[DE] Question on copyright breach by framing submitted to CJEU

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In a decision of 25 April 2019, the Bundesgerichtshof (Federal Supreme Court - BGH) submitted the following question to the Court of Justice of the European Union (CJEU): does embedding on a third-party website a work that, with the consent of the rightsholder, is available on a freely accessible website ("framing") constitute communication to the public in the sense of Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society if the work is embedded in a way that circumvents protective measures taken or ordered by the rightsholder?

In the related proceedings, the BGH must decide whether a collecting society is entitled to make the granting of a licence to use digitised, copyright-protected works on the Internet conditional on the user taking effective technical measures to prevent so-called "framing". Framing is the embedding of content provided on one website on a different, third-party website.

The Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation), which supports the German Digital Library, offers an online culture and knowledge platform containing links to digital content owned by partner cultural and academic institutions. Since the library stores thumbnail images of this digital content, some of which are copyright-protected, the foundation wanted, on its behalf, to obtain the necessary licences from the Verwertungsgesellschaft (VG) Bild-Kunst collecting society, which is responsible for managing the relevant rights. However, the VG Bild-Kunst said it would only grant the licences if the library agreed to take technical measures to prevent the content being framed. The foundation, which refused to make such a commitment, therefore asked the courts to rule that such a clause was unnecessary.

The lower-instance courts had taken different decisions on the matter. While the district court had rejected the action as inadmissible, the appeal court had ruled that the VG Bild-Kunst should grant the licences without the disputed clause. The Bundesgerichtshof has now suspended the proceedings pending clarification of the preliminary question.

Under Article 34(1), sentence 1 of the Verwertungsgesellschaftengesetz (Collecting Societies Act), the defendant, as a collecting society, is obliged, on the

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basis of the rights it manages, to grant any person, upon request, rights of use under reasonable conditions. However, it is also obliged to safeguard and enforce the rights of the authors that it represents. In the BGH's opinion, the defendant might therefore be entitled to demand that the plaintiff take technical measures to prevent framing. However, this was only the case if the authors' right to communicate their works to the public were violated if such protective measures were circumvented in order to embed the thumbnail images, which were freely accessible to all Internet users on the plaintiff's website, on another website by means of framing. Since the BGH was unsure whether, in such a case, the right to communicate to the public, enshrined in Article 3(1) of Directive 2001/29/EC and transposed into German law by Article 15(2) of the Urhebergesetz (Copyright Act - UrhG) would be violated, it submitted the question to the CJEU.

In 2014, the CJEU decided, in the BestWater case (decision of 21 October 2014, Case no. C 348/13) that framing did not constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC if the work was not communicated to a new public and no new technical means were used. In the case at hand, however, the focus was on Article 34(1), sentence 1 of the Collecting Societies Act: whereas VG Bild-Kunst considered technical measures to prevent framing necessary in order to adequately safeguard and enforce the authors' rights, the foundation did not think the required measures were reasonable conditions in the sense of the Act because implementing them would be an expensive process.

Pressemitteilung des BGH vom 25. April 2019

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2019/2019054.html?nn=10690868

Press release of the Federal Supreme Court, 25 April 2019

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