



How Much “New” Public Is Too Much? The CJEU’s *VG Bild-Kunst* Judgment and Non-Exhaustive Control Over a Work’s Consumption

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Abstract Pursuant to the EU copyright *acquis*, right holders enjoy broad control over the communication of a work to the public. Following the *VG Bild-Kunst* judgment of the CJEU, right holders can rely on copyright to preclude framing of their otherwise freely available works on other websites. Circumventing technical measures placed by the right holders to prevent framing infringes their exclusive right of communicating works to the public. The judgment not only constrains secondary communication of a work, but also de facto places restrictions on the consumption of lawfully communicated works. The CJEU’s reasoning builds upon the expansive interpretation of the “new public” criterion coined in the preceding *Renckhoff* case. This paper argues that relying on the new public criterion in *VG Bild-Kunst* concealed the relevant circumstances of the case. Fundamental questions of the extent of the right holder’s exclusive control over authorized communication and the circumstances of a work’s consumption remained unexplored. It is concluded that revising the scope of application of the new public criterion is in order. Restricting the new public test to secondary communication and access to a work in its strict sense will expose the fundamental normative questions and the need to consider the underlying objectives of the copyright *acquis*.

Keywords Digital copyright · New public · Exhaustion · Framing · Consumption

1 Introduction

The online environment has enabled a variety of ways to exploit a work that do not squarely fit into the traditional division of the exclusive rights under copyright. From reaching a broader public by retransmission of a broadcast to targeting a

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virtually unlimited public by streaming or making a work freely available online, technology development has facilitated ample possibilities for a work's exploitation while threatening to weaken control over it. At the same time, production of copyright-protected content is no longer strictly centralized, and works are remixed, reused and produced by creative users.¹ As the public's engagement with works online changes and distribution models evolve, the question of an appropriate balance between the copyright holder's control and a work's consumption arises.

Whereas many works are distributed against payment within closed systems requiring a user account, the internet is also full of freely and lawfully made available content. Remuneration for the use of a work might be obtained not only by offering access exclusively to paying customers, e.g. through the purchase of an e-book or time-limited subscription to a music library, but the website traffic can also be monetized.² For the latter, website openness to the public is crucial: the more visitors, the higher the potential remuneration. Potential website visitors might be attracted by self-produced content or by framed³ third-party content which is freely available on a different website. Is such framing of others' works against the interests of the respective right holders, considering that they chose to make the works freely available online? Further, should copyright holders be able to object to framing relying on copyright law?

Similar questions were raised in the *VG Bild-Kunst* case,⁴ where the CJEU ruled on the framing of a freely available work by a third party on a different website falling under the exclusive right of communication to the public under Art. 3(1) of the InfoSoc Directive.⁵ As the Advocate General noted in his opinion, the issue concerned the control over the circumstances of access to a work that was otherwise freely available rather than the mere access to it.⁶ Although in line with the landmark *Renckhoff* case,⁷ the Court relied largely on the controversial "new public" criterion. The judgment in *VG Bild-Kunst* illustrates how the expansion of the field of application of the new public criterion conceals relevant considerations, as does the repeated use of the exhaustion metaphor in support of the expansive interpretation of the right holder's control over the communication of a work.

¹ See on the development from mere consumption to users' participation as creative users, Lukoševičienė (2021), pp. 19–21.

² For the widely spread internet advertising models, for instance, every website visitor matters, as it can generate an automatic payment for displaying an advertisement (cost per impression model) or a potential payment if an advertisement is clicked on (cost per click model).

³ Through framing, one integrates external content into one's website without hosting it. One example is the ability to share YouTube videos on other platforms (e.g. Facebook), where content can be consumed from that other platform as long as the original source is available on YouTube and framing is not restricted by the uploader of the video.

⁴ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, 9 March 2020.

⁵ 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, 22 June 2001, OJ L 167/10 (InfoSoc Directive).

⁶ Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, 10 September 2020, para. 85.

⁷ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*, Case C-161/17, 7 August 2018.

This paper demonstrates how the *VG Bild-Kunst* judgment falls short of examining the core issue at stake, being caught up in applying the new public criterion after *Renckhoff*. Part 2 provides the background to the *VG Bild-Kunst* judgment on the development of the new public criterion in hyperlinking cases and parallels drawn to the exhaustion principle. Part 3 focuses on the expansion of the application of the new public criterion in *Renckhoff*. Part 4 turns to the *VG Bild-Kunst* judgment and how the interpretation of the new public criterion concealed the relevant circumstances in the case. Finally, part 5 of the paper draws conclusions and suggests mitigating the consequences of expansive interpretation by restricting the scope of application of the new public criterion.

