

Provisional text

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 10 September 2020 (1)

**Case C-392/19**

**VG Bild-Kunst**  
v  
**Stiftung Preußischer Kulturbesitz**

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights in the information society – Directive 2001/29/EC – Article 3(1) – Concept of ‘communication to the public’ – Embedding of a copyright-protected work by the process of framing – Work freely accessible on a licensee’s website with the authorisation of the copyright holder – Article 6 – Effective technological measures – Directive 2014/26/EU – Collective management of copyright and related rights – Article 16 – Licensing terms – Term in the exploitation agreement requiring the licensee to introduce effective technological measures against framing)

## **Introduction**

1. The heroes of George Lucas’ *Star Wars* film saga were able to travel through ‘hyperspace’ faster than the speed of light using a ‘hyperdrive’. In a similar fashion, internet users can ‘travel’ through ‘cyberspace’ using hyperlinks. Although 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. Those challenges have already been partially addressed, inter alia, in the case-law of the Court. The present case will provide an opportunity to review and supplement that case-law.

2. When they think about the internet, people commonly refer in fact to only one function of that network, probably the most used one: the World Wide Web or the Web. That network comprises units of information and resources contained in webpages. A webpage is a document written in HTML (hypertext markup language) which may contain other related resources, in particular images or audiovisual or text files. A structured set of webpages and any other resources published by an owner and hosted on one or more servers constitutes a website.

3. When a website is viewed, a computer establishes a connection with the server(s) on which that site is hosted and requests the information comprising the site. A copy of that information is then sent and (temporarily) stored in the computer's temporary memory or 'cache memory'. That information can be read and reproduced on a computer screen using specific software, namely a web browser.

4. Every resource on the World Wide Web, that is to say every file, page and website, has a unique identifier called a URL (uniform resource locator), which is a kind of 'web address'. (2) The page to which a website address leads is called the home page. There are two ways of accessing a resource on the World Wide Web using the URL address. The first is to enter that address in the address bar of a browser and the second, which is at issue in the present case, is to use a hyperlink.

5. Hyperlinks (hypertext links) are what 'webs the Web'. They make it possible, from one website, directly to access the resources on another site. Hyperlinks are in fact the very essence of the World Wide Web and differentiate it, for example, from the Library of Alexandria. The Court has recognised in its case-law the importance of hyperlinks for the operation of the World Wide Web and for freedom of speech, which is bolstered by the World Wide Web. (3)

6. A hyperlink is an instruction for a browser to search for resources on another website. It expresses in HTML the URL address of the target resource, the text or image symbolising the link on the original webpage (4) and possibly other elements, such as the manner of opening the target resource on screen. A link normally needs to be activated (clicked) to work.

7. A simple link contains only the URL address of the site to which it links, that is to say its home page. After the link has been clicked on, that home page is opened either in place of the page containing the link or in a new window. The address bar of the browser displays the URL address of the new site, so that the user is aware that he or she has changed sites. There are other types of links, however.

8. A 'deep link' leads not to the home page of the target site, but to another page on that site or even a specific resource contained on that page, for example a graphics or text file. (5) Each page and each resource have a URL address which can be used in the link instead of just the main address of the site. A deep link disregards the intended order of navigation on the target website, by circumventing its home page. However, since the URL address of a webpage generally contains the name of the site, the user is always informed of the site which he or she is viewing.

9. A webpage may contain resources other than text, in particular graphics or audiovisual files. Those files do not form an integral part of the HTML document constituting the page, but are linked to it. Those resources are embedded using specific HTML instructions for that purpose. For example, the 'image' tag ('<img>') is used in order to embed an image. (6) Normally, that tag is used in order to embed in a webpage a graphics file stored on the same server as that page (a local file). However, replacing the address of a local file ('relative URL') in the 'source' attribute of the 'image' tag with the address of a file on another website ('absolute URL') is sufficient to embed the latter file in one's own webpage, without having to reproduce it. (7)

10. 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'.

11. Framing is a technique which allows the screen to be divided into several parts, each of which can independently display a different webpage or internet resource. Thus, the original webpage may be displayed on one part of the screen, while a webpage or other resource from another website is displayed on the other part. That second webpage is not reproduced on the server of the framing site, but viewed directly by means of a deep link. The URL address of the target page of that link is often concealed, so that

a user may have the impression that he or she is viewing a single webpage, when in fact he or she is viewing two (or more) pages.

12. Framing is currently considered obsolete and has been abandoned in the latest version of HTML (HTML5). It has been replaced by the ‘inline frame’, (8) which allows an external resource, such as a website, page, or even element of a webpage from another site, to be placed in a frame whose dimensions and location are freely defined by the author of the webpage in question. An inline frame functions like an integral part of that page because that technique, unlike conventional framing, is not a screen-splitting technique but a means of embedding external resources in a webpage.

13. To further complicate matters, an inline frame may be defined as the location where a hyperlink opens. (9) In that way, after the link has been activated (by a click), the target resource opens in a frame (whose edges may or may not be visible on the screen), at the location defined by the author of the page containing the link. (10)

14. Those manipulations may seem to be complex and to require in-depth IT knowledge, but the very large number of website creation services and content-sharing platforms automate those processes, making it easy to create webpages, embed content in them and create hyperlinks without possessing that knowledge.

15. The Court has consistently held that hyperlinks to 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. (11) However, more recent decisions cast that settled case-law in a slightly different light. Accordingly, it is necessary 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. It will also be necessary, in my view, to reconsider the issue of the embedding of works from one site in the webpages of another site (inline linking).

## **Legal framework**

### ***European Union law***

16. Article 3(1) and (3) 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 (12) provides:

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.’

17. Pursuant to Article 6(1) and (3) of Directive 2001/29:

‘1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

...

3. For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. <sup>[13]</sup> 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.’

18. Article 16(1) and (2), first subparagraph, of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (14) provides:

‘1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.

2. Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.

...’

### ***German law***

19. Under German law, the right of communication to the public, for the purposes of Article 3(1) of Directive 2001/29, is covered by Paragraph 19a (‘making available’) and Paragraph 15(2) (‘undefined right’ of communication to the public) of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (15) (‘the UrhG’).

20. Article 6(1) of Directive 2001/29 was transposed into German law by Paragraph 95a of the UrhG.

21. Lastly, pursuant to the first sentence of Paragraph 34(1) of the Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften – Verwertungsgesellschaftengesetz (Law on the management of copyright and related rights by collecting societies) of 24 May 2016 (16) (‘the VGG’), which transposed Article 16(1) and (2) of Directive 2014/26, collecting societies are required to grant to any person who so requests, on reasonable terms, a licence to use the rights entrusted to them for management.

### **Facts, procedure and question referred**

22. Verwertungsgesellschaft Bild-Kunst (‘VG Bild-Kunst’) is a copyright collecting society for the visual arts in Germany. Stiftung Preußischer Kulturbesitz (‘SPK’) is a foundation under German law.

23. SPK is the operator of the Deutsche Digitale Bibliothek (DDB), a digital library devoted to culture and knowledge, which networks German cultural and scientific institutions.

24. The DDB website contains links to digitised content stored on the internet portals of participating institutions. As a ‘digital showcase’, the DDB itself stores only thumbnails, that is to say smaller versions of the original images. When a user clicks on a search result, he or she is redirected to the page for the object – on the DDB’s site – which contains an enlarged version of the image (440 x 330 pixels). When that image is clicked on or the ‘magnifying glass’ function is used, an enlarged version of the thumbnail, with a maximum resolution of 800 x 600 pixels, is displayed in a lightbox. Moreover, the ‘Display object

on original site' button contains a direct link to the website of the institution providing the object (either a simple link to its home page or a deep link to the page for the object). The DDB uses works with the authorisation of the holders of the copyright in those works.

