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Linking: Essential functionality on the internet and never-ending story?

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1. Defying the laws (of physics)

It might seem surprising that one of the most essential functions on the internet, linking –or “what webs the Web”²– is still topical twenty years after the adoption of the InfoSoc Directive.³ Yet, on 9 March 2021 the Grand Chamber of the Court of Justice of the European Union (CJEU), comprising 15 judges, handed its 56-paragraph long judgment in the latest piece of the linking puzzle: This time in relation to thumbnails, framing and effective technological protection measures in Case C-392/19, *VG Bild-Kunst*, a referral from the German Bundesgerichtshof (Federal Court of Justice) lodged on 21 May 2019.⁴

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² Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Opinion of AG Szpunar, delivered on 10 September 2020, ECLI:EU:C:2020:696, point 5.

³ 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, OJ L 167, p.10-19 (“InfoSoc Directive”).

⁴ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181.

Hyperlinks, as Advocate General (AG) Szpunar notes in his Opinion to the case, allow internet users to “travel’ through ‘cyberspace’” in a similar fashion as “[t]he heroes of George Lucas’ *Star Wars* film saga were able to travel through ‘hyperspace’ faster than the speed of light using a ‘hyperdrive’”.⁵ He continues in his science fiction analogy that “[a]lthough 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.”⁶ With this science fiction analogy in mind, it is less surprising that the question of whether hyperlinking to copyright-protected material constitutes a communication to the public in the sense of Article 3(1) InfoSoc Directive has kept the CJEU and legal scholarship busy for the last decade.⁷ With the recently performed update of EU copyright rules in the CDSM Directive,⁸ no legislative clarification is in sight.⁹ And just like George Lucas’ successful *Star Wars* imperium, the linking saga keeps on going.

The concept of communication to the public in Article 3(1) of the InfoSoc Directive, according to established and sophisticated (read: complex and complicated) case-law by the CJEU starting in 2006 with *SGAE*¹⁰, includes two basic cumulative criteria: firstly, an act of communication and, secondly, the communication of that work to the “legal fiction”¹¹ of a new public. For the specific copyright-relevance of different forms of (hyper)linking on the internet, the CJEU has within a few years in the last decade established a somewhat consistent line

⁵ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 1. For another recent Hollywood movie reference –to the Western “*The Good, the Bad and the Ugly*”– by AG Bobek, see e.g. case C-645/19, *Facebook v Gegevensbeschermingsautoriteit*, Opinion of AG Bobek, delivered on 13 January 2021, ECLI:EU:C:2021:5, point 71.

⁶ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 1.

⁷ On the ample academic literature see, e.g., Eleonora Rosati, ‘Linking and Copyright: Easier at Last? First National Applications of the CJEU GS Media Judgment’, in: Tatiana E. Synodinou et al. (eds) *EU Internet Law in the Digital Era* (Springer 2020), pp. 61–78; Jane C. Ginsburg & Luke A. Budiardjo, ‘Liability for Providing yperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’, 41(2) *The Columbia Journal of Law & The Arts*, pp. 153–224; Ole-Andreas Rognstad, ‘Linking: A Gordian Knot of Copyright law’, in Gunnar Karnell et al. (eds) *Liber Amicorum Jan Rosén* (Eddy.se.ab 2016), pp. 679-692; Johan Axhamn, ‘Hyperlinking: Case C-466/12, Svensson and Others and its impact on Swedish copyright law’, *Europarättslig tidskrift* (2015), pp. 847–866; Emmanuel Arezzo, ‘Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?’, *IIC* (2014), pp. 524–555.

⁸ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17 May 2019, pp. 92–125 (‘CDSM Directive’).

⁹ See, e.g., Matthias Leistner, ‘Closing the book on the hyperlinks: brief outline of the CJEU’s case law and proposal for European legislative reform’, 39(6) *European Intellectual Property Review* (2017), pp. 327–333.

¹⁰ Case C-306/05, *SGAE v Rafael Hoteles SA*, ECLI:EU:C:2006:764.

¹¹ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 56.

inter alia in seminal cases C-466/12, *Svensson*¹², C-348/13, *Best Water*¹³, C-160/15, *GS Media*¹⁴ and C-527/15, *Filmspelers*¹⁵.