2 New Public Criterion and Copyright Exhaustion

The judgment in *VG Bild-Kunst* is the result of years of development and harmonization through the case law of the CJEU and the path dependence of EU copyright law.⁸ Before turning to the reasoning in the case, it is therefore necessary to take a brief look at the essence of the notions with which the CJEU operates. Part 2.1 addresses the exhaustion principle, which is repeatedly used as an argument against restricting the right holder’s control over online communication of a work. Part 2.2 looks at the new public criterion as an exhaustion-like norm adopted by the Court in its earlier case law, setting the subsequent development of the new public criterion in the *Renckhoff* and *VG Bild-Kunst* cases into context.

2.1 What Exhaustion Is (and What It Is Not)

According to the exhaustion principle in copyright, the right holder’s control over tangible copies of a work is exhausted once these copies are put into circulation.⁹ The rationales for the principle vary. First, the principle resolves a conflict between the property rights in a tangible medium and the rights in a work stored on it. Second, right holders obtain a reward through the first distribution of a tangible copy, which justifies exempting further circulation from the exclusive control to the benefit of a work’s dissemination. Third, depending on the territoriality of exhaustion, it allows the cross-border movement of goods, e.g. within the EU/EEA. From the end-user perspective, the principle draws a line for the right holder’s control over the disposal and consumption of an acquired work.

Recognition of the exhaustion principle at the international level became necessary with the harmonization of a broad right of distribution covering every and each distribution of a copy of a work. During the negotiations on the Protocol to the

⁸ On the path dependence, see Larsson (2011), pp. 8–31.

⁹ Under the EU copyright *acquis*, the principle is harmonized under the InfoSoc Directive, Art. 4(2); Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), 5 May 2009, OJ L 111/116, Art. 4(c); and Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 27 November 1992, OJ L 346/61, Art. 9(2).

Berne Convention (PBC),¹⁰ it became clear that the right to control the resale of copies should not survive the first distribution of the copies.¹¹ The exhaustion principle was thus introduced to achieve the “termination of the right of distribution”.¹² If the broad right of distribution rather than the right of first distribution was to be recognized internationally, it would have to be accompanied by the exhaustion principle.¹³

Yet another reason to harmonize the exhaustion principle internationally was the existence of national laws that defined the distribution right broadly as also including rental and lending, and the consensus that control over rental should survive the first distribution of a copy.¹⁴ Hence, it was necessary to harmonize the conditions of exhaustion (i.e. occurring upon the first sale of a copy) in order to prevent states from limiting right holders’ control over subsequent rental. Recognition of the broad right of distribution received support subject to the condition that the exhaustion of the right through the first sale would apply.¹⁵

The WIPO Copyright Treaty, adopted in the aftermath of the negotiations on the PBC, harmonized the right of distribution and the right of rental as distinct rights.¹⁶ The right of distribution was recognized in its broad form, covering both the initial and subsequent distribution. In line with the previous negotiations, the right is accompanied by a provision on exhaustion of the right, which provides that states are free to determine conditions, if any, under which the exhaustion of the right applies after the first sale of other transfer of ownership.¹⁷ The latter has been interpreted as meaning that exhaustion can only take place upon the first sale or

¹⁰ The Protocol was not adopted, but instead, negotiations laid the ground for the adoption of the WIPO Copyright Treaty.

¹¹ Committee of Experts on a possible Protocol to the Berne Convention, Third Session. Questions concerning a possible protocol to the Berne Convention Part III, New Items. Memorandum prepared by the International Bureau, BCP/CE/III/2-III 1993, pp. 9–10.

¹² *Ibid.*, p. 3.

¹³ During the negotiations on the Protocol to the Berne Convention, two options for recognizing the right of distribution were discussed: the right of first distribution (putting into circulation) and the right of distribution (right of circulation) accompanied by an exhaustion principle. See Committee of Experts on a Possible Protocol to the Berne Convention, Third Session. Questions concerning a possible protocol to the Berne Convention Part III, New Items. Memorandum prepared by the International Bureau, BCP/CE/III/2-III 1993, p. 3.

During the negotiations on the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization), only the right of first distribution and the right of importation were discussed, although neither made it into the final text, see Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 1990, p. 8.

¹⁴ Committee of Experts on a possible Protocol to the Berne Convention, First Session. Questions concerning a possible protocol to the Berne Convention Part II (Draft). Memorandum prepared by the International Bureau, BCP/CE/I/3 1991, p. 20.