25. VG Bild-Kunst makes the conclusion with SPK of a licence agreement for the use of its catalogue of works in the form of thumbnails conditional on the inclusion of a provision whereby the licensee undertakes, when using the protected works and subject matter covered by the agreement, to apply effective technological measures against the framing by third parties of the thumbnails of the protected works or subject matter displayed on the DDB website.

26. Taking the view that such a contractual provision was unreasonable from the point of view of copyright, SPK brought an action for declaratory relief before the Landgericht (Regional Court, Germany) seeking a declaration that VG Bild-Kunst was required to grant the licence in question to SPK without making that licence conditional on the implementation of those technological measures. That action was initially dismissed by the Landgericht (Regional Court). On appeal by SPK, the judgment of the Landgericht was overturned by the Kammergericht (Higher Regional Court, Germany). By its appeal on a point of law (*Revision*), VG Bild-Kunst seeks the dismissal of SPK's action.

27. The Bundesgerichtshof (Federal Court of Justice, Germany) points out, first, that, pursuant to the first sentence of Paragraph 34(1) of the VGG, collecting societies are required to grant to any person who so requests, on reasonable terms, a licence to use the rights entrusted to them for management. The referring court states, secondly, that, according to its case-law applicable in the present case, it is accepted that collecting societies may, in exceptional cases, derogate from their obligation and refuse to grant a licence, provided that that refusal does not constitute an abuse of monopoly power and that it is possible to rely, in opposition to the licence application, on overriding legitimate interests. In that regard, in order to determine whether there is an objectively justified exception, it is necessary to weigh up the interests of the persons concerned, taking into account the purpose of the law and the objective underlying that basic obligation of collecting societies.

28. The outcome of the appeal on a point of law depends on 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 within the meaning of Article 3(1) of Directive 2001/29/EC where it circumvents protection measures against framing taken by the rightholder or imposed by him or her on a licensee. If it does, the rights of the members of VG Bild-Kunst are affected and it could legitimately request that the obligation to implement technological measures against framing be included in the licence agreement with SPK.

29. Being uncertain as to the answer to be given to that question, in the light of the Court's case-law on the use of hyperlinks on the internet, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the embedding of a work – which is available on a freely accessible website with the consent of the rightholder – in the website of a third party by way of framing constitute communication to the public of that work within the meaning of Article 3(1) of Directive 2001/29/EC where it occurs through circumvention of protection measures against framing taken or instigated by the rightholder?'

30. The request for a preliminary ruling was received at the Court on 21 May 2019. Written observations have been submitted by the parties to the main proceedings, the French Government and the European Commission. The same parties were represented at the hearing held on 25 May 2020.

## Analysis

31. By its question, the referring court asks the Court whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the embedding of a work – which is available on a freely accessible website

with the consent of the copyright holder – in the website of a third party by way of framing constitutes communication to the public of that work within the meaning of that provision, where that embedding circumvents protection measures against framing taken or imposed by the copyright holder.

32. Both the referring court and the parties that have submitted observations suggest answers to that question which, in their view, follow from the case-law of the Court on the assessment of hyperlinks from the point of view of copyright. However, their analysis of that case-law leads them to contradictory results. While the referring court, VG Bild-Kunst, the French Government and the Commission propose that the question referred for a preliminary ruling be answered in the affirmative, SPK puts forward cogent arguments in favour of an answer in the negative.

33. I share the view that the answer to the question referred for a preliminary ruling may be partially inferred from the Court's case-law. It seems to me, however, that that case-law needs to be clarified following an analysis which takes into account recent case-law that is not directly concerned with hyperlinks.

### *Case-law relating to hyperlinks*

34. The making available to the public of works protected by copyright, on the internet, is covered by the exclusive right of communication to the public provided for in Article 3(1) of Directive 2001/29. (17) That right encompasses 'any communication to the public of ... works, by wire or wireless means, including the making available to the public of ... works in such a way that members of the public may access them from a place and at a time individually chosen by them'. On the internet, it is making available to the public which plays a major role, although 'conventional' communication also occurs. (18)

35. The question which therefore arises in relation to hyperlinks is whether the inclusion on a webpage of a link to another person's work available on the internet (on the World Wide Web, more specifically) constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29, that is to say, whether the inclusion of such a link is covered by the exclusive right of the holder of the copyright in that work.

36. In the judgment in *Svensson and Others*, (19) the Court answered that question, in principle, in the negative. The Court found, in the first place, that a hyperlink did indeed constitute an act of communication, since the link affords users direct access to the work. (20) That communication is directed at a public consisting of an indeterminate and fairly large number of people, that is to say a public. (21)

37. In the second place, however, the Court held that, in the case of a work already freely available on a website, the public targeted by a hyperlink posted on another website did not constitute a new public in relation to the public for the initial communication. The Court considered that the public targeted by the initial communication consisted of all potential visitors to a freely accessible website, that is to say all internet users. All those users therefore should have been taken into account by the copyright holder at the time of the initial communication. (22) Logically, the hyperlink could not provide access to the work to a wider circle of users.

38. In the event of secondary communication effected by the same technical means as the initial communication (which is the case for all communications on the World Wide Web), the case-law of the Court requires the existence of a new public for that secondary communication to be covered by the exclusive right of communication to the public provided for in Article 3(1) of Directive 2001/29. (23)

39. The Court therefore concluded that the posting on a website of a hyperlink (a 'clickable link' in the words of the judgment in question) to a work protected by copyright which is already freely accessible on the internet does not require the authorisation of the holder of the copyright in that work. (24) It could be otherwise only if the link makes it possible to circumvent restrictions on access to the work on the original site, in which case the link would have the effect of extending the public for the initial communication and of giving a new public access to it. (25)



40. That analysis was quickly confirmed in so far as concerns hyperlinks using the framing technique. (26)

41. Subsequently, the Court explained that the analysis described above applied only where the work was initially communicated with the consent of the copyright holder. (27)

42. As regards links to websites on which works are made available to the public without the authorisation of copyright holders, the Court held that they constituted a communication to the public within the meaning of Article 3(1) of Directive 2001/29 if the user who posted the link knew or ought to have known that that link leads to a work made available to the public without the authorisation required by copyright. (28) Where that user is acting for financial gain, knowledge of the facts must be presumed, although that presumption is rebuttable. (29)

43. To summarise the case-law relating to hyperlinks, where a link leads to a work which has already been made freely available to the public with the authorisation of the copyright holder, that link is not considered to be a communication to the public within the meaning of Article 3(1) of Directive 2001/29, since, although it constitutes an act of communication, the link is directed at a public which had already been taken into account by the copyright holder when the work was initially made available, that is to say all internet users.

### *Critical analysis of the case-law relating to hyperlinks*

44. The case-law approaches which I have just considered are not always immediately obvious and may raise some questions, in particular in relation to three major issues: the classification of links as ‘acts of communication’ (of making available), the introduction of the subjective criterion of knowledge of the facts into the definition of the concept of ‘communication to the public’ and the application to the internet of the ‘new public’ criterion. (30)

#### *The classification of hyperlinks as ‘acts of communication’*

45. As I recalled in point 36 of this Opinion, the Court held in the judgment in *Svensson and Others* (31) that a hyperlink to a protected work accessible on the internet constituted an act of communication of that work for the purposes of the right of communication to the public as governed by Article 3(1) of Directive 2001/29. However, that statement is, from a technical perspective, far from self-evident. (32)

46. Admittedly, I do 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. (33) In particular, the most widespread form of communication on the World Wide Web, that is to say the making available to the public of works in a manner which allows each person to access them at a place and time individually chosen by him or her, presupposes no transmission. In that situation, a work is made available to the public, that is to say stored on the server which hosts the website in question, and the public is able to access that site using its URL address. A form of transmission of the work occurs only after a member of the public accesses that server, because when he or she does so the webpage visited is temporarily reproduced on his or her client computer.

