

THE CJEU RULES ON THE EMBEDDING OF THIRD PARTY WORKS IN A WEBSITE BY MEANS OF THE TECHNIQUE OF FRAMING

The Court of Justice of the European Union (“CJEU”), following the case law initiated in the *Svensson*¹ case, has ruled in its judgment in Case C-392/19 that embedding, by means of the technique of *framing*², in a webpage of copyright-protected works that are freely available to the public with the authorisation of the copyright holder on other websites constitutes a communication to the public. In particular, the CJEU has stated that for such embedding to constitute a communication to the public, the measures adopted or imposed by that copyright holder to provide protection from framing must have been circumvented.

This judgment is the result of a reference for a preliminary ruling from the *Bundesgerichtshof* (Federal Court of Justice, Germany) in proceedings brought by the German foundation *Stiftung Preußischer Kulturbesitz* (“SPK”) against the copyright collecting society for the visual arts VG Bild-Kunst (“VG”). SPK managed a digital library devoted to promoting culture through a “digital showcase”, storing thumbnail versions of images. VG made SPK’s access to its catalogue of works conditional on SPK’s commitment to implement effective technological measures against framing. In this context, SPK, considering this contractual provision to be unreasonable, brought the action which is the subject of these proceedings.

To reach this conclusion, the CJEU analysed the concept of “communication to the public” within the meaning of Article 3(1) of Directive 2001/29/EC 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**”), recalling that this concept brings together two cumulative criteria: an act of communication of a work and the communication of that work to a public.

In addition, the CJEU recalled that the concept of “communication to the public” requires an individual assessment and that, in order to constitute an act of exploitation of this type, a protected work must also be communicated:

- (i) By any act through which the user gives access to these works to third parties, in full **knowledge of the consequences** of this behaviour;
- (ii) To an **indeterminate number of potential recipients**, involving a fairly large number of people;
- (iii) Using **specific technical means**, which are different from those used previously.
- (iv) In the absence of such a technique, to a **new public** (i.e. to a public that has not been taken into consideration by the copyright holders when they authorised the initial communication).

¹ Judgment of 13 February 2014, *Svensson* and others, C-466/12, EU:C:2014:76.

² This technique consists of dividing a web page into several parts and displaying in one of them an element from another page in order to conceal the origin of that element from users.

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In this respect, the CJEU confirmed what had already been stated by the Advocate General in paragraphs 100 and 101 of his Opinion, which indicated that the copyright holder cannot be faced with the choice of tolerating the unauthorised use of his work by others or abandoning their own use of the work. In this regard, the CJEU added that any interpretation to the contrary would be in conflict with the exclusive and inexhaustible right that Article 3 of Directive 2001/29 recognises for authors to authorise or prohibit any communication to the public of their works.

Furthermore, the CJEU stated that, in order to ensure legal certainty and the smooth functioning of the internet, the copyright holder can only be allowed to limit their consent by effective technological measures (regulated in the Spanish Intellectual Property Law in Article 196 et seq.), which seems to imply that the copyright holder cannot resort to other remedies, such as restrictions in the contractual provisions of the website where the work in question is located. Indeed, paragraph 46 of the judgment includes a practical conclusion, since, in the absence of such measures, the CJEU argues that it could be difficult, especially for individual users, to ascertain whether the right holder intended to oppose the framing of their works, and that this should therefore be done by means of technological protection measures.

As a consequence of the above, in accordance with what has been established by the CJEU, it must be concluded that the embedding, by means of the technique of framing, in a third party website page, of works that are protected by copyright and that are freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing, constitutes a communication to the public within the meaning of Article 3 of Directive 2001/29. This should be without prejudice to a possible infringement for those who circumvent such technological protection measures, which have, in addition, a specific protection framework in Directive 2001/29.

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