The first two cases concerned linking to content that was made available with the authorisation of the respective rightholder: In the first case, *Svensson*, the Court basically established that hyperlinking (providing a “clickable” link) to copyright-protected works which are already freely and lawfully available does not constitute a “communication to the public” because it does not address a “new public”. According to the Court, the initial communication had already targeted all internet users,¹⁶ i.e., the “general internet public”.¹⁷

This view was quickly reiterated in the *Best Water* case regarding embedded videos and the framing technique, which was rendered as an Order without the opinion of an AG.¹⁸ Most importantly, though, the Court set in stone that linking falls within the InfoSoc Directive’s exclusive right of communication to the public; with the consequence of a tap-dance of balancing the high level of protection for rightholders on the one hand and mitigating detrimental effects on conflicting fundamental rights and the functioning of the internet at large.

The final case of the trilogy, *GS Media*, concerned hyperlinking to copyright-protected content that is freely available on the internet but was made available without the authorisation of the respective rightholder (in the concrete case, previously unpublished copyright-protected pictures of Dutch Playboy that were available on an Australian website).¹⁹ Contrary to the

¹² Case C-466/12, *Svensson*, ECLI:EU:C:2014:76.

¹³ Case C-348/13, *Best Water*, ECLI:EU:C:2014:2315.

¹⁴ Case C-160/15, *GS Media*, ECLI:EU:C:2016:644. For an in-depth analysis, see, e.g., P. Radosavljev, ‘For Whom the Copyright Scale Tips: Has the CJEU Established a Proper Balance of Rights with its GS Media Case Judgement?’, 8(3) *European Journal of Law and Technology* (2017), and Eleonora Rosati, ‘GS Media and its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture’, 54(4) *Common Market Law Review* (2017), pp. 1221–1242.

¹⁵ Case C-527/15, *Filmspelers*, ECLI:EU:C:2017:300.

This section is partly based on Sebastian F. Schwemer, ‘Location, Location, Location! Copyright Content Moderation at Non-content Layers’, in Eleonora Rosati (ed.), *Handbook of European Copyright Law* (forthcoming, Routledge 2021).

¹⁶ Case C-466/12, *Svensson*, ECLI:EU:C:2014:76, paras. 25-27. Based on the more recent judgment in case C-161/17, *Renckhoff*, ECLI:EU:C:2018:634, AG Szpunar makes the case for somewhat restricting the envisaged public to the one visiting the website and linking to it, see Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 73.

¹⁷ C-301/15, *Soulier and Doke*, ECLI:EU:C:2016:878, para. 36.

¹⁸ Case C-348/13 *Best Water*, ECLI:EU:C:2014:2315.

¹⁹ The Court was asked “whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29”, see case C-160/15 *GS Media*, ECLI:EU:C:2016:644, para. 25.

Court's findings in *Svensson*, AG Wathelet interestingly suggested in his Opinion in the GS Media case that “[a]lthough it is true that hyperlinks posted on a website make it much easier to find other websites and protected works available on those websites and therefore afford users of the first site quicker, direct access to those works, I consider that hyperlinks which lead, even directly, to protected works do not ‘make available’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works”.²⁰

Also AG Szpunar in his recent Opinion in *VG Bild-Kunst* recalls (and rejects) Wathelet's argument that it is “far from self-evident” that linking to a copyright-protected work constitutes an act of communication to the public within the meaning of Article 3(1) InfoSoc Directive.²¹ In *GS Media*, in any case, the Court did not adopt the AG Wathelet's view and instead held that hyperlinks to freely available content which is made available to the public without the consent of the respective rightholder, constitutes a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive when the person who knows or reasonably must have known of the illegal nature of the publication of the content on the website that is linked to.²² According to the judgment, if that person is providing links with the pursuit of financial gain, knowledge of the illegality must be (rebuttably) presumed. Thus, in *GS Media* the Court effectively introduced a “subjective criterion into the definition of an objective element”, which by AG Szpunar has been aptly labelled “unorthodox from the point of view of general copyright rules.”²³ In conclusion, the provision of a hyperlink from a website to a copyright work that is freely available but was published without the rightholder's consent can – under certain conditions – constitute a “communication to the public” within the meaning of Article 3(1) of the InfoSoc Directive.²⁴

In the most recent proceedings before the CJEU involving hyperlinking, *C-392/19 VG Bild-Kunst*, AG Szpunar recalls in his opinion the Court's consistent line that “hyperlinks to

²⁰ Case C-160/15, *GS Media*, Opinion AG Wathelet, ECLI:EU:C:2016:221, point 54.