¹⁵ Committee of Experts on a possible Protocol to the Berne Convention, Third Session. Report adopted by Committee, BCP/CE/III/3 1993, p. 19.

¹⁶ WIPO Copyright Treaty, adopted in Geneva on 20 December 1996, Arts. 6 and 7.

¹⁷ Views as to the exact meaning of the provision for the conditions of exhaustion differ, depending if one views the obligations under Art. 6 WIPO CT as solely requiring the recognition of the right of first distribution or also requiring that exhaustion takes place only upon the first sale or other transfer of ownership.

other transfer of ownership.¹⁸ At the same time, that conclusion can be called into question if the provision’s aim was to secure the right holders’ control over the initial distribution, also given the absent need to carve out rental and lending, as those were harmonized as separate rights.

The international harmonization of the exhaustion principle has thus been closely linked to the recognition of a broad right of distribution, encompassing every initial and secondary act, as well as a need to distinguish between distribution by sale and rental. It was not disputed that every initial distribution of copies of a work is subject to authorization, which would already be covered by the recognition of the right of first distribution. What recognition of the broad right of distribution with the exhaustion principle achieved is to first subject all the secondary acts of distribution to authorization and then to exempt some of those secondary acts from authorization. Perhaps not so evident at the very beginning, the two solutions are not equal to each other. The recognition of a broad right accompanied by the exhaustion principle provided a de facto possibility of widening control by adapting the exhaustion principle.

At the EU level, harmonization of the distribution right under Art. 4(1) of the InfoSoc Directive has been accompanied by the exhaustion principle under Art. 4(2) of the InfoSoc Directive. Although straightforward at first glance, the principle does not provide a definitive answer regarding the right holder’s control over the subsequent distribution of physical copies, let alone digital ones. In the *Art & Allposters* case, the CJEU held that the exhaustion principle did not apply to copies that have been altered following their first sale, meaning that the right holder could preclude further distribution of such altered copies.¹⁹ Were these copies not altered after the first sale, the right holder would not be able to control their further resale. In that sense, copies were “covered” by the exhaustion principle at the point of their first sale; it is just that the principle does not clarify whether subsequent alteration of sold copies should subject them to the right holder’s post-sale control. The latter was answered by the CJEU in the affirmative.

The application of the distribution right and, subsequently, the principle of exhaustion to the distribution of electronic copies of a work has been subject to scholarly debate.²⁰ Whereas in the landmark *UsedSoft* judgment, the CJEU interpreted the right of distribution under the Software Directive as covering the dissemination of copies of computer programs over the internet (lacking a tangible medium),²¹ recently, in *Tom Kabinet*, the CJEU considered the dissemination of e-books to fall under the right of communication to the public.²²

As it stands, the exhaustion principle does not apply to copies that are not distributed on a tangible medium. Dissemination on the internet falls under the right

¹⁸ Reinbothe and von Lewinski (2015), p. 112.

¹⁹ CJEU, *Art & Allposters International BV v Stichting Pictoright*, Case C-419/13, 22 January 2015.

²⁰ Mezei (2018); Karapapa (2014); Sganga (2018); Hilty (2016); Spedicato (2015); Benabou (2016); Oprysk (2020a); Dias (2021); Geiregat (2021).

²¹ CJEU, *UsedSoft GmbH v Oracle International Corp.*, Case C-128/11, 3 July 2012.

²² CJEU, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others*, Case C-263/18, 19 December 2019.

of communication to the public.²³ The InfoSoc Directive seemingly precludes exhaustion of the right of communication to the public in Art. 3(3), which then, by analogy to the distribution right, means that secondary acts of dissemination (communication to the public) do fall under the exclusive right and require authorization. Under the CJEU jurisprudence, however, secondary communication is occasionally exempted from the right holder's control.²⁴

Article 3(3) of the InfoSoc Directive on non-exhaustion of the right of communication to the public has until recently rarely been referred to by the CJEU when interpreting the right of communication to the public. In fact, before the *Renckhoff* case, which will be examined in part 3, the article was interpreted only once in 2013 in the *TVCatchup* case on retransmission of a broadcast on the internet.²⁵ Since *Renckhoff*, however, the provision has been used continuously as an argument that not considering a particular act in question to fall within the right of communication to the public will lead to the exhaustion of the right.²⁶