47. However, the Court has pointed out that, for there to be an act of communication, it is sufficient that a work is made available to the public, irrespective of whether members of the public actually access it. (34) In other words, Article 3(1) of Directive 2001/29 applies as soon as a work is made available to the public, even before the actual transmission of the work takes place.

48. That said, in the case of a hyperlink to a work which is already freely accessible on the internet, the making available of the work to the public occurs on the original website. The link, for its part, is merely an instruction given to the web browser to access the work by following the URL address contained in that link. The user is thus redirected to another website. The connection (and thus the transmission of the work)

then occurs directly between the user's client computer and the server(s) hosting the target site of the link, with the site containing that link playing no intermediary role. (35) Moreover, the URL address to which a link leads is generally displayed by right-clicking on that link. It is then possible to copy that link to the address bar of the browser in order to access the same location as that referenced by the hyperlink. The link merely automates that process, thereby allowing access to another website 'in one click'.

49. However, the Court went beyond that purely technical analysis in holding that a hyperlink constitutes an act of communication in that it provides 'direct access' to the work contained on another website. (36)

50. In my view, that functional approach takes into account elements other than mere fact that a connection with the targeted website is made automatically. What is much more important, and what makes hyperlinks so powerful as the building blocks of the World Wide Web, is the fact that the link contains the URL address of the targeted webpage, thus relieving the user from having to search for that address (or the link is the result of the user's search, as is normally the case with internet search engines). Although a resource may be *available* on the internet, it is *accessible* only through its URL address. If users are not aware of that address, the availability of the resource is purely theoretical. The most effective way to transmit the URL address of a webpage is to create a hyperlink to that page. It is not by chance that the 'telephone directories' of the World Wide Web, namely search engines, use the technique of hyperlinking.

51. It is therefore 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, in my view, the classification of hyperlinks as 'acts of communication' within the meaning of Article 3(1) of Directive 2001/29.

#### *The subjective element in communication to the public*

52. It should be recalled that the rule laid down by the Court in the judgment in *Svensson and Others*, (37) according to which a hyperlink to a work freely accessible on the internet does not constitute a communication to the public within the meaning of Article 3(1) of Directive 2001/29, is applicable only where the work in question has been made available to the public with the authorisation of the copyright holder.

53. If not, that is to say where the work has been made available without the authorisation of that rightholder, the legal situation resulting from the Court's case-law is much more complex. The Court has held that, in such circumstances, the question of whether there is a communication to the public depended on whether the user who posted the link knew or ought to have known that the work targeted by that link was made available to the public without the consent of the copyright holder. In the case of links provided for financial gain, knowledge of the facts must be presumed, although that presumption is rebuttable. (38)

54. The Court drew that distinction with the legitimate aim of preserving the fair balance between, on the one hand, the interests of copyright holders and, on the other hand, the protection of the interests and fundamental rights of users of protected objects. (39) Nevertheless, that solution is unorthodox from the point of view of general copyright rules, in particular in that it introduces a subjective criterion (knowledge of the facts) into the definition of an objective element, namely the scope of the acts subject to the exclusive right of the author. (40)

#### *The 'new public' criterion*

55. Although application of the 'new public' criterion in order to assess whether there has been a communication to the public of works protected by copyright was contemplated even before the entry into force of Directive 2001/29, (41) it was only after the entry into force of that directive that that criterion was adopted by the Court, first of all in the context of the retransmission of television broadcasts. (42) According to the current formulation of that criterion, a secondary communication of a protected work using the same technical means as the initial communication must be directed at a new public, that is to



say, a public which was not taken into account by the copyright holder at the time of the initial communication, in order to be categorised as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 and to be therefore subject to that rightholder’s exclusive right. (43)

56. Applied to the internet, that criterion is based on the assumption, which is a kind of legal fiction, (44) that a work, as soon as it is made freely available to the public on the World Wide Web, can be viewed by any internet users and that all those users must therefore be regarded as having been taken into account by the copyright holder as a public when the work was initially made available. (45) I call this a legal fiction because that assertion, while true in theory, overlooks the fact that the cyberspace formed by the World Wide Web is quite simply too vast for anyone to be able to know about, let alone access, all its resources.

57. That assumption is not only based on an artificially constructed and fictitious premiss but, taken to its logical conclusion, results in exhaustion of the right of communication to the public, though this is expressly excluded by Article 3(3) of Directive 2001/29. As I shall demonstrate below, that assumption now seems to be outdated in the Court’s case-law.

### ***A new reading of the case-law relating to hyperlinks***

58. That analysis of the Court’s case-law on hyperlinks leads me, without calling that case-law into question, to propose an adaptive reading of it, in line with the Court’s more recent case-law.

59. Although the Court uses conventional copyright terminology, defining acts subject to the exclusive right of the author and distinguishing them from those not subject to that right, it does not approach copyright from a theoretical perspective. When the Court is required to provide an interpretation of EU law, in the present case Directive 2001/29, though the requested interpretation is abstract and therefore applicable *erga omnes*, it is nevertheless based on a specific dispute referred to the Court by a national court, and the Court must give an answer which enables the national court to establish a party’s liability for copyright infringement. The Court must therefore set out the conditions governing that liability, a task which goes far beyond a simple definition of the parameters of the act covered by the author’s exclusive rights. A more restrictive approach might jeopardise the effectiveness of the harmonisation brought about by Directive 2001/29, leaving the national courts to make necessarily divergent assessments of the decisive elements of such liability. (46)

60. Accordingly, the Court has ruled that both the making available and management, on the internet, of a sharing platform for protected works in the context of a peer-to-peer network and the sale of a multimedia player on which there are pre-installed hyperlinks to websites – that are freely accessible to the public – on which copyright-protected works have been made available to the public without the consent of the copyright holders fall within the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, (47) even though in both cases the actual making available of the works to the public took place at an earlier stage. The Court based its decision on the essential role of the user concerned and his or her full knowledge of the facts when giving effective access to those works. (48)

61. That approach may also lead to a reduction in liability. In a different sphere of copyright law (more specifically, in the sphere of related rights), the Court has held that the phonogram producer’s right to reproduce and distribute his or her phonogram, recognised in Article 2(c) of Directive 2001/29, does not allow him or her to prevent another person from taking a sound sample of his or her phonogram for the purposes of including that sample in another phonogram, if that sample is included in the phonogram in a modified form unrecognisable to the ear, (49) although any use of a sample of a phonogram clearly requires a reproduction of that phonogram.

62. As regards hyperlinks, the Court’s approach focusing on defining the conditions governing liability for copyright infringement explains, in particular, the introduction of the subjective element into the analysis of the act potentially giving rise to that infringement. (50)

63. The ‘new public’ criterion, which, as I have pointed out, has allowed the Court to hold that hyperlinks did not, in principle, require the authorisation of the copyright holder, (51) must, in my view, be understood in the same vein.

64. It will be recalled that, according to that criterion, a secondary communication of a work to the public using the same technical means and directed at the same public as that which was taken into account by the copyright holder at the time of the initial communication does not require fresh authorisation. (52) This is true of hyperlinks which, in using the same technical means, namely the World Wide Web, are directed at the same public as the initial communication, that is to say all internet users, if that initial communication was made without restrictions on access.

65. However, first of all, the Court itself has already noted that that solution might be justified not so much by the absence of an act of communication, because such a communication exists in its view, but by the fact that, since the copyright holder is familiar with the architecture of the internet (or, more precisely, of the World Wide Web), he or she is deemed, in authorising the making available of the work to the public without restriction, to have authorised also the posting of hyperlinks to that work. The Court has ruled that, while any act subject to an exclusive right of the author must receive his or her prior consent, Directive 2001/29 does not require that such consent must necessarily be given expressly. (53)

66. Then, referring expressly to the judgment in *Svensson and Others*, (54) the Court stated that ‘in a case in which it was questioned about the concept of a “new public”, the Court held that, in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his or her articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, *that author could be regarded, in essence, as having authorised the communication of those works to the general internet public*’. (55)

67. It remains necessary to examine whether that implicit consent on the part of the copyright holder can indeed apply to ‘the general internet public’. It seems to me that it cannot.

