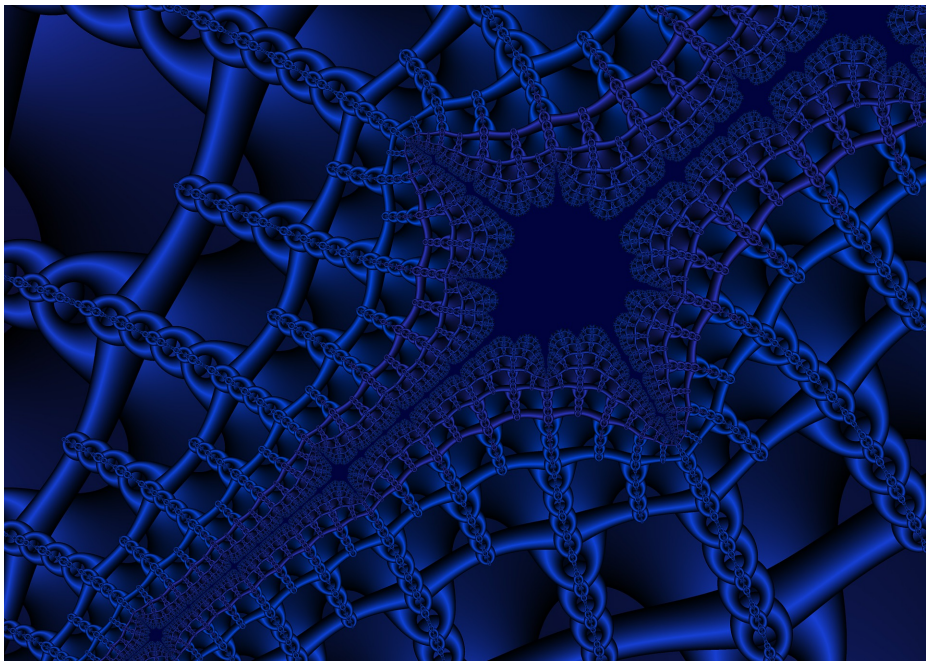
Kluwer Copyright Blog

Copyright law trapped in the web of hyperlinking: the AG's Opinion in the VG Bild-Kunst case (Part I)

Tatiana Synodinou (University of Cyprus) · Thursday, October 22nd, 2020



On September 10, 2020 the Advocate General (AG) Maciej Szpunar delivered his Opinion on the case of VG Bild-Kunst v Stiftung Preußischer Kulturbesitzanother (C?392/19), a further case concerning the legality of linking. The assessment of linking from an EU copyright law perspective appears to be a labyrinthine legal exercise, since, following the seminal Svensson (C?466/12) and GS Media (C-160/15) decisions, several factors have to be taken into account such as the initial lawful communication of the linked work, the application of access restrictions, the actual or constructive knowledge of the linker regarding whether the work has been initially communicated with the author's consent, and the profit making activity of the linker. Despite the CJEU's efforts to provide clarity on the issue, there are still some questions which have remained unanswered, such as whether contractual or licence restrictions should also be taken into account in order to conclude that content is not freely available on the Internet and whether the specificities of each linking technique should also be considered. The AG's Opinion focuses on the latter question.

The facts of the case are interesting, since the question of the lawfulness of frame linking and of inline linking was not directly put, but arose in the context of the assessment of licence terms requiring the licensee to apply technological protection measures against framing. Specifically, DDB, a digital library which displays thumbnails of original images upon a licence agreement for the use of these works with the copyright collecting society for the visual arts in Germany ("VG Bild-Kunst"), sought a declaration of the unreasonableness of a licence term requiring the implementation of effective technological measures against the framing by third parties of the

thumbnails displayed on its site. In this context, the Bundesgerichtshof (Federal Court of Justice, Germany) asked the Court of Justice of the EU (CJEU) whether the embedding of a work – which is available on a website, such as that of the DDB, 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 where it circumvents protection measures against framing taken by the rightholder or imposed by him or her on a licensee. If answered in the affirmative VG Bild-Kunst could legitimately request that the obligation to implement technological measures against framing be included in the licence agreement with DDB.