Such use of the exhaustion principle in reasoning is problematic. First, parallels to exhaustion are drawn in the cases (e.g. *Renckhoff*) considering an independent act of communication rather than a secondary one.²⁷ This is misleading as exhaustion does not exempt separate acts of distribution (e.g. distribution of new independent copies) but only subsequent secondary acts (e.g. resale of a copy).²⁸ Second, the use of the exhaustion principle seems to free the Court from the need to examine whether an act in question ought to fall under the exclusive right. Although the task of the Court is to interpret the *acquis*, the CJEU's role in further harmonization cannot be downplayed.²⁹

Given that the exhaustion argument is increasingly used to argue for a broad reach of the exclusive right of communication to the public, it is essential to clarify how the principle is understood for the purpose of further analysis. Exhaustion is a construct that exempts *secondary* acts of distribution (dissemination) from the right holder's control without sanctioning *independent* acts of distribution, such as the creation of new copies, or substantial alteration of acquired copies leading to serving a separate market. On the other hand, exhaustion is *not* a construct for taking away *all* further control over a distributed (disseminated) work.

²³ Art. 3 of the InfoSoc Directive.

²⁴ Oprysk (2020b), pp. 270–274.

²⁵ The CJEU held that authorizing inclusion of a work in communication to the public did not exhaust the right to authorize or prohibit other communications, such as retransmission of a broadcast on the internet. CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*, Case C-607/11, 7 March 2013.

²⁶ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17, para. 33; CJEU, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* (2019), Case C-263/18; CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, para. 52.

²⁷ The CJEU reasoning in *Renckhoff*, using the exhaustion rhetoric, will be analyzed in part 3.

²⁸ See also Szkalej's newfangled consumer-centric approach to exhaustion on the example of purchased content, where the question of digital exhaustion is phrased by reference to ability or inability to exploit exclusive rights to discontinue access to purchased content, Szkalej (2021), pp. 382–385.

²⁹ Rosati (2019), pp. 73–85.

2.2 New Public – an Exhaustion-Like Norm for Hyperlinking?

Article 3(3) of the InfoSoc Directive seemingly precludes exhaustion of the right of communication to the public. By analogy to the right of distribution, this ought to mean that secondary communication acts are not exempted from the right holder’s authorization. Nevertheless, some instances of secondary communication have been exempted from the right holder’s control under the CJEU jurisprudence, relying, *inter alia*, on the new public criterion.

This criterion made its way into the jurisprudence in the *Rafael Hoteles* case, where the Court referred to Art. 11^{bis}(1)(ii) of the Berne Convention (BC) in the context of signal retransmission.³⁰ As the Court stipulated,

a communication made in the circumstances such as those in the main proceedings constitutes, according to Article 11^{bis}(1)(ii) of the BC, a communication made by a broadcasting organization other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.³¹

The quote suggests that the mere fact that the communication was made by a different organization indicates that such communication reaches a new public. It also suggests that the public is defined in isolation from the intended public, or the public that could potentially have access to the broadcast, i.e. through a TV set at home. Even though the visitors to the hotel were within reach of the original broadcast, the hotel providing the means of receiving a signal communicated this broadcast to a new public, which is limited to a specific circle of persons, i.e. the hotel’s customers.

The new public criterion has subsequently been used outside the retransmission cases and has been applied to any case falling under the right of communication to the public.³² It was in the landmark *Svensson* case on hyperlinking that the CJEU exempted a secondary act of communication from authorization on the basis of the new public criterion.³³ The case provoked a lot of attention and criticism and was said to lead to a *de facto* exhaustion of the communication to the public right.³⁴

At that stage, the new public criterion in hyperlinking scenarios still made sense in economic terms, e.g. as a way to distinguish between the paying and non-paying

³⁰ Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979).

³¹ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, Case C-306/05, 7 December 2006, para. 40.

³² Extensively on the new public criterion development, see Marušić (2021), pp. 224–232; Quintais (2018), pp. 9–14.

³³ The Court ruled that hyperlinking constituted an act of communication to the public. However, the linking in question did not reach a new public as a work was already lawfully made available to all the internet public. CJEU, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, 13 February 2014, para. 30.

³⁴ See extensively Hugenholtz and van Velze (2016), pp. 797–816. Also, Koo called the judgment the first in the series of missteps by the CJEU and Rognstad called the result a conceptual collapse. See Koo (2018), p. 543; Rognstad (2018), pp. 119–120.

public. Had the right holder posted a work in a closed environment that could be accessed for a fee and the hyperlink in question circumvented that restriction on access, such hyperlink would provide access to a “non-authorized” new public and, hence, require authorization. A hyperlink would extend the public by a “new” public outside the one taken into account when posting a work online subject to limited availability. As will be discussed in parts 3–4, such reasoning did not prove helpful in other cases. Much online dissemination happens outside closed systems requiring a fee for access, where remuneration is obtained by other means, such as advertising. The distinction between the envisaged public and the new public then becomes blurred.