²¹ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 45. Szpunar continues, however, to express that he does “not share the view expressed in that regard, according to which each act of communication must necessarily involve a transmission or retransmission of the work“ (point 46) and concludes that the “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, in my view, the classification of hyperlinks as ‘acts of communication’ within the meaning of Article 3(1) of Directive 2001/29.” (point 51).

²² Case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para. 49.

²³ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 54. with reference to Martin Husovec, ‘How Europe Wants to Redefine Global Online Copyright Enforcement’, in Tatiana E. Synodinou (ed.), *Pluralism or Universalism in International Copyright Law* (Wolters Kluwer, 2019), p. 513ff.

²⁴ The judgment has been interpreted as establishing a *de facto* take-down obligation for users, see, e.g., Eleonora Rosati, ‘Hyperlinks and Communication to the Public: Early Thoughts on the GS Media Decision’ (2016), <<http://ipkitten.blogspot.com/2016/09/hyperlinks-and-communication-to-public.html>> (last accessed 15 March 2021).

copyright-protected subject matter made freely available to the public on the internet with the authorisation of the copyright holder do not constitute acts which require that rightholder's authorisation."²⁵ He also argues that "more recent decisions [not directly related to linking] cast that settled case-law in a slightly different light"²⁶, which make it necessary both to clarify the case law²⁷ and "to determine whether the fact that a copyright holder uses technical means intended to prevent the use of his or her work in the form of hyperlinks or by means of framing changes that assessment from the point of view of copyright."²⁸

2. The latest addition to the saga: framing and effective technological measures

The recently decided case C-392/19, *VG Bild-Kunst*, involves the *Deutsche Digitale Bibliothek*, an online library operated by the German cultural heritage organisation *Stiftung Preußischer Kulturbesitz*, as defendant and the German visual arts collective management organisation *VG Bild-Kunst* as plaintiff. The library's website "contains links to digitised content stored on the internet portals of participating institutions" (para. 10) as well as "thumbnails", i.e. reduced-size versions of the original image, as a "digital showcase" with authorization of rightholders. Importantly in *VG Bild-Kunst*, the relevant digital reproductions concern "only" thumbnails of protected works, which are reduced in size in comparison with the original.²⁹ The Court, however, in line with AG Szpunar, deems that the change of size of the protected works is not a factor in assessing Article 3(1) InfoSoc Directive.³⁰

Notably, the present case is distinguished from the previous cases in that *Svensson* did not involve restrictive measures in this respect.³¹ The case is also special in that it regards contractual obligations.³² *VG Bild-Kunst* had made the grant of a licensing agreement for the use of works in the form of thumbnails with the *Deutsche Digitale Bibliothek* "subject to the implementation of measures to restrict framing in order to limit access to his or her works from

²⁵ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 15.

²⁶ *Ibid.*

²⁷ *Ibid.*, point 33.

²⁸ *Ibid.*, point 15.

²⁹ *Ibid.*, point 23.

³⁰ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 25, and Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 50.

³¹ See to this extent Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 37.

³² This might also make the case of special interest to Jørgen Blomqvist, who already in his PhD thesis from 1980's has already examined the scope of transfer of copyright, see Jørgen Blomqvist, *Overdragelse af ophavsrettigheder: Rettighedsoverdragelsen og dens fortolkning* (Jurist- og Økonomforbundets Forlag 1987), pp. 65 et seq.