68. The limits of that assumption were highlighted in the case that gave rise to the judgment in *Renckhoff*. (56) That case was concerned not with a hyperlink to a protected work, but with a work which was downloaded from a website on which it had been made available to the public with the authorisation of the author and which was posted online on another website without his authorisation.

69. However, if the ‘new public’ criterion were to be applied literally, (57) that act would not be covered by the exclusive right of the copyright holder, because as long as the work in question was accessible with the authorisation of that rightholder on the first website (or on any other website, not necessarily the website from which the work was copied), the making available of the work on the second website was not directed at a new public, since all internet users were taken into account when the work was first made available. Thus, the copyright holder would lose control over the dissemination of his or her work, which, as the Court recognised in its judgment, would lead to the exhaustion of his or her exclusive right. (58)

70. Accordingly, the Court ruled that the scope of the ‘new public’ criterion should be limited by modifying the definition of the public which is supposed to have been taken into account by the copyright holder when the work was initially made available. The Court therefore held that that public was composed solely of users of the website on which that initial making available of the work took place ‘and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users’. (59)

71. Thus, following the judgment in *Renckhoff*, (60) the legal fiction that all (actual and potential) internet users are targeted whenever a protected work is made freely available to the public on the internet is similarly no longer tenable in the context of hyperlinks. It not only leads to de facto exhaustion on the internet of the right of communication to the public, but is also logically irreconcilable with that judgment.

72. Indeed, imagine the implications of the judgment in *Svensson and Others* (61) in a situation similar to that of the case that gave rise to the judgment in *Renckhoff*. According to the judgment in *Renckhoff*, the act of downloading the protected work from a website on which it had been made available to the public with the authorisation of the copyright holder and of posting that work on another website infringes the rights of that rightholder. However, the posting on the second website of a link to the same work available on the first website, even using the framing technique, so that the work appears as if it were posted on the second website, would not be subject to the author's exclusive rights and would therefore not infringe those exclusive rights. (62) However, in both cases the public to whom the work was initially made available is the same: all internet users!

73. It is therefore necessary to conclude, as did the Court in the judgment in *Renckhoff*, (63) 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. Such a definition of the public taken into account by the copyright holder actually reflects, in my view, the reality of the internet. Although a freely accessible website may in theory be visited by any internet user, in practice the number of potential users likely to access it, while admittedly variable, is approximately determined. The copyright holder takes into account the extent of that circle of potential users in authorising the making available of his or her work. This is important in particular when the work is made available under a licence, since the potential number of presumptive visitors may be an important factor in determining the price of the licence.

74. That website may, and in most cases will, be accessed by means of a hyperlink. The public of the site containing the link thus becomes the public of the target site of the link, that is to say the public targeted by that copyright holder.

75. To summarise, the case-law of the Court concerning hyperlinks, or more generally the communication of works to the public on the internet, must be understood, in my view, as meaning that a copyright holder, in giving consent for his or her work to be made freely available to the public on a webpage, takes into account the entire public likely to access that webpage, including by means of hyperlinks. Consequently, those links, while constituting acts of communication, since they give direct access to the work, are in principle covered by the authorisation given by the copyright holder at the time of the initial making available of the work and do not require additional authorisation.

### ***Application in cases involving the embedding in webpages of works from other websites***

#### *The scope of the question referred for a preliminary ruling*

76. It should be recalled that, by its question referred for a preliminary ruling, the referring court asks whether the embedding, by way of framing, in a website of a protected work made freely available to the public on another website with the authorisation of the copyright holder constitutes a communication of that work to the public, within the meaning of Article 3(1) of Directive 2001/29, where it circumvents protection measures against framing taken or imposed by the copyright holder on the second website.

77. Certain terminological aspects must be clarified at the outset. Internet terminology has not been established with Cartesian clarity and the terms 'framing', 'inline linking' and 'embedding' are sometimes used synonymously. In its case-law, the Court has also adopted the French term 'transclusion' ('framing'), which seems to be capable of denoting all those techniques. Although the referring court refers in its question to framing, it is reasonable, in my view, to assume that the issue in the main proceedings concerns, or may concern, all means of incorporating into a webpage a resource from another website.

78. Such a result can be achieved using techniques other than framing, which consists in dividing the screen into several parts, each of which may display the content of another website. For example, inline linking makes it possible to embed an element, usually a graphics or audiovisual file, in a webpage from another website. (64) The embedded element then appears on the screen automatically, without the user having to click on the link. That automatic process seems to me to be much more important from the point of view of copyright than whether or not framing is used. I shall develop this idea in more detail below.

79. There are technological protection measures against those types of links. Those measures include, in particular, the insertion into the HTML code for the protected webpage of instructions which prevent the link from working, 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.

80. The question referred for a preliminary ruling must therefore be understood as relating to whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the embedding of a work – which is freely available to the public on one website with the consent of the copyright holder – in another website by means of hyperlinks, so that the work appears on the latter website as if it were an integral part of that website, constitutes a communication to the public within the meaning of that provision, where that embedding circumvents protection measures against such use of the work.

### *Clickable links*

81. As I have pointed out, according to the settled case-law of the Court, the act of posting a hyperlink to a work protected by copyright made freely available to the public on another website with the consent of the copyright holder constitutes an act of communication of that work within the meaning of Article 3(1) of Directive 2001/29.

82. For that reason, I do not concur with SPK's assessment that it follows from the Court's case-law that hyperlinks to protected works, including those using framing or similar techniques, fall outside the exclusive rights of copyright holders, so that there can never be a communication to the public, even if those rightholders apply protection measures against the use of such links.

83. It is clear from the Court's case-law that the posting of a hyperlink is indeed a relevant act from the point of view of copyright, in that it gives direct access to a work. However, that act does not require additional authorisation by the copyright holder because, in so far as that act targets the public which had already been taken into account by the copyright holder when the work was initially made available, it is covered by the authorisation given by that rightholder at the time of that initial communication.

84. As regards the definition of the public which was taken into account by that rightholder, I propose that, in the light of all the relevant case-law of the Court, that public be found to be composed of the public, including the potential public, of the website on which the work was initially made available. (65)

85. That public can access that site in various ways, in particular by means of hyperlinks. That observation does not raise any problem in the case of simple links to the site's home page. The same is true, in my view, in the case of deep links to specific pages of a site. As a matter of fact, nobody can expect that his or her work will always be read or viewed starting with the cover page or the opening credits. Moreover, this is not so much an issue of access to the works in the strict sense, but of the circumstances attending that access, such as the omission of any advertising which is associated with the work and provides income to the copyright holder. Nevertheless, this should not determine the extent of the exclusive rights of that rightholder.

86. The use of framing and, in particular, of inline frames raises more delicate questions. In that case, it is difficult to determine whether the public accessing one website from another site in that manner should be regarded as having been taken into account by the copyright holder when the work was initially made available on the first website.

87. In my view, it is quite clear that the answer must be in the affirmative where the object framed is an entire website or an entire page of that website. It is true that such use of a third party's website may constitute abuse and cause certain problems from the point of view of the author's moral rights, trade mark law or fair competition. However, from the point of view of access to the work, and therefore of the right of communication to the public, that situation is not diametrically opposed to that of conventional links. Users indeed access the target website of the link and, although that website is displayed within the page

containing the link, they constitute the public of that site, that is to say the public which was taken into account by the copyright holder when the work was made available on that site.

88. The case of links to specific elements of a webpage (for example images or audiovisual files) is more problematic, in particular when the use of framing or of an inline frame makes the element appear to be an integral part of another website. However, in that situation also, by clicking on the link, the user establishes a connection with the original site of the linked element, thus causing that element to be transmitted. That user must therefore be regarded as part of the public of the original site, that is to say the public which was taken into account by the copyright holder when he or she authorised the making available of his or her work on that site.

