

being paid “excessively low” amounts for their work, and/or accepting unfair terms, even if there is no express mechanism for specific firms/organisations to exercise control over them, and their work, during the creative process itself. For such persons, the Supreme Court’s new statutory approach as presently conceived, will be unhelpful.

However promising the Supreme Court’s decision might seem from the perspective of the many individuals working in the gig-economy, then, and for precariously employed individuals more generally, much work is still to be done to fashion an approach to employment status that is adequately tailored to the real challenges which structural inequality and dependence generates in the context of capitalist work. Until it does so, approaches to employment status will continue to struggle to support, and advance, employment law’s “purposes”.

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COMMUNICATION TO THE PUBLIC AND TECHNOLOGICAL RESTRICTIONS AGAINST
“FRAMING” COPYRIGHT WORKS

IN recent years, the legality of linking to copyright-protected works has been diligently explored in the case law of the Court of Justice of the European Union (CJEU). With its judgment of 9 March 2021 in *VG Bild Kunst* (C-392/19, ECLI:EU:C:2021:181), the court added another stone to the edifice of this case law. The question at issue was whether a copyright owner can require a licensee of a protected work to implement effective technological measures against the use of “framing” by a third party to embed the work on the third party’s website – that is, the technique of dividing a web page into separate frames to enable posting within one frame of an element from another site so that the environment from which that element was taken is hidden (see definition at [35]). The answer depended on whether such framing would amount to an act of communication to the public of the work (at [24]), this being an exclusive right of the copyright owner (art. 3(1), Directive 2001/29/EC, OJ 2001 L 167 p.1 (InfoSoc Directive)). If so, the copyright owner may insist on the implementation of the measures, even when otherwise obliged by law to grant the licence (at [14]–[15]).

Previous judgments have established that an act of communication to the public requires two cumulative elements: (1) an “act of communication” and (2) a “public” (*Reha Training*, C-117/15, ECLI:EU:C:2016:379, at [37]). It is moreover necessary that, unless the communication takes place through different technical means than those previously used with

the permission of the copyright owner (*ITV Broadcasting*, C-607/11, EU: C:2013:147, at [26]–[28]), the public be a “new” one, namely one that was not taken into account by the copyright owner when the initial communication to the public of the work was authorised (*FAPL*, C-403/08 and C-429/08, EU:C:2011:631, at [97]). Notably, an “individual assessment” of the circumstances of each case is necessary (*Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, at [29]).

The CJEU first applied these principles to linking in *Svensson* (C-466/12, ECLI:EU:C:2014:76). Here it found that, as the provision of a clickable link to a protected work affords users direct access to that work, it must be considered to be an “act of communication” of the work (at [18]–[20]). It then held that where a clickable link leads to content that had been made freely available online with the permission of the copyright owner, that “act of communication” will not be to a “new public”, as the public targeted by the initial communication encompasses all Internet users (at [25]–[28]). However, where a clickable link makes it possible for users to circumvent restrictions put in place to limit access to subscribers, a “new public” does exist (at [31]). According to *Svensson*, this remains the case where, when users click on the link, the way in which the work appears gives the impression that it is located on the site on which that link is found (at [29]). In *Bestwater* (C-348/13, ECLI:EU:C:2014:2315), the court confirmed that this description covers the use of framing to embed content onto one site that originates from another site (at [17]).

In *GS Media* (C-160/15, ECLI:EU:C:2016:644), the CJEU turned to links that lead to content that had been made freely available online without permission. According to the court, in such cases it is necessary to consider the importance that links play to the sound operation of the Internet and therefore freedom of expression (at [45]). To safeguard the “right balance” (at [44]) between copyright and freedom of expression, the court concluded that whether or not the link provider knew or ought to have known that the link leads to content posted without consent is decisive (at [47]–[49]). The court reiterated its ban on the circumvention of access restrictions (at [50]) and introduced a rebuttable presumption of knowledge for linking for profit (at [51]).

On the basis of this case law, in *VG Bild Kunst*, the CJEU found that framing constitutes an “act of communication” (at [35]). The court also found that framing uses the same technical means (namely, the Internet) as those used by the copyright owner. Moreover, as long as no restrictive measures are circumvented, the work will have already been made available with the owner’s permission to all Internet users, so that a “new public” is not reached. As a result, there is no act of communication to the public (at [37]–[40]). These conclusions flow naturally from *Svensson*.