What soon became apparent is that the new public criterion in the hyperlinking context would need to be limited to cases where a work had lawfully been made available. In the *GS Media* case, the Court made it clear that it could not be inferred from *Svensson* that the lawfulness of the initial making available of a work did not influence the assessment. In other words, it could not be inferred that posting a link to an unauthorized online copy would fall outside the right of communication to the public.³⁵ Although the work in question in *GS Media* was already available to the internet public and a hyperlink in no way extended that public, the initial communication of the work was unlawful, rendering the new public criterion inapplicable and submitting hyperlinking to the right of communication to the public.

A rather significant misstep in the application of the new public criterion occurred two years after *GS Media* in the *Renckhoff* case.³⁶ Previously, the new public criterion was examined in the context of online dissemination in cases of secondary communication dependent on the lawful initial communication. In *Renckhoff*, the Court examined the criterion when dealing with an unauthorized *independent* communication, undermining possible practical use of the new public criterion and opening room for constant redefining of the scope of the initially intended public.

3 *Renckhoff* and Uncalled-For Partitioning of the New Public

In the *Renckhoff* judgment, the CJEU interpreted the new public criterion in the context of independent posting of a work online. Were it not for the preceding jurisprudence of the CJEU, the answer to the question posed by the national court would be a straightforward one.³⁷ If such a case had made it all the way to the CJEU in the 2000s, the outcome would most certainly be the same, but the reasoning would likely be much more streamlined.

The question referred to the CJEU was whether the upload of a copy of a work that was already freely available on another website with the right holder’s

³⁵ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*, Case C-160/15, 8 September 2016, para. 43.

³⁶ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17.

³⁷ Ohly (2018), pp. 1003–1004.

authorization amounted to an act of making that work available to the public.³⁸ The case had to be distinguished from the *Svensson* case concerning hyperlinks which provided access to a work on the original website as long as it was accessible there and without altering the manner of its presentation.³⁹ In *Renckhoff*, a separate act (of uploading) took place, independent of the original upload apart from the obvious copying of a file. The circumstances of the upload were slightly different from typical infringing posting and hyperlinking cases in that the upload in question concerned a school’s website and a freely available student’s presentation, which, in turn, included a photo that was freely available online on a different website.

Advocate General Sánchez-Bordona found the upload of a work on a website without the author’s authorization to be an act of making that work available.⁴⁰ The AG then turned to the particular circumstances of the case and examined the role of the user uploading a work without authorization and the consent of the author to the original making available of a work. In the AG’s opinion, when a work was already freely available online without attribution to the author, a regular user could assume that the author had no objection to the usage of a work for educational purposes.⁴¹ Therefore, to hold that every such user is accountable for infringement of the right of communication to the public would undermine the freedom of expression and the right to education under the EU Charter of Fundamental Rights (Arts. 11 and 14(1)).⁴²

The CJEU, nonetheless, took a different path, recalling the well-known cumulative criteria of an act of communication and the presence of the public. The posting of a work on a website, the Court held, amounted to communication as it essentially made a work available to the public.⁴³ Instead of stopping here, however, the Court went on to examine the new public, which it held was decisive for qualifying an act of uploading as infringing the right of communication to the public, as both initial and subsequent communication took place using the same means.⁴⁴ By discussing the new public in a case concerning independent communication, the Court, in essence, examined whether the right of communication to the public can be reduced to “one-time-only” authorizing of making a work available on the internet, which is certainly not something envisaged by *Svensson*.

³⁸ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17, para. 12. The Court reformulated the question as essentially asking whether such upload would be covered by the right of communication to the public. See para. 13.

³⁹ *Svensson* concerned hyperlinking to press articles published online, where links would take a user to a corresponding website where an article in question was freely available. Articles would be “consumed” on the original website and their availability was controlled by the website on which it was posted, *i.e.* a hyperlink would not redirect to an article if it had been removed on the original website. See part 2.2.

⁴⁰ Opinion of Advocate General in *Land Nordrhein-Westfalen v Dirk Renckhoff*, Case C-161/17, 25 April 2018, paras. 61–62.

⁴¹ *Ibid.*, paras. 62–68.

