/

On March 9th, 2021 the CJEU delivered its eagerly awaited decision on the VG Kunst case (C-392/19).

The facts of the case are interesting, since the question of the lawfulness of frame linking and of inline linking was not directly raised. Instead, it appears indirectly in the context of the assessment of licence terms requiring the licensee to apply technological protection measures against framing. In an insightful Opinion (see our comments here and here), the Advocate General (AG) Maciej Szpunar had, on the basis of an alternative reading of previous CJEU case law concerning the right of communication to the public, proposed different treatment for: (1) clickable links, including links using the framing technique, and (2) inline links which automatically display the resource to which the link leads on the webpage containing that link.

While the CJEU adopted some of the arguments of the AG (such as applying some of the findings of the *Renckhoff* decision on hyperlinking, see para. 52 of *VG Kunst*), the Court has departed from the AG’s Opinion on important points, such as the differential treatment of unconventional links. Methodologically, the CJEU has permitted itself to interpret liberally its findings in previous case law (mainly *Svensson* (C-466/12) and *Bestwater* (C-348/13)) by relying on the interpretative principle of individual assessment (paras 33, 34) in order to conclude that the concept of ‘communication to the public’ must be tailored to the individual case (para. 39).

Furthermore, 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 (para. 30). Such an approach has been implied in previous CJEU case law, such as in *Vcast* (C-265/16) or *Renckhoff* (C-161/17) where the issue of the reproduction of the work has somehow been absorbed by the question of the application of the making available right (see e.g. here and here).

These are the main axes of the line of the reasoning of the CJEU.

Recalling the status quo: the right of communication to the public, an exclusive, preventive, and inexhaustible right

First, the Court notes that *Svensson*’s legal construction – that third parties can provide hyperlinks to copyright protected content that was made lawfully available on the Internet without restrictions – cannot apply in cases, such as the present one. That is to say, cases where there is no place for presuming any implicit consent of the right holder, but, on the contrary, there is an explicit expressed will of the right holder to impede linking by imposing or asking licensees to impose technical access restrictions. In such circumstances, that copyright holder cannot be regarded as having consented to third parties being able freely to communicate his or her works to the public. (para. 41 of the judgment).

This approach is in conformity with the classic stance of the Court to emphasize the broad conceptual scope of the right of communication to the public, but also with the nature of copyright as a property right with a preventive and exclusive character. By affirming this principle, the CJEU also emphasizes that the opposite approach would amount to creating a rule on exhaustion of the right of communication (para. 52).

“The answer to the machine is the machine”: technical ‘fences’, the sole means to prove the author’s intention to restrict access

The absolute discretion of the right holder to impose access restrictions (not only technical but also contractual) is counterbalanced by the need to ensure legal certainty and the smooth functioning of the Internet. For the CJEU, it is of primordial importance to safeguard that Internet users, particularly individual users, are in a position to ascertain with certainty whether the right holder intended to oppose the framing of his or her works. In the opinion of the Court, the only way the copyright holder can limit consent is by means of effective technological measures. This is akin to an opt-out system, since the consent of the right holder is presumed unless he has taken effective technological measures within the meaning of Article 6(1) and (3) of Directive 2001/29.

This is a seminal finding. Even if access or use restrictions for a property asset, including intellectual property, can be a priori imposed in many ways (contract, license, sub-license and material means limiting or denying de facto the access and use), in the chaotic dematerialised Internet ecosystem, where works are accessed, viewed, and used in multiple ways, the only means to make access restrictions visible and enforceable *erga omnes* is to impose de facto restrictions, technological “fences” or “walls”. Legal certainty is the key rationale behind this approach, which restricts the authors’ means as to how to express their will to limit linking to their works. This approach is also justified by the balancing of copyright with other fundamental rights, mainly freedom of expression. As the Court notes in para. 49, “*it cannot be forgotten that hyperlinks, whether they are used in connection with the technique of framing or not, contribute to the smooth operation of the Internet, which is of particular importance to freedom of expression and information*”.

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. In this context, recital 14 of the Directive on copyright and related rights in the Digital Single Market provides that, for the purposes of the application of the text and data mining exception of Article 3 (by research organisations), lawful access should also cover access to content that is freely available online.

A uniform approach for all kinds of hyperlink

Another main finding of the decision is that the right of the copyright holder to control the access to protected content shall apply indiscriminately to all types of link. By treating all links alike the CJEU has departed from the thoughtful Opinion of the AG Spuznar on this point who proposed adoption of a differential treatment of hyperlinks depending on their functionalities and the modalities of interference with the copyright holders’ rights. For the AG, the modalities of providing access could serve as a balancing factor and should result in a differential treatment for clickable and non-clickable links. Clickable links (both simple hyperlinks and framing) should be seen as a different but usual way of accessing content by the same authorised public. On the contrary, automatic, non-clickable links should be considered as a more intrusive intervention by the linker who plays a decisive role in communicating the linked work to a new public which was not taken into account by the copyright holder when the work was initially made available (para. 98 of the Opinion).

The CJEU avoids providing legal categorisations of links and any further scrutiny of the lawfulness of unconventional hyperlinks based on their technical particularities. By treating all kinds of linking techniques alike, the CJEU adopts a straightforward, technologically neutral and one for all approach. The need for simplicity has prevailed. At the same time, the all-encompassing character of this principle could lead to less calibrated results from a fundamental rights perspective.

Even if the AG’s detailed inquiry on the modalities of various linking techniques was deemed to be inherently tied to technical specificities, it opened the door for a more tailored legal assessment on how the modalities of providing access to content interfere with the core of copyright law. However, in a digital ecosystem whose function and dynamics they often barely apprehend, Internet users and jurists would probably prefer simpler solutions.