websites other than those of his or her licensees.”³³ In other words, the German CMO required the library to apply effective³⁴ technological measures, which would prevent the access to the thumbnails on the library’s website from other third-party websites.³⁵ Technically, this can, for example, be achieved by instructions in the HTML code of the website “which prevent the page from opening in a frame by requiring a new window or tab, or which send another image, for example a copyright warning, instead of the element sought”.³⁶ In practice, different techniques are used to prevent e.g. clickjacking, where internet users are tricked into clicking on something different from what they expect, with the risk of being exposed to fraud or other abuse.³⁷ The *Deutsche Digitale Bibliothek*, on the other hand, argued that such an obligation in the licensing agreement would not be reasonable.³⁸

In this context, the CJEU was called upon by the German Bundesgerichtshof to assess whether “Article 3(1) of Directive 2001/29 must be interpreted as meaning 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 made freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents protective measures against framing adopted or

³³ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, paras. 11 and 41. See also case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 25.

³⁴ According to Article 6(3) InfoSoc Directive, “Technological measures shall be deemed ‘effective’ where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.”

³⁵ Framing is described by AG Szpunar in point 10 in this way: “That technique uses the functionality of a hyperlink, which means that an element, for example an image, can be displayed in a browser from its original location (the target website) and is therefore not reproduced on the server of the site on which it appears. Nevertheless, the embedded element is displayed automatically, without the need to click on any link. From a user’s point of view, the effect is the same as it is when a file is contained and appears on a single page. That practice is known as ‘inline linking’ or ‘hotlinking’.”

³⁶ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 79.

³⁷ This could be achieved, e.g., by having a transparent button on top of the content that is being framed, leading the internet user to believe he or she is engaging with the original content while in fact engaging with the content of the fraudulent or abusive site.

³⁸ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, paras. 11 et seq. Article 16 of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20 March 2014, pp. 72–98 (‘CRM Directive’) stipulates certain duties in relation to the licensing between a collective management organisation and users. In the German proceedings, the question was whether the CMO *VG Bild-Kunst*, based on established German case-law, could exceptionally depart from the obligation to license, notably inter alia under the condition that ‘the licence application was objectionable by reference to overriding legitimate interests’ (para. 15). The case thus depends on whether the embedding of a work as in the case constitutes a communication to the public, ‘where it circumvents protection measures against framing adopted by the right holder or imposed by him or her on a licensee’ (para. 16). If affirmed, *VG Bild-Kunst* could oblige the licensee to implement protection measures.

imposed by the copyright holder, constitutes a communication to the public within the meaning of that provision.”³⁹

Recalling the high level of protection of authors in the InfoSoc Directive⁴⁰ and the broad understanding of the communication to the public concept, the Court underlines “that the authorisation of the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications to the public of such works”.⁴¹ In the specific circumstances where rightholders try to limit the access to the licensed content from websites other than those of the licensee, as in the present case, the Court concludes that a rightholder ‘cannot be regarded as having consented to third parties being able freely to communicate his or her works to the public’.⁴² Therefore, the Court determines that “the initial act of making available on the original website and the secondary act of making available, by means of the technique of framing, constitute different communications to the public, and each such act must, consequently, be authorised by the rights holders concerned”.⁴³ Even though the work is made freely available, the relevant intended ‘public’ selected by the rightholder was restricted to the licensed website and its users. According to the Court, neither users of the third-party website that subsequently embeds the copyright-protected content nor other internet users, are part of that initial audience.⁴⁴ Thus, the CJEU concludes that

“the embedding, by means of the technique of framing, in a third party website page of a work protected by copyright and made freely available to the public with the authorisation of the copyright holder on another website must be classified as an act of ‘making that work available to a new public’.”⁴⁵

Yet the CJEU once again acknowledges the difficulties around and the importance of linking: firstly, it underlines that “in order to ensure legal certainty and the smooth functioning of the internet” and recalling the practical difficulties for individual users to determine whether a rightholder’s intention was to limit framing, only effective technological measures are allowed to be relied on by rightholders with a view to limiting their consent.⁴⁶ Already in *GS Media*, the Court had pointed toward the importance of the internet for the exercise of fundamental

³⁹ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 19.

⁴⁰ See recitals 4 and 10 InfoSoc Directive.

⁴¹ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 28, with reference to Case C-607/11, *ITV Broadcasting and Others*, ECLI:EU:C:2013:147, para. 23.

⁴² Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 41.