89. Moreover, 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. Although the authorship of that content may be concealed to a greater or lesser extent, a user reasonably aware of the way in which the internet operates should expect that the content targeted by the link may come from a source other than the webpage he or she is visiting. The copyright holder may then rely on moral rights or, where appropriate, rights in other areas of intellectual property, such as trade mark law, to combat possible abuses. (66)

90. It is, in my view, also difficult to draw a clear dividing line here, since situations can vary greatly: the framing of websites or webpages whose only significant content consists of protected works or which themselves constitute such works, deep links to protected objects which open in a separate browser window with or without an indication of the address of the original site, simple links to sites whose home page or the site itself constitutes a protected work, etc. The analysis of those different situations would require case-by-case factual assessments, with uncertain results. The circle of persons which is able to access the copyright holder's work and which he or she is deemed to have taken into account when making it available cannot depend on such factual assessments. (67)

91. I am therefore of the view that, in the case of works protected by copyright made freely available to the public on the internet with the authorisation of the copyright holder, the public accessing such works by means of clickable links using the framing technique, including inline frames, must be regarded as forming part of the public which was taken into account by that rightholder when those works were initially made available. (68) Of course, that assessment does not apply in cases where links circumvent access restrictions or in cases where hyperlinks link to works made available to the public without the copyright holder's authorisation, in which cases the solutions set out, respectively, in the judgments in *Svensson and Others* (69) and *GS Media* (70) apply.

### *Embedding*

92. I shall now examine the situation in which works protected by copyright contained on other websites are embedded in a webpage in such a way that those works are automatically displayed on that webpage as soon as it is opened, without any further action on the part of the user (inline links). I shall describe that technique as 'automatic links'. The situation of automatic links is in my view different in several respects from that of clickable links, including those using the framing technique. (71)

#### *– Automatic links as communication to the public*

93. An automatic link makes a resource appear as an integral element of the webpage containing that link. For a user, there is therefore no difference between an image embedded in a webpage from the same server and one embedded from another website. Although, in the case that gave rise to the judgment in *Renckhoff*, (72) the owner of the site on which the secondary communication had taken place had posted an automatic link to the image in question instead of reproducing it and uploading it from his own server, the result for the public was the same. It is only 'behind the scenes' that the mode of operation differs.

94. Automatic links therefore make it possible to exploit, without authorisation, another person's work on the internet in a way which is, in practice, tantamount to reproducing it and independently making it



available to the public. At the same time, the use of hyperlink technology serves as a cover which gives to that practice an appearance of legality, since the work is posted online, technically speaking, solely from the server hosting the original site. (73)

95. However, in the case of an automatic link, the public which enjoys the work can under no circumstances be regarded as constituting the public of the original site of that work. Indeed, for the public, there is no longer any link with the original site: everything takes place on the site containing the link. It is therefore the public of the latter site which benefits from the work. It cannot be presumed, in my view, that the copyright holder took that public into account when authorising the initial making available of the work, unless there is to be a return to an interpretation of the public as consisting of all internet users, (74) which conflicts with the judgment in *Renckhoff*. (75) However, in so far as the effect of an automatic link is the same as that of a reproduction made available to the public independently, I see no reason to treat them differently. Such a difference in treatment would render ineffective both the approach laid down in the judgment in *Renckhoff* and the author's exclusive right, which is preventive in nature, if, instead of having to reproduce a work and post it online, it were possible simply to embed it in one's own website by means of an automatic link. (76)

96. This is particularly true since the situation of an automatic link also differs from that of a clickable link from the point of view of the interpretation of the right of communication to the public as governed by Article 3(1) of Directive 2001/29.

97. By way of reminder, that exclusive right covers acts of making the work available to the public in such a way that members of the public may access it at a chosen place and time. This is the usual method of communication to the public on the World Wide Web. The work is therefore made available on a website and users initiate the transmission of the work when they access that site. In the case of clickable links, it is the act of activating the link and, therefore, the user's action which initiates that transmission.

98. In the case of an automatic link, transmission from the original site of the work is initiated by means of the automatic process written into the HTML code of the site containing the link. That site thus gives rise to the communication. Its owner therefore plays a decisive role in communicating the linked work to a public which was not taken into account by the copyright holder when the work was initially made available, namely the public of his or her own website. (77) He or she thus carries out an additional act of communication (act of transmission), independent both of the making available of the work to the public, which takes place on the original site, and of the act of giving direct access to that work, represented by the act of posting a link. That additional act requires the authorisation of the copyright holder of the work in question.

99. In the case of automatic links, it is true that, unlike the situation in the case that gave rise to the judgment in *Renckhoff*, the copyright holder in principle retains ultimate control over communication of the work, since he or she can remove that work from the original site, thus rendering obsolete any link to it. (78)

100. However, first, as the French Government rightly points out, presenting the copyright holder with a clear-cut choice between tolerating the unauthorised use of the work by a third party or abandoning his or her own use of the work runs counter to the whole idea of copyright. The purpose of copyright is indeed to allow the copyright holder to choose freely how to exploit the work and to derive income from it, without his or her exploitation of that work leading to its subsequent unauthorised use.

101. Secondly, the copyright holder is not always in a position to remove a work from a website, as its use may be subject to a licence agreement. (79) That copyright holder would therefore be obliged to revoke his or her consent for the exploitation of the work, with all the ensuing legal and financial consequences.

102. Thirdly and lastly, loss of control by the copyright holder over his or her work is in no way a requirement for a finding of the existence of an act falling within the rightholder's exclusive rights and, therefore, of an infringement of those exclusive rights where that act is carried out without his or her



authorisation. In particular, in the case of communication to the public, secondary communication may constitute such an act, while being dependent on the initial communication carried out by the copyright holder or with his or her authorisation. (80)

103. That theoretical control exercised by the copyright holder over the initial making available of the work cannot therefore, in my view, determine the assessment, from the point of view of copyright, of the subsequent use of that work by means of an automatic link.

104. The same applies to the fact that it is relatively easy to render obsolete an automatic link by modifying the URL address of the work in question, for example by changing the name of the file containing that work. First, the copyright holder does not always control the initial making available of the work, in particular when it is made available on a licensee's website. He or she is therefore not always free to change the address of the work, just as he or she cannot remove it from the website. Secondly, that measure is possible only once use of the work by means of an automatic link has been detected, whereas the author's exclusive rights are preventive in nature, as pointed out by the Court in its case-law. (81)

105. For those reasons, it is necessary, in my view, to draw a distinction between 'clickable' links, to which the Court's case-law refers, and automatic links, which automatically display the resource to which the link leads on the webpage containing that link, without the need for the user to take any action. Where those automatic links lead to works protected by copyright, there is, from both a technical and a functional point of view, an act of communication of the work in question to a public 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.

– *The situation of copyright holders*

106. Such an interpretation would give copyright holders legal instruments to protect against unauthorised exploitation of their works on the internet. Accordingly, this would strengthen their negotiating position when licensing the use of those works. Indeed, who would agree to pay an appropriate price for the use of a work on the internet if it were possible and perfectly lawful to post without charge an automatic link to the author's website or to any other website on which the work in question is made available to the public?

107. That solution would also provide the flexibility necessary in cases in which copyright holders wish to allow automatic links to their works. Some authors publish their works on the internet with a view to the widest possible distribution of those works, without seeking to obtain income directly from them. Those authors could then make their work available on the internet together with a licence specifying the authorised uses (for example, commercial or non-commercial use) and the conditions of such use (for example, indication of the author's name), as with the 'Creative Commons' licensing system. (82) Content-sharing platforms on the internet already regulate that issue in their policies on the re-use of content downloaded by their users, allowing a varying degree of freedom to those users in that regard. (83) While controversy sometimes arises as to whether those licences cover automatic linking or framing, the source of that controversy is the uncertainty surrounding the status of those techniques from the point of view of copyright. Once that uncertainty has been resolved, the platforms will be in a position to adapt their terms of service accordingly. (84)

108. Moreover, some automatic links to works made available to the public on the internet would likely fall within one of the exceptions to the right of communication to the public provided for in Article 5(3) of Directive 2001/29. I am thinking here in particular of the exceptions for quotations and for caricature, parody and pastiche (respectively, Article 5(3)(d) and (k) of Directive 2001/29), which could cover a large number of current practices on the internet. Those uses must, of course, fulfil the requirements for the application of those exceptions.