⁴² *Ibid.*, para. 79. Charter of Fundamental Rights of the European Union, 18 December 2000, OJ C 364/1.

⁴³ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17, para. 21.

⁴⁴ The claimant, the intervening governments, and the EC rightly disagreed on this point. *Ibid.*, paras. 24–28.

Finding an upload of a work on a website as communicating it to a new public was based on two grounds. First, the Court reasoned, the right would be undermined if the right holder could not object or put an end to the exploitation of a work on a third-party website.⁴⁵ The second ground was based on, in this author's view, a misinterpretation of the non-exhaustion provision under Art. 3(3) of the InfoSoc Directive. If this new upload did not constitute an act of making available, the Court held, it would amount to the exhaustion of the right of communication to the public.⁴⁶ As the purpose of IP is to enable right holders to exploit their work commercially,

in such circumstances, the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the right holder or other internet users.⁴⁷

The Court has introduced these criteria without an actual need to do so. The case could have been decided solely based on the fact that an upload of a work on a publicly accessible website is a separate and independent act of making available and, thus, a new act of communication to the public. It was actually even stated in the judgment that an upload constituted a new and independent communication.⁴⁸ Further criteria would not have been necessary, in particular those developed in the context of hyperlinking to lawfully available works where the acts in question did not concern independent communication. Although the CJEU rightly held that the case law on hyperlinks to unauthorized copies of a work was inapplicable, it justified the conclusion by a reference to a different balance of interests.⁴⁹ The uploader had the ability to control the availability of a work and was actively involved in its communication.

The new public criterion often conceals the relevant normative considerations.⁵⁰ Whereas it was stated at the outset that any upload constitutes an act of communication, subsequent discussion of the new public underplayed the significance of the separate and independent nature of communication by uploading a work, in contrast to hyperlinking, relying on an initial act of communication. Examining the new public criterion in a case concerning a clearly distinct act of communication, the Court caused further uncertainty as to the scope of the right of communication to the public, which is apparent in the following cases, notably in *VG Bild-Kunst*.

⁴⁵ *Ibid.*, paras. 29–31.

⁴⁶ *Ibid.*, paras. 32–33.

⁴⁷ *Ibid.*, paras. 34–35.

⁴⁸ *Ibid.*, para. 44.

⁴⁹ *Ibid.*, paras. 39–45.

⁵⁰ Ohly (2018), p. 1000. Also, the AG in his opinion in *VG Bild-Kunst* was critical of the new public in the *Renckhoff* case, as applying it alone would mean that the upload of a work is not covered by the exclusive right. See Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, paras. 67–68.

Prominent is also the Court’s interpretation of Art. 3(3) on the non-exhaustion of the right of communication to the public: “[t]o hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication”.⁵¹ This statement goes well beyond the scope of the exhaustion principle. If authors cannot prevent others from copying and uploading their work on a different website, it would turn the right of communication to the public into the one-time right of communicating a work freely on the internet. To compare exempting subsequent uploads of a copy of a work from the right holder’s control to exhaustion of that right is misleading because it is something that even the exhaustion principle could not achieve. An analogy to this reasoning would be to say that the exhaustion principle reduces the right of distribution to the right of one-time distribution of copies, after which anybody can produce new copies and distribute them to the public.

Overall, the outcome of the case (that uploading a work and making it accessible to the public requires authorization) is justified. However, it would suffice if the Court simply held that uploading amounts to a separate and independent act of communication to the public, as the Court explicitly provides that posting on a website “gives rise to a new communication, independent of the communication initially authorized”.⁵² Instead, the case provided a great illustration of the need to distinguish between initial (primary) and secondary (dependent) acts of communication. The way an upload has been dealt with appears rather unfortunate, considering that a new standard of interpreting the new public criterion emerged, which concealed the issues at stake in subsequent cases.

4 *VG Bild-Kunst*: Avoiding “Exhaustion” and Securing Control Over Consumption

The judgment in *VG Bild-Kunst* well illustrates the unfortunate development of the new public criterion set out in *Renckhoff*. As will be argued, endorsing the expansion of the new public criterion and partitioning the internet public led to concealing the underlying interests at stake.

The facts of the case were as follows. The Deutsche Digital Bibliothek (DDB) website operated by Stiftung Preußischer Kulturbesitz (SPK) contains links to digitized content stored on the websites of participating institutions and thumbnails of the original images. *VG Bild-Kunst*, the collecting society for visual arts in Germany, made the use of such thumbnails conditional on the conclusion of a licence agreement requiring SPK to implement on the DDB website effective technological measures against framing by third parties. SPK considered the claim unreasonable from the copyright viewpoint and brought an action before a German

⁵¹ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17, para. 33.