⁴³ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 43, with reference by analogy to Case C-256/16, *VCAST*, ECLI:EU:C:2017:913, para. 49.

⁴⁴ See Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 47, with reference to Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, points 73 and 84, and by analogy, Case C-161/17, *Renckhoff*, ECLI:EU:C:2018:634, para. 35.

⁴⁵ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 48.

⁴⁶ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 46, with reference to C-355/12, *Nintendo and Others*, C-355/12, ECLI:EU:C:2014:25, paras. 24, 25 and 27.

rights and the central role of hyperlinking, commenting that “the internet is of particular importance to freedom of expression and of information [...], and hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information”.⁴⁷ Despite emphasis on the importance of hyperlinks for “smooth operation of the Internet” and “particular importance to freedom of expression and information [...] as well as to the exchange of opinions and information on the Internet” (para. 49), the Court in *VG Bild-Kunst* concludes that it would be incompatible with the exclusive and non-exhaustive right of communication to the public, if “a copyright holder is to be deemed, even if he or she has introduced measures to restrict the framing of his or her work, to have consented to any act of communication to the public of that work by a third party for the benefit of all internet users”.⁴⁸ Otherwise, what would amount to an exhaustion principle for the right of communication to the public would be introduced.⁴⁹

Interestingly, in his thoughtful 139-paragraph opinion, AG Szupnar had suggested a “drastic”⁵⁰ differentiated treatment of links, namely between *clickable* links (including framing), on the one hand, and *non-clickable* (automatic) links (also referred to as inline linking or hotlinking) on the other.⁵¹ The latter, according to the AG, do not require an active click and are characterised by the fact that an element of a website ‘can be displayed from its original location’ without the need for reproducing it “on the server of the site on which it appears”,⁵² and the effect from an internet user’s point of view “is the same as it is when a file is contained and appears on a single page”.⁵³ In this context, he suggests that from both “a technical and a functional point of view, an act of communication of the work in question to a public [takes place] which was not taken into account by the copyright holder when the work was initially made available, namely the public of a website other than that on which that initial making available of the work took place”⁵⁴ and that therefore it requires the consent of the respective rightholders. Stressing that the “need to activate a link indicates to the user that he or she is accessing content which does not form an integral part of the webpage containing that link” (point 89), the AG suggests that such differentiation would not only be “easily perceptible to any internet user and should not create any uncertainty” (point 116) but would also take into

⁴⁷ Case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para. 45. See Case C-160/15, *GS Media*, Opinion AG Wathelet, ECLI:EU:C:2016:221, point 54. One of the accompanying footnotes (28) reads: “I believe that, because of the enormous quantity of information available on the internet, such information would actually be largely unfindable without hyperlinks. In my view, hyperlinks are at present an essential element of the internet architecture.”

⁴⁸ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 50.

⁴⁹ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 52.

⁵⁰ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szupnar, ECLI:EU:C:2020:696, point 105.

⁵¹ Similarly, also national case-law, e.g. in Germany by the Bundesgerichtshof, has distinguished between different forms of links.

⁵² *Ibid.*, point 10.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, point 105.

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account his view that automatic links are somewhat detrimental to the “sound operation of the internet”, given the danger of “monopolisation of the World Wide Web and the concentration of information in the hands of a limited number of market-dominant services belonging to an even smaller number of companies” (point 117). Consequently, he proposes that the Court interprets Article 3(1) InfoSoc Directive in a way whereby

“the embedding in a webpage of copyright-protected works freely available to the public with the authorization of the copyright holder on other websites, in such a way that those works are automatically displayed on that page as soon as it is opened, without any further action on the part of the user, constitutes a communication to the public within the meaning of that provision.”⁵⁵

As seen, however, the CJEU did not pick up Stpunar’s distinction between clickable and automatic links.