– *The order in BestWater International*

109. Lastly, the interpretation proposed above may appear not to be fully consistent with the solution adopted in the order in *BestWater International*. (85) I must, however, make the following remarks concerning that order.

110. That order is based on the statement, contained in the judgment in *Svensson and Others*, that the finding that a clickable link does not constitute a communication of the work to a new public ‘cannot be called in question were the referring court to find ... 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’. (86) In the order in *BestWater International*, that situation was treated ‘essentially’ in the same way as that of an inline link. (87)

111. However, as I have explained in points 93 to 105 of this Opinion, there is a substantial difference between the embedding of a resource using a technique such as inline linking and clickable links, even when they use framing. The judgment in *Svensson and Others* (88) concerns only clickable links. That judgment therefore could not reasonably serve as the basis for an order concerning inline linking. Moreover, it appears that the dispute in the main proceedings in that case concerned a clickable link. The operative part of the order in *BestWater International* refers not to inline linking, but only to framing. (89)

112. Furthermore, the referring court’s wording of the question in the case which gave rise to the order in *BestWater International*, (90) and subsequently that order, failed to take into account certain factual circumstances which, had they been taken into account, should have led to the adoption of a different solution in that case. First, that case concerned the embedding in a website of an audiovisual work posted online on the YouTube platform. However, as I have mentioned, (91) the terms of service of that platform contain an express licence for the use by third parties of the content posted on that platform. To my knowledge, that was already the case at the time of the facts in the main proceedings in the case in question. Secondly, the work in question had been made available to the public on that platform without the authorisation of the copyright holder. (92) It is therefore possible that the case should have been decided in accordance with the principles subsequently set out by the Court in its judgment in *GS Media*. (93)

113. I am therefore of the view that the order in *BestWater International* (94) should not be regarded as a binding precedent as regards the assessment of automatic links in the light of the right of communication to the public as provided for in Article 3(1) of Directive 2001/29.

– *The balance between the various interests at stake*

114. The difference in treatment which I propose to apply, on the one hand, to clickable links using the framing technique and, on the other hand, to automatic links as I have defined them above may not appear to be clearly justified. Indeed, once a user has clicked on the link, the result of those two techniques is, from his or her point of view, analogous: the object of the link is displayed as an integral part of the webpage containing the link. It is therefore reasonable to ask whether clickable links using the framing technique should not, like automatic links, be regarded as acts of communication to the public where those clickable links lead to works protected by copyright.

115. However, apart from the technical and functional differences between those two types of links described in points 93 to 98 of this Opinion, it seems to me that that distinction enables the best possible achievement of one of the objectives of Directive 2001/29, that is to say the objective of ensuring a fair balance between the interests of copyright holders and the interests of users. (95) It is often difficult for a user to know with certainty whether the object to which he or she has posted a link on his or her webpage constitutes a work protected by copyright. Even a simple link is not without some risk, as the home page of a website or the entire website may constitute such a work. That difficulty could have the effect of discouraging internet users, to an extent which is in my view disproportionate to the legitimate interests of copyright holders, from using the technique of framing, which is widespread on the internet and is very useful to its operation and to the attractiveness of many websites.

116. By contrast, it should be noted, first, that the distinction between clickable and automatic links is easily perceptible to any internet user and should not create any uncertainty. Moreover, automatic links are rarely used to embed entire webpages or websites. That technique is normally used to embed graphics and audiovisual files.

117. Secondly, the Court's observation that hyperlinks contributed to the sound operation of the internet by enabling the dissemination of information in that network (96) is undoubtedly true of clickable links. (97) However, I do not think that the same argument can be made in respect of automatic links. On the contrary, those links 'hoover up' content present on the World Wide Web, freeing users from having to 'surf' between different websites. Those links therefore contribute to the 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.

118. It seems to me, therefore, that the balance between the various interests at stake justifies a difference in treatment between clickable links, including those using the framing technique, and automatic links. While it may be presumed that copyright holders have taken clickable links into account when authorising the making available of their works on the internet, they cannot be required to tolerate automatic links.

119. Accordingly, I propose that Article 3(1) of Directive 2001/29 be interpreted as meaning that the embedding in a webpage of copyright-protected works freely available to the public with the authorisation 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.

120. This applies irrespective of whether the work is embedded in the form of a thumbnail or whether, as in the main proceedings, the embedded object is a miniature of the original work. The change in size plays no role in the assessment of the existence of an act of communication to the public as long as the original elements of the work are perceptible. (98) Moreover, the size of an image on a webpage is relative, since it depends on the resolution of the image and the size of the screen on which it is displayed. The display size is adapted not only to the design of the webpage but also usually to the screen size of the device on which that page opens. However, images are rarely displayed at their actual size, since for contemporary files that size often exceeds the size of a standard computer screen. It is therefore difficult to determine what constitutes a thumbnail and what constitutes the 'normal' size of the image.

### *Protection measures*

121. However, the interpretation which I propose to give regarding automatic links does not fully answer the question raised by the referring court. Treating automatic links as acts of communication to the public does not resolve the issue, raised in the question referred, of whether it is also necessary to regard the use of framing involving clickable links as communication to the public where those links circumvent technological protection measures against framing.

122. According to VG Bild-Kunst, the French Government and the Commission, that question should be answered in the affirmative. The referring court also takes that view.

123. I must admit that that solution seems striking at first glance. It certainly has the merit of being clear. As the French Government observes, the use of technological protection measures clearly indicates the copyright holder's intention not to allow public access to his or her work by means of hyperlinks using the framing technique. That expression of intention delimits with certainty the circle of persons taken into account by that rightholder when the work was initially made available.

124. I think, however, that there are several major arguments against such an interpretation.

125. First, in many situations where protected works are made available to the public on the internet (or, more precisely, on the World Wide Web), the copyright holder is not in a position to decide upon the use of

technological protection measures. That is the case, in particular, for works posted online under licence, that is to say not by the copyright holder him- or herself, but by a third party with his or her permission. (99) That is also the case for works posted online on various sharing platforms, whose users control neither the content protection policy nor the use of the technological protection measures for that content. Lastly, the present case shows that collective management organisations may require the use of such protection measures without being expressly mandated by their members.

126. In all those situations, I do not see how whether or not technological protection measures are used can be regarded as reflecting any intention on the part of a copyright holder as regards access to his or her work by means of hyperlinks using the framing technique.

127. Secondly, the proposed solution is based on an analogy with the solution put forward by the Court in the judgment in *Svensson and Others*, according to which ‘where a clickable link makes it possible for users of the site on which that link appears to circumvent 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, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public’. (100) In other words, a hyperlink requires authorisation by the copyright holder only where it widens the circle of the public having access to the work as compared to the public which was taken into account by that rightholder when the work was initially made available, in particular by circumventing the access restrictions employed when it was initially made available.