⁵² *Ibid.*, para. 44. Such conclusion would also be in line with the economic perspective on linking versus a new upload, see Poort (2018), p. 328. Also, Ohly (2018), p. 999.

court for declaratory relief, stating that the licence in question should be granted without a condition to implement the technical protection measures.⁵³

The German Federal Court of Justice referred a question on the interpretation of the right of communication to the public, as the outcome in the case would depend on whether framing would constitute a communication to the public. The Court asked if framing a work already freely available on another website with the right holder's consent constitutes a communication to the public of that work under Art. 3(1) of the InfoSoc Directive if it circumvents protection measures against the framing.⁵⁴

Hyperlinks to works freely available online with the right holder's authorization since 2014 were considered to fall outside the scope of the right of communication to the public following the *Svensson* judgment.⁵⁵ Also, framing of a work fell outside the scope of the right as long as the work was not in any way altered or communicated to a new public, following the CJEU's reasoning in *BestWater*.⁵⁶ In *VG Bild-Kunst*, the question was whether circumventing technical measures adopted by the right holder, which prevent framing of a freely available work, would nevertheless infringe the right of communication to the public.

Important to note here is that the question in *VG Bild-Kunst* concerned framing⁵⁷ of the thumbnails on the DDB website with the permission of the right holder.⁵⁸ Full-sized images were available only on the original institutions' websites, to which the DDB website linked.

As customary, the CJEU recalled the preventive nature of the right of communication to the public and the need to interpret communication broadly, given the objective of a high level of protection of the InfoSoc Directive.⁵⁹ In a recent development, the CJEU also recalled Art. 3(3) on an act of communication to the public not exhausting the right to authorize or prohibit other communications to the public, citing the *TVCatchUp* case.⁶⁰ The Court, however, did not engage with the meaning of "other communication".

The Court also recalled the two cumulative criteria of the concept of communication to the public, an act of communication and the presence of the

⁵³ Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, paras. 22–26.

⁵⁴ *Ibid.*, para. 29.

⁵⁵ See part 2.2 on *Svensson* and new public.

⁵⁶ CJEU, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, Order of the Court, Case C-348/13, 21 October 2014.

⁵⁷ As the AG explained in the opinion, creation of inline frame embedding context from other websites, Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, paras. 10–14. This technique allows displaying on a website content that is, in fact, hosted on a different website.

⁵⁸ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, paras. 22–23.

⁵⁹ *Ibid.*, paras. 21, 26–27.

⁶⁰ *Ibid.*, para. 29. See part 2.1, the CJEU started actively mentioning Art. 3(3) InfoSoc from the *Renckhoff* judgment onwards.

public, referencing the jurisprudence.⁶¹ Framing of thumbnails constituted an act of communication, the Court argued, relying on the *Svensson* case.⁶² If framing were to be considered to communicate a work using the same technical means as the original communication, then there would be no new public reached, resulting in no need for authorization.⁶³ In the remaining part of the judgment, the Court focuses on the individual assessment of the case, in particular on the potential new public reached, avoiding a statement on whether framing constitutes new technical means, which would revise the conclusion reached in *BestWater*.⁶⁴

4.1 New Public: Limiting Access to a Work or Controlling Circumstances of Consumption?

The Court set the stage for an individual assessment of the case by distinguishing the facts from those in *Svensson* and *BestWater*. In the latter cases, the right holder made a work available without using any restrictive measures, leading the Court to conclude that all internet users were envisaged as the public for that original communication.⁶⁵ The Court also recalled the *Soulier and Doke* case, in that an author giving prior, explicit and unqualified consent to the publication of their works on a website without the use of technological protection measures restricting access from other websites may be regarded as having authorized the communication to all internet users.⁶⁶

In its individual assessment, the CJEU established at the outset that the conclusion reached in *Svensson* was not applicable where the right holder established or imposed restrictive measures linked to the publication of a work.⁶⁷ The Court recalled linking to a work accessible to subscribers only, where circumventing linking restrictions would reach a new public if it provided access to persons otherwise not having access to that work.⁶⁸

Notably, the referenced paragraph from *Svensson* concerned communication of a work on a “closed” website with restrictions placed on access to the work, where that work was not freely accessible. In *VG Bild-Kunst*, there was no issue about access to works, as they were freely accessible on the original website. Rather, the

⁶¹ CJEU, paras. 29–32. Interestingly, the new public criterion is referenced through the *Tom Kabinet* case, and the case law cited. *Tom Kabinet* concerned a platform for resale of e-books and the question whether dissemination of e-books falls under the right of distribution, and, if so, whether it is also subject to exhaustion. The CJEU, however, examined dissemination in the light of the right of communication to the public. The making available of an e-book was considered to reach a new public if it was directed to persons other than those who concluded a user licence agreement. See CJEU, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* (2019), Case C-263/18, para. 71. See also Oprysk (2020c), pp. 206–207.