3. What’s new under the sun?

The Court’s ruling in *VG Bild-Kunst* comes without new substantial plot twists. Once again, the AG in a linking case had proposed to adjust the communication to the public-test. Once again, the CJEU stuck to its line established in the linking prequels and effectively further cemented the *Svensson*, *Best Water* and *GS Media* trilogy. In this line, the judgment is hardly surprising. Nonetheless, the judgment is of great interest in several dimensions.⁵⁶

AG Stpunar had pointed out “three major issues” in the Court’s line on hyperlinking relating to firstly, “the classification of links as ‘acts of communication’”; secondly, “the introduction of the subjective criterion of knowledge of the facts into the definition of the concept of ‘communication to the public’”; and thirdly, “the application to the internet of the ‘new public criterion’”.⁵⁷ Unfortunately, while revisiting its own case-law on linking as well as the relevant case-law on Article 3(1) InfoSoc Directive the Court has not addressed all of these concerns in depth.

⁵⁵ Ibid., point 139. Furthermore, Stpunar specified that “the embedding of a work—which has been made freely available to the public on a website with the consent of the rightholder—in the website of a third party by means of a clickable link using the framing technique does not constitute a communication to the public within the meaning of that provision, where that embedding circumvents protection measures against framing taken or imposed by the copyright holder.”

⁵⁶ In addition to the hyperlinking perspective, the judgment is also of interest with regard to the licensing contracts entered into by collective management organisations. See, e.g., Sebastian F. Schwemer, *Licensing and Access to Content in the European Union. Regulation between Copyright and Competition Law* (Cambridge University Press, 2019).

⁵⁷ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Stpunar, ECLI:EU:C:2020:696, point 44.

Whereas the AG put great emphasis on a “connection” that users establish with the original site of the linked element by clicking a hyperlink⁵⁸ and suggested a potential differential treatment of hyperlinks distinguish between clickable and non-clickable (automatic) links, the CJEU stuck—unsurprisingly—to its technology-neutral line whereby all types of hyperlinks are seemingly treated the same as previously implied by *Best Water*. Since the Court in *Svensson* very explicitly addressed “clickable links”,⁵⁹ the proposed distinction by AG Szpunar is at first glance not far-fetched from either a technical or a legal perspective. At the same time, however, the Court had already hinted—almost in an obiter dictum-fashion—at its view of non-differential treatment of links in *Svensson*.⁶⁰ The linking case-law by the CJEU had already distinguished sharply between, and put much emphasis on, content that is made available with the consent of a rightholder on the one hand, and content that is made without the consent of a rightholder on the other, when assessing the public criterion. Thus, it is at least surprising that the Court chose not to devote a more substantive discussion to a potential differential treatment of links.

On the one hand, this one-size-fits-all approach likely contributes to legal certainty and minimises complexity in an already highly complex field. On the other hand, however, the question remains as to whether this simplistic view as legal concept corresponds well with the internet and succeeds in striking the right balance between colliding fundamental rights in all scenarios, beyond the specific case at hand. In this context, we should also not forget that ‘linking’ is not static, but constantly developing.⁶¹ Over recent years, for example, it has become common practice for links to include a small preview, i.e. a snippet including thumbnails, which enables internet users to know in a somewhat reliable way what can be expected when following the link.⁶²

In *VG Bild-Kunst*, the Court importantly expands once more on the intended public in relation to hyperlinks. Effectively, this public intended by the rightholder can be specified by employing contractual restrictions on linking in the licensing agreement. It has been noted in the context of determining the intended public that the “very use of technological protection measures clearly indicates the copyright holder’s intention not to allow public access to his or her work

⁵⁸ See, e.g., Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, points 88 or 92.

⁵⁹ See, e.g., Case C-466/12, *Svensson*, ECLI:EU:C:2014:76, paras. 2, 8, 14, 18, 20, 22, 25, 27, 30–32.

⁶⁰ See Case C-466/12, *Svensson*, ECLI:EU:C:2014:76, para. 29: “Such a finding cannot be called in question were the referring court to find, although this is not clear from the documents before the Court, that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site.”

⁶¹ Technical standards and other documentation play an accentuated role, for example those dealt with by the international standards organisation World Wide Web Consortium (W3C).