In an insightful Opinion, AG Szpunar, on the basis of an alternative reading of previous CJEU case law, proposes different treatment for clickable links, including links using the framing technique, and inline links which automatically display the resource to which the link leads on the webpage containing that link. For the AG, while the first do not fall within the ambit of the right of communication to the public, the latter do. In line with this reasoning, the AG further advances that technological protection measures against embedded non-clickable links constitute effective protection measures within the meaning of Article 6 of Directive 2001/29.

By doing so, the AG proposes a theory on copyright liability for linking which is based on three main axes. In the first part of this blogpost (Part I), the foundations of the AG's approach will be analysed. The second part of this blogpost will focus on the application of the AG's reasoning in the specific cases of framing and of automatic links (Part II).

a) Making available, a right of controlling access to digital content

First, the AG confirms the finding of the CJEU in Svensson that the posting of a hyperlink is a relevant *act* from the point of view of copyright, in that it gives direct access to a work (paras. 50 and 83 of the Opinion). In this context, the AG clearly dissociates the concept of communication from the notion of transmission. The AG even goes one step further by distinguishing the theoretical availability of a work from its effective accessibility. As he notes, although a resource may be available on the internet, it is accessible only through its URL address and the most effective way to transmit the URL address of a webpage is to create a hyperlink to that page. In this context, it is that technological capability of giving direct access to a work specified by its URL address (or the address of the webpage containing that work) which justifies the classification of hyperlinks as 'acts of communication' (par. 51 of the Opinion).

The AG's focus on the concept of access has a unique symbolism and significant ramifications. Construing the making available right from an access perspective strengthens the scope of this right, since the availability of the work is dissociated from classic availability patterns, such as transmission, dissemination or publication and enables this right to theoretically cover any way of accessing the work. This approach also has another effect. The focus on the concept of access results in a holistic assessment of the users' acts regardless of the mainstream copyright law classifications. In this context, access is a technologically neutral and all-encompassing notion which might combine both acts of reproduction and of communication of the work. 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 dominant question of the application of the making available right (see e.g. here and here).

b) Understanding Svensson through Renckhoff: the emergence of "special Internet publics"

Another seminal idea in the AG's line of reasoning is the recognition of the Internet as a conglomeration of numerous public spheres, alias as a synthesis of several distinct audiences. As the AG concludes, from a copyright law perspective these "publics" are defined by the rightholder's will (the consent for the making available of the work on a specific webpage) and the choice regarding the accessibility of the work (free or with restrictions). For the AG this is the only reasonable understanding of the Svensson decision after the Renckhoff judgment. Specifically, the AG concludes that the legal fiction that all internet users are targeted whenever a protected work is made freely available to the public on the internet is no longer tenable. It is, therefore, necessary to conclude as a general copyright principle, which also applies in the case of hyperlinks, that the public which was taken into account by the copyright holder when making a work available on a website is composed of the public which visits that site (par. 73 of the Opinion). This does not however result in a reversal of Svenson's main findings regarding hyperlinks. Since that website may, and in most cases will, be accessed by means of a hyperlink, a copyright holder, in giving consent for his or her work to be made freely available to the public on a webpage, is presumed to have taken into account the entire public likely to access that webpage, including by means of hyperlinks. In this context, the AG distinguishes the access of a work via conventional hyperlinking as an *a priori* special, anodyne way of accessing the work. Under this approach, the right of controlling access to content is construed by taking into consideration the reality of the Internet's architecture, usages and practices, which recognise hyperlinking as a building block of the Web.

As will be shown in the second part of this blogpost (Part II), the conception of the making available right as an access right necessitates a delimitation of this powerful concept. In this context, the modalities of access play a decisive role on the basis of a functional and technological approach which has led the AG to propose the lawfulness of framing and to affirm that automatic links are subject to the rightholder's control.

This entry was posted on Thursday, October 22nd, 2020 at 10:24 am and is filed under AG Opinion, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, Communication (right of), European Union, Liability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.