Framing – problems with ECJ rulings

EVA Seminar
February 28th 2017

Dr. Anke Schierholz, VG Bild-Kunst
Brief history of the „Making Available Right“ or „Communication to the Public Right“

• Continental European perception of copyright: included in the general authors´ right to decide about all uses of their works
• 1996: included in the WIPO treaties (Berne Convention and WCT)
  • Aimed at a strong protection of authors´ rights in the digital environment
  • Recital 23: „This right should be understood in a broad sense“
  • Art. 3 Para 1: Member States shall provoide authors with the exclusive right to authorize or prohibit any communication to the public [...]including the making available to the public of their works [...]]
  • Art 3 Para: the rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making avialble to public as set out in this Article
Brief history, continued: the interpretation by the ECJ

• The Svenson Case:
  • if the making available does not address a new public, the exclusive right of communication is not touched by the use

• The Best Water Case:
  • the concept of „new public“ also applies to frame links if the material was freely accessible on the internet (it „already envisaged the entire internet community“ and not only the visitors of the linked website)
Brief history, continued: the interpretation by the ECJ: GS Media

• Confirmed Svenson and Best Water: Works which are made available with the author’s consent may freely be framed

• Took into consideration special circumstances of the case:
  
  GS Media positive knew that the framed website was illicit
  
  GS Media linked for a commercial purpose
  
  The framed servers were non-european

• Held the framing illegal in this special case
Problem for Visual Artists:

• **Online publications** immediately referred to the ECJ rulings and refused to take licenses where they could frame the works from museums´ pages or authors´ pages

• Licensing to **Cultural Heritage Institutions** would be a making available with the author´s consent, all works could be freely framed

• Technical protection measures required

• Technical protection refused by CHI for being too complicated, access needs to be simple and free

• German Digital Library: Lawsuit against VG Bild-Kunst for licenses without technical protection in the LG Berlin court; oral hearing early next year
Example 1: Image from DDB´s Image bank

source: https://www.deutsche-digitale-bibliothek.de - search keyword: „Karl Lagerfeld“, solution: 800x539 Pixel
Ikea Advertising - Original

source: https://www.ikea.de
Ikea Advertising:
So could it look...
Example 2: Image from DDB´s Image bank

source: [https://www.deutsche-digitale-bibliothek.de](https://www.deutsche-digitale-bibliothek.de) - search keyword: „Slumbewohner“, solution: 800x566 Pixel
Ikea Advertising:
So could it look...
What does this mean for Access to Cultural Heritage?

• Draft directive on Copyright in the single digital market aims at facilitating licensing for Cultural Heritage Institutions but does not address the framing issue

• No licensing without technical protection against framing

• Severe burden for Cultural Heritage Institutions

• Without feeling save in the internet and knowing that their works are properly protected when being made available, authors will hesitate to make their works available

• Only cat videos will be freely accessible, all material which would need a license will be locked behind technical access barriers
Shall linking be restricted?

• No, regular referencing links must be allowed, they are the backbone of the internet
• Framing is more than linking: it is illegal appropriation of protected works
• Framing missleads the user of the framed website about consent of the rightholder to the specific communication to the public
• Authors lose all control about the context in which their works are presented
Therefore:

• Modify Art. 3 and 5 of the Directive 2001/29/EU in order to

• Prohibit framing and

• Allow linking