128. However, there is a fundamental difference between the access restrictions at issue in that judgment and protection measures against framing. Access restrictions actually limit the circle of persons capable of having access to the work in question. Persons who gain access to it by circumventing those measures therefore constitute a new public, that is to say a public which was not taken into account by the copyright holder when he or she made his or her work available. While it is true that that copyright holder does not always have control over the use of those measures, their use normally constitutes an element in the negotiation of the price of the user licence, since it determines the expected income from such use and, therefore, the value of the licence. The copyright holder therefore takes those restrictions into account when agreeing a price for the licence. As regards cases where copyright holders themselves make works available, those copyright holders normally have a certain degree of control over the circle of persons having access to the works. That is true, in particular, of ‘bespoke’ websites, but also of sharing platforms which usually make it possible, at the very least, to specify whether an online posting is ‘public’ or ‘private’. Accordingly, it is in my view permissible to take the view that the choice made in that regard by the copyright holder actually reflects, at least in most situations, his or her intention in so far as concerns the public which he or she had taken into account when the work was initially made available.

129. The situation is quite different in the case of protection measures against framing. Those measures restrict neither access to a work nor even a means of accessing it, but only a manner of displaying it on a screen. They often cause a browser to refuse to open the target page of the link in a frame and then either offer to open that page in a new window or open it automatically in place of the page containing the link. The link then behaves like a standard hyperlink. In those circumstances, there can be no question of a new public, because the public is always the same: the public of the website targeted by the link. There is therefore no analogy with measures restricting access to the work as regards the assessment of the existence of a new public. Thus, quite apart from the fact that the use of such measures only rarely reflects the intention of the copyright holder, those measures do not determine the circle of persons taken into account as the potential public for which the work was made available. The possible circumvention of those measures therefore does not widen that circle and accordingly cannot constitute an act of communication to the public under the ‘new public’ doctrine.

130. Thirdly and lastly, the solution of linking the scope of the author’s exclusive rights to the application not of technological measures to restrict access but of technological measures to protect against certain

practices on the internet would, in my view, push EU copyright in a dangerous direction. Such a solution would in fact mean that the application of technological protection measures would be a prerequisite for the legal protection conferred by copyright and would run counter to the principle that the protection conferred by copyright is unconditional. (101) The Court has already expressly rejected the idea that the protection conferred by the right of communication to the public could be made conditional on whether the copyright holder has limited the ways in which internet users can use the work. (102)

131. In my view, it is preferable to delimit with certainty the scope of the author's exclusive rights and to permit opt-out solutions, such as those described in point 107 of this Opinion, rather than to transform the copyright system, as far as online uses are concerned, into an opt-in system subject to the application of technological protection measures. The objectives of Directive 2001/29 of, on the one hand, providing a high level of protection for rightholders and, on the other hand, ensuring a fair balance between the interests of those rightholders and the interests of users (103) will thus be better achieved.

132. For all the reasons which I have set out above, I propose that the question referred for a preliminary ruling be answered to the effect that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the embedding of a work – which is made freely available on a website with the consent of the rightholder – in the website of a third party by means of framing 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.

#### *Article 6 of Directive 2001/29*

133. It could still be relevant, for the resolution of the dispute in the main proceedings, to determine whether technological protection measures against the embedding in webpages of works contained on other websites are themselves eligible for protection – legal protection, this time – pursuant to Article 6 of Directive 2001/29.

134. Under that Article, Member States are obliged to ensure legal protection against the circumvention in full knowledge of the facts of any effective protection measures. Protection measures for the purposes of that provision are, inter alia, technologies designed to prevent or restrict acts which are not authorised by copyright holders. Those measures are to be deemed effective where they give rightholders control over the use of a work, through the application, inter alia, of any process of transformation of the work.

135. It appears that protection measures against the embedding of works from other websites in principle fulfil those requirements. Those measures are technologies which, through a process of transformation of the work, that is to say of the code of the webpage containing that work, give the copyright holder control over use of the work in the form of its embedding in another website. While those measures cannot completely prevent such use, because of the existence of 'countermeasures', they can certainly limit it.

136. The Court has ruled, however, that the legal protection referred to in Article 6 of Directive 2001/29 applies only in the light of protecting the copyright holder against acts which require his or her authorisation. (104) I propose that the Court should rule that the embedding of works from other websites by means of clickable links using the framing technique does not require the copyright holder's authorisation, since he or she is deemed to have given it when the work was initially made available. Protection measures against such acts, though lawful, are not eligible for protection under Article 6 of Directive 2001/29.

137. By contrast, I propose that the embedding of works from other websites by means of automatic links (inline linking) requires the copyright holder's authorisation. Technological protection measures against such embedding therefore fall within the scope of Article 6 of Directive 2001/29.

138. I therefore propose that technological protection measures against the embedding in a webpage of copyright-protected works freely available to the public with the authorisation of the copyright holder on other websites, where those works are embedded in such a way that they are automatically displayed on



that webpage as soon as it is opened, without any further action on the part of the user, should be regarded as constituting effective protection measures within the meaning of Article 6 of Directive 2001/29.

## Conclusion

139. In the light of all the foregoing, I propose that the Court should answer as follows the question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany):

- (1) 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 must be interpreted as meaning that the embedding in a webpage of copyright-protected works freely available to the public with the authorisation 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.
- (2) That article must be interpreted as meaning 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.
- (3) Technological protection measures against the embedding in a webpage of copyright-protected works freely available to the public with the authorisation of the copyright holder on other websites, where those works are embedded in such a way that they are automatically displayed on that webpage as soon as it is opened, without any further action on the part of the user, constitute effective protection measures within the meaning of Article 6 of Directive 2001/29.

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[1](#) Original language: French.

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[2](#) In order to find resources on the internet, it is necessary to convert those URL addresses, by means of DNS (domain name system) servers, into the IP (internet protocol) addresses of the servers hosting those resources. That operation is irrelevant from the point of view of copyright.

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[3](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 45).

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[4](#) A hyperlink is usually structured as follows: ‘<a href=“[URL address of the target resource]”>[the description of the link on the original page]</a>’. The tag <a> indicates it is a link and the location on the page to which the link is ‘anchored’.

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[5](#) The references to the Court’s case-law in this Opinion (in electronic form) are examples of deep links.

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[6](#) Other tags exist to embed other types of files, such as ‘<audio>’, ‘<video>’, ‘<object>’ or ‘<embed>’.

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[7](#) The instruction then has the following form: ‘<img src=“[absolute URL address of the graphics file]”>’.

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[8](#) Tag ‘<iframe>’.

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[9](#) By giving the name of the inline frame as the value of the ‘target’ attribute in the HTML link description (‘<a href=“[URL address of the link]” target=“[iframe name]”>[visible link description]</a>’).

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[10](#) For technical information concerning the various functionalities of HTML, I referred, in particular, to the sites <https://developer.mozilla.org> and <https://www.w3schools.com/html>.

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[11](#) See, in particular, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 1 of the operative part).

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[12](#) OJ 2001 L 167, p. 10.

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[13](#) Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

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[14](#) OJ 2014 L 84, p. 72.

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[15](#) BGBl. 1965 I, p. 1273.

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[16](#) BGBl. 2016 I, p. 1190.

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[17](#) In this Opinion, I shall refer, for the sake of simplicity, to the right which authors have in their works. However, the same analysis applies, *mutatis mutandis*, to other protected subject matter, inter alia that listed in Article 3(2) of Directive 2001/29.

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[18](#) This is the case, in particular, with web radio.

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[19](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[20](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 18 to 20).

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[21](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 22).

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[22](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 25 to 27).

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[23](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 24 and the case-law cited).

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[24](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 27).

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[25](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 31).

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[26](#) Order of 21 October 2014, *BestWater International* (C-348/13, not published, EU:C:2014:2315, operative part).

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[27](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 43).

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[28](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 49).

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[29](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 51).

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[30](#) That case-law has also been the subject of a great deal of, more or less critical, commentary in the legal literature. That legal literature is far from unanimous, however, in particular as regards the appropriate treatment to be afforded to hyperlinks in the context of EU copyright law. See, for example, the positions adopted on that subject by three copyright associations: the International Literary and Artistic Association, *ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet*, adopted on 17 June 2015 (modifying the position on the same subject adopted on 15 September 2013); the European Copyright Society, *Opinion on the Reference to the CJEU in Case C-466/12 Svensson*, of 18 February 2013, and the International Association for the Protection of Intellectual Property, *Resolution on Linking and Making Available on the Internet*, of 20 September 2016. The divergent conclusions in those positions show that there is no single and obvious solution to the issue of the classification of hyperlinks from the point of view of the right to communicate works to the public.