⁶² CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, para. 35.

⁶³ *Ibid.*, para. 36.

⁶⁴ CJEU, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, Case C-348/13.

⁶⁵ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, para. 37.

⁶⁶ *Ibid.*, para. 38.

⁶⁷ *Ibid.*, para. 39.

⁶⁸ *Ibid.*, para. 40.

case concerned the ability of the right holder to restrict *consumption* of such work from a website other than the one on which it was posted by preventing framing. The CJEU, however, considered these two situations equal, assimilating restrictions on the consumption of a work from a different website with restrictions on overall access to it.⁶⁹

The CJEU also referred to the right holders' will, holding that copyright holders seeking to make the grant of a licence subject to the measures restricting framing cannot be regarded as having consented to third parties freely communicating the work to the public.⁷⁰ By making the licence dependent on the implementation of technical protection measures, the right holder expresses their intention to authorize communication only to the users of a website where the work is posted.⁷¹ This led the Court to conclude that if copyright holders adopted measures or obliged a licensee to employ measures against framing on other websites, then the initial act of making available and the act of making available through framing constitute different acts of communication to the public and require authorization.⁷²

Interestingly, the Court referred here to the *VCAST* judgment, which distinguished between the acts of communication to the public on the basis of the different technical means used.⁷³ Hence, the Court suggests that the issue concerns communication using different technical means, which is at odds with *BestWater*. There is a further inconsistency here that has to do with what Rognstad calls a conceptual collapse in *Svensson*.⁷⁴ It has been held since *Svensson* that the provision of a link constitutes an act of communication to the public.⁷⁵ The reasoning of the CJEU in *Svensson* was that the absence of a new public meant that there was no requirement to obtain authorization for such communication to the public.⁷⁶ To take due account of *Svensson* in this case, the Court would have to take its statement on the authorization of different acts of communication to the public into consideration of the new public reached.

The Court further continued to equate a situation of authorized communication on a "closed" website with a situation of authorized communication on a freely accessible website, where consumption of a work from a different website is restricted.⁷⁷ Relying on *Renckhoff*, the CJEU concludes that, in the present case, the public reached by the framing of a work includes a new public because the right

⁶⁹ *Ibid.*, para. 41.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, para. 42. The notion of the right holder's intent to confine the public to users of a particular website, on which a work is freely available without any access restrictions stems from *Renckhoff*, see part 3.

⁷² *Ibid.*, para. 43.

⁷³ Referencing the *VCAST* judgment, CJEU, *VCAST Limited v RTI SpA*, Case C-265/16, 29 November 2017.

⁷⁴ Rognstad (2018), pp. 119–120.

⁷⁵ CJEU, *Nils Svensson and Others v Retriever Sverige AB* (2014), Case C-466/12, paras. 20 and 23.

⁷⁶ See CJEU in *Svensson*, para. 28, "since there is no new public, the authorization of the copyright holders is not required for a communication to the public such as that in the main proceedings".

⁷⁷ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, para. 45.

holder authorizing the communication of a work to the public by posting it online only takes into account the users of that particular website.⁷⁸

The CJEU speaks of measures confining the public solely to the users of the original website as it would be a defined circle of people. In fact, as long as a work is available on a website open to anyone on the internet, the public is virtually anybody finding their way to that website. However, what was rather at stake in *VG Bild-Kunst* was actually where or how this limitless internet public consumes a work. It may well be the same circle of persons accessing a work on the original website and on the website on which a work is framed. In the latter case, the circle of persons does not consume a work from the envisaged original website.

Referring to “technological measures preventing access” is also not too precise because it is not public access as such that is prevented, but rather an ability to frame (a part of) a website. A work can be accessed on the original publicly accessible website at any time. What measures actually prevent or restrict is the consumption of a work that bypasses the visit to the original website. This also lies at the core of this case – the right holder wishes to control the circumstances of a freely accessible work’s consumption by confining it to a particular website(s), and the question is whether enabling such work’s consumption from a different website falls under the exclusive right