However, according to the CJEU, the circumvention of measures against framing is a different matter. The court relied on the need for an “individual assessment” of communication to the public to hold that the use of such measures must be interpreted as an expression of the owner’s intention to confine the public to which the works are communicated to the users of a particular website (at [41]–[42]). In such cases, the public taken into account by the copyright owner will consist solely of the users of that website, to the exclusion of those of any website on which the work is subsequently embedded via framing in circumvention of the measures (at [47]). To hold otherwise would, according to the court, amount to introducing a rule of exhaustion of the right of communication to the public, so that copyright owners would be obliged to either refrain from using their own works online or tolerate unauthorised online uses by third parties (at [50]–[53]).

At the same time, the CJEU emphasised that such an intention cannot be expressed by means other than effective technological measures, as otherwise it might prove difficult for users to ascertain it (at [46]). According to the court, this solution safeguards the balance required by *GS Media* (at [54]).

The CJEU’s judgment diverges from the approach proposed by A.G. Szpunar in his Opinion on the case (Opinion of A.G. Szpunar, 10 September 2020, C-392/19, ECLI:EU:C:2020:696). The A.G. relied on the reference in *Svensson* to “clickable” links to suggest a differentiated solution that distinguished between embedding a work in a website through clickable links using framing and embedding a work in a website through what he termed “automatic links” – that is, in such a way that those works are automatically displayed on the page as soon as it is opened, without any further action on the part of the user (at [92]). According to the A.G., use of the first in relation to a work which has been made freely available to the public online with the authorisation of the copyright owner does not constitute a communication to the public even where the link circumvents protection measures against framing. By contrast, use of the second without permission in relation to such works amounts to copyright infringement in all cases (at [139]).

The A.G.’s proposal was an attempt to overcome a perceived fault in the CJEU’s case law in the form of an inconsistency between the interpretation of “new public” for linking and for uploads. In *Renckhoff* (C-161/17, ECLI:EU:C:2018:634), the CJEU found that the public which is taken into account by the copyright owner when consenting to the communication of a work on a website is composed, not of all Internet users, but solely of users of that site. As a result, the unauthorised posting of the work on a different site will communicate it to a “new public” and copyright will be infringed (at [35]). The A.G. questioned whether this makes sense given that a user’s experience of works embedded using “automatic links” and works reproduced and uploaded onto a website is identical (at

[94]–[95] and [106]). The A.G. further observed that it is often not open to the copyright owner to adopt anti-framing measures, for example because the sharing platform used does not provide that option, so that the use of such measures cannot be taken to reflect his or her intention (at [125]–[126]). Finally, requiring the use of such measures for protection against unauthorised framing would contradict the prohibition of formalities which forms one of the basic principles of copyright law (at [130]).

The A.G.’s approach is appealing: it seems fair to distinguish disguising the source of (and therefore misappropriating) embedded objects from links that redirect the user back to the original website. Yet this solution does not map well onto the EU copyright framework. As the court observed in *Renckhoff*, while the right-holder has no control over unauthorised uploads, this is not true of embedded objects, since the removal of the work from the original site will render any link to it obsolete (at [44]). Uploads also involve infringement of the reproduction right, while embeds do not – a fact which the similarities in user experience cannot justify ignoring any more than they can justify treating the two in the same way under the communication right. Further, in most browsers, the difference between “clickable” and “automatic” links is often nothing more than the difference between a left click and a right click: the content’s source is usually easy for the user to uncover.

From this perspective, the one-size-fits-all approach preferred by the court respects not only previous case law, but the nature of the public web: both “clickable” and “automatic” links are links to content which the right-holder made publicly available for others to access online. To the extent that the reframing of the presentation of a work is problematic, arguably this is the domain of moral, not economic, rights. In light of the objections against interpreting the right-holder’s intention through the use of technological measures against framing, an even better approach might have left their circumvention to the para-copyright rules targeted at such activities (art. 6 InfoSoc Directive).

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THE RIGHT TO REMAIN SILENT IN EU LAW

DB v Commissione Nazionale per le Società e la Borsa (Consob), Case C-481/19, EU:C:2021:84, is a landmark ruling on the right to silence in EU law. The Grand Chamber decision of the Court of Justice of the EU (CJEU) is the first ruling on the right to silence outside of competition law and in relation to natural – as opposed to legal – persons.