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[31](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[32](#) For an in-depth analysis of this issue, see Opinion of Advocate General Wathelet in *GS Media* (C-160/15, EU:C:2016:221, points 48 to 60).

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[33](#) European Copyright Society, *op. cit.*

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[34](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 19).

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[35](#) The appearance of the result may differ for a user depending on how the webpage targeted by the link is opened: whether in place of the source page of the link, in a new browser window or in a frame within the source page (a link using the framing technique). In particular, in the latter case, a user may have the impression that he or she is connected only to the source page of the link. However, each of these situations is the same from a technical perspective – a direct connection is made to the target site of the link.

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[36](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 18).

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[37](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[38](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, operative part).

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[39](#) Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraphs 44 to 49).

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[40](#) According to the legal literature, that solution may be necessary, nonetheless, in order to mitigate the effects of a broad interpretation by the Court of the scope of the exclusive right of communication to the public (see Husovec, M., ‘How Europe Wants to Redefine Global Online Copyright Enforcement’, in Synodinou, T. E. (ed.), *Pluralism or Universalism in International Copyright Law*, Wolters Kluwer, 2019, p. 513 et seq., in particular p. 526).

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[41](#) See Opinion of Advocate General La Pergola in *Egeda* (C-293/98, EU:C:1999:403, in particular point 22).

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[42](#) Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 40).

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[43](#) See, recently, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraph 70).

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[44](#) The expression is from Karapapa, S., ‘The requirement for a “new public” in EU copyright law’, *European Law Review*, No 42/2017, p. 63, who nevertheless uses it in a slightly different context.

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[45](#) See, in the context of hyperlinks, inter alia, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 24 to 27).

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[46](#) I have already made similar comments in my Opinion in *Stichting Brein* (C-610/15, EU:C:2017:99, point 3). See, to that effect, Rosati, E., ‘When Does a Communication to the Public under EU Copyright Law Need to Be to a “New Public”?’ , SSRN (papers.ssrn.com), 2 July 2020. However, see also, for a contrary view, Opinion of Advocate General Øe in Joined Cases *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2020:586, inter alia points 94 to 106).

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[47](#) See, respectively, judgments of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, operative part), and of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 1 of the operative part).

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[48](#) Judgments of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 37), and of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 50).

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[49](#) Judgment of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624, paragraph 1 of the operative part).

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[50](#) See points 52 to 54 of this Opinion.

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[51](#) See points 37 to 39 of this Opinion.

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[52](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 24 and the case-law cited).

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[53](#) Judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraphs 33 to 35).

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[54](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[55](#) Judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 36). Emphasis added.

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[56](#) Judgment of 7 August 2018 (C-161/17, EU:C:2018:634).

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[57](#) As was indeed requested by the applicant in the main proceedings in that case (see judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 27).

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[58](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 33).

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[59](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 35). Emphasis added.

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[60](#) Judgment of 7 August 2018 (C-161/17, EU:C:2018:634).

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[61](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[62](#) Pursuant to the judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76).

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[63](#) Judgment of 7 August 2018 (C-161/17, EU:C:2018:634, paragraph 35).

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[64](#) See points 9 and 10 of this Opinion.

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[65](#) See point 73 of this Opinion.

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[66](#) Such as, for example, usurpation of authorship.

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[67](#) See, to that effect, judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 38).

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[68](#) I must also point out that the activation of a link with a ‘click’ must be distinguished from the actions which users must carry out on the internet for other purposes, for example to start a video or sound recording,

which also require a mouse click. Those actions are irrelevant from the point of view of the right of communication to the public, since they take place *after* the user has accessed the work.

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[69](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[70](#) Judgment of 8 September 2016 (C-160/15, EU:C:2016:644).

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[71](#) The hypothesis that all categories of links cannot be treated in the same way simply on account of their similar technical mode of operation is also put forward in the United States, both in the case-law and in the legal literature. The following passages owe much to Ginsberg, J. C., and Budiardjo, L. A., ‘Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?’ , *Columbia Journal of Law & the Arts*, No 42/2019, p. 417, although those authors propose that both inline linking and framing should be regarded as covered by the exclusive right of the author.

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[72](#) Judgment of 7 August 2018 (C-161/17, EU:C:2018:634).

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[73](#) I am leaving aside other undesirable effects of automatic links which do not fall within the scope of the author’s economic rights, such as the infringement of moral rights, the deprivation of advertising revenue linked to exploitation of the work, unfair competition or the phenomenon of ‘bandwidth theft’ (use of the bandwidth of the server of the website to which the link leads for the benefit of the site containing the link).

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[74](#) See points 68 to 72 of this Opinion.

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[75](#) Judgment of 7 August 2018 (C-161/17, EU:C:2018:634).

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[76](#) See, to that effect, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 30).

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[77](#) See, to that effect, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraphs 45 and 46).

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[78](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraphs 30 and 44).

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[79](#) In the case which gave rise to the judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634), the work was reproduced from a site belonging not to the copyright holder but to a licensee.

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[80](#) For example a retransmission of the television signal in hotel rooms, see judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764).

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[81](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 29).

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[82](#) Creative Commons licences are a group of licences governing the conditions of re-use and distribution of works, in particular on the internet, drawn up by a non-profit organisation of the same name established in the United States. That system provides for various licences on the basis of three criteria which may be freely combined by the author of the work when it is made available: commercial or non-commercial use, whether or not the original work can be modified and any condition governing the distribution of a derivative work under the same licence. A system of signs, incorporated into the work using HTML codes, makes it possible to inform the public of the applicable licence.

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[83](#) For example, YouTube's terms of service state: 'You ... grant each other user of the Service a worldwide, non-exclusive, royalty-free licence to access your Content through the Service, and to use that Content (including to reproduce, distribute, modify, display, and perform it) only as enabled by a feature of the Service.'

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[84](#) Such a controversy recently arose concerning another content-sharing platform, Instagram: <https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus>.

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[85](#) Order of 21 October 2014 (C-348/13, not published, EU:C:2014:2315).

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[86](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 29). Emphasis added.

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[87](#) Order of 21 October 2014, *BestWater International* (C-348/13, not published, EU:C:2014:2315, paragraph 17).

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[88](#) Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

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[89](#) Order of 21 October 2014, *BestWater International* (C-348/13, not published, EU:C:2014:2315, paragraph 5 and operative part).

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[90](#) Order of 21 October 2014 (C-348/13, not published, EU:C:2014:2315).

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[91](#) See footnote 83 of this Opinion.

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[92](#) Order of 21 October 2014, *BestWater International* (C-348/13, not published, EU:C:2014:2315, paragraph 4, last sentence).

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[93](#) Judgment of 8 September 2016 (C-160/15, EU:C:2016:644).

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[94](#) Order of 21 October 2014 (C-348/13, not published, EU:C:2014:2315).

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[95](#) Recital 31 of Directive 2001/29.

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[96](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 40 and the case-law cited).

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[97](#) See point 5 of this Opinion.

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[98](#) By contrast, the embedding of a thumbnail so small that the original elements of the work in question are not perceptible, for example to mark the location of a clickable link, would not constitute an act of communication to the public of that work.

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[99](#) That was true, I would recall, of the work at issue in the case which gave rise to the judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634).

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[100](#) Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 31).

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[101](#) Or, more precisely, is conditional only on the existence of a work understood as the expression of the intellectual creation of its author.

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[102](#) Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 36).

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[103](#) Recitals 9 and 31 of Directive 2001/29.

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[104](#) Judgment of 23 January 2014, *Nintendo and Others* (C-355/12, EU:C:2014:25, paragraph 25).