⁶² Which has given rise to other copyright concerns, see in this context also Article 15 of the CDSM Directive.

by means of hyperlinks using the framing technique”.⁶³ Yet AG Szpunar had concerns with such an interpretation, recalling inter alia that in many situations rightsholders might not be in a position to decide on technical protection measures, e.g. when content is posted by a licensed third party or on a sharing platform (point 125).⁶⁴ Furthermore, he pointed to the weakness in the analogy to *Svensson* that the present “measures restrict neither access to a work nor even a means of accessing it, but only a manner of displaying it on a screen” (point 128). Therefore, in his view, “those measures do not determine the circle of persons taken into account as the potential public for which the work was made available”, and consequently their “possible circumvention [...] does not widen that circle and accordingly cannot constitute an act of communication to the public under the ‘new public’ doctrine” (point 129). Importantly, if the Court had followed the AG’s view, the embedding by means of framing of a work (made freely available to the public with the consent of the relevant rightholder) in form of a clickable link would not constitute a communication to the public—even if the embedding circumvents technical protection mechanisms against framing.⁶⁵

With its judgment, the Court has made clear that the only⁶⁶ permissible way to limit the extent of licensing by a rightholder is by means of requiring effective technological measures.⁶⁷ AG Szpunar’s concern that the copyright system turns “into an opt-in system subject to the application of technological protection measures” (point 131) was unheard.⁶⁸ In effect, on a more abstract level, both a paywall (or login) and the blocking of framing can be seen as technical restrictions. Notably, however, the former regards restrictions on access to content (as in the earlier case-law), whereas the latter regards restrictions to link to content (as in *VG Bild-Kunst*).⁶⁹ This means that other ways of communicating a rightholder’s intention, for example by merely including a note on a website that “linking is prohibited”, would not be sufficient in this context. If the opposite were true, it would in practice be extremely difficult for internet users to have legal certainty as to the intention of the rightholder. The Court

⁶³ See observation by French government, case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 123.

⁶⁴ Szpunar also pointed towards the specific context of the present case, where a collective management organisation is requiring the use of such measures, ‘without expressly mandated by their members’, case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, point 125.

⁶⁵ Case C-392/19, *VG Bild-Kunst*, Opinion of AG Szpunar, ECLI:EU:C:2020:696, points 132 and 139.

⁶⁶ Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, para. 46.

⁶⁷ On effective technological measures and their context within international copyright treaties, see, e.g., Jørgen Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar 2014), pp. 205–215.

⁶⁸ See also Tatiana Synoudinou, “Framing” the right of communication to the public: the CJEU’s decision on the *VG Kunst* case’ (2021), <<http://copyrightblog.kluweriplaw.com/2021/03/15/framing-the-right-of-communication-to-the-public-the-cjeus-decision-on-the-vg-kunst-case/>> (last accessed 15 March 2021), who notes that “[t]his 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.”

⁶⁹ Compare also the Court’s engagement with Case C-161/17, *Renckhoff*, EU:C:2018:634, in Case C-392/19, *VG Bild-Kunst*, ECLI:EU:C:2021:181, e.g., paras. 47, 52-54.

clearly wanted to minimise these potential chilling effects.⁷⁰ In this context, concerns have been raised by rightsholders about whether the judgment effectively imposes formalities on the enjoyment and exercise which would be in conflict with Article 5(2) of the Berne Convention.⁷¹ It seems that in *VG Bild-Kunst*, however, rather than introducing such—prohibited—formalities on the scope of protection, the CJEU merely lays out boundaries for the exploitation of works.⁷²

It is noteworthy that *VG Bild-Kunst* does not comment on the consequences in instances where a licensee does not implement technical measures despite the licensing contract requiring such measures:⁷³ Would the framing of this content, which is freely available but regarding which the licensee was obliged and failed to implement technological protection mechanisms, amount to communication to a new public? *VG Bild-Kunst* does not provide an explicit answer to this question. Given the Court’s focus on internet users’ ability to easily understand the intention of the rightholder (cf. para. 46), however, it would be inconsequential if there were any kind of ‘backdoor’ for a delimitation of the intended public beyond technical protection measures. The intended public can only be expressed via an objective access criterion. In this hypothetical scenario, there is no technical protection measure in place which would restrict the framing of the content. Therefore, for the internet user the situation is essentially the same as if there were no provision in the licensing agreement requiring technical protection measures (i.e. content directed at the “general internet public”⁷⁴). Consequently, the licensed work would—from a copyright perspective—have been communicated to the “general internet public”, where framing is permissible and does not constitute a communication to a new public in the sense of Article 3(1) InfoSoc Directive. In this scenario, therefore, rightsholders would be restricted to

⁷⁰ On chilling effects in the context of reasonable exploitation, Rognstad & Poort note that ‘uncertainty about the scope of copyright and whether or not certain acts will be an infringement will discourage risk-averse agents from making certain uses of works or even developing certain business models’. See Ole-Andreas Rognstad & Joost Poort, ‘The Right to Reasonable Exploitation Concretized: An Incentive Based Approach’, in P. B. Hugenholtz (ed.), *Copyright Reconstructed: Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018), pp. 121–161, 128.

⁷¹ See European Visual Artists, ‘Statement On CJEU Ruling In Case C-392/19, VG Bild-Kunst v. Stiftung Preußischer Kulturbesitz’ (Brussels, 10 March 2021) <<https://www.eartists.org/statement-on-cjeu-ruling-in-vg-bild-kunst-case/>> (last accessed 15 March 2021).

⁷² Berne Convention for the Protection of Literary and Artistic Works of 1886, last revised at Paris 1971 and amended in 1979. Given that neither the AG’s opinion nor the judgment makes any reference to the Berne Convention, it can be assumed that the Grand Chamber saw no conflict in the case.

⁷³ Similarly, the judgment does not address the situation where a licensee introduces technological protection measures voluntarily, i.e. without being obliged to do so in the licensing contract with the rightholder. Unless the licensing contract expressly states that the use of technological protection measures is prohibited, the licensee is likely allowed to do so. In that scenario, the licensee would –acting as a proxy for the rightholder– then be able to restrict the ‘public’ in the sense of Article 3(1) InfoSoc Directive. Furthermore, the question of circumvention of technical protection mechanisms by third parties becomes relevant, which is neither addressed in the present *VG Bild-Kunst* case.

⁷⁴ C-301/15, *Soulier and Doke*, ECLI:EU:C:2016:878, para. 36.

the breach of the licensing contract inter partes. As it has been pointed out by others, these contractual restrictions on content (or data) that the Court has addressed in *VG Bild-Kunst* might also become relevant in the context of text and data mining activities in Articles 3 and 4 of the CDSM Directive, which puts emphasis on ‘lawful’ access.⁷⁵

Effectively, the Court confirmed in *VG Bild-Kunst* that in situations where rightholders license content without requiring technological measures that limit e.g. framing, a hyperlink to that content would not constitute a communication to the public in the sense of Article 3(1) InfoSoc Directive.⁷⁶ In turn, if a rightholder requires such a technological measure, a hyperlink to that content would constitute a communication to the public. In *GS Media*, the Court considered the intricacies of copyright licensing and noted that “it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet”.⁷⁷ Similarly, the intricacies of technological measures to restrict various forms of linking (and potential intersections with limitations and exceptions) should make for an interesting topic to follow in the coming years. The Court has opted to continue its somewhat clear and predictable line of thinking. But just as few could have foreseen that George Lucas’s Star Wars saga would eventually continue beyond the initial six films, it is similarly difficult to predict future cases on linking.

⁷⁵ See recital 14 of the CDSM Directive, which in the context of text and data mining by research organisations and cultural heritage organisations states that “[l]awful access should also cover access to content that is freely available online”. See also Eleonora Rosati, ‘CJEU rules that linking can be restricted by contract, though only by using effective technological measures’ (2021), <<https://ipkitten.blogspot.com/2021/03/cjeu-rules-that-linking-can-be.html>> (last accessed 15 March 2021). For a discussion on the ‘lawful use’ taxonomy, see Tatiana E. Synodinou, ‘Who Is a Lawful User in European Copyright Law? From a Variable Geometry to a Taxonomy of Lawful Use’, in Tatiana E. Synodinou et al. (eds), *EU Internet Law in the Digital Era* (Springer 2020), pp. 27–60.

⁷⁶ See also to this effect *Svensson* as recalled by the CJEU in case C-301/15, *Soulier and Doke*, ECLI:EU:C:2016:878, para. 36.

⁷⁷ Case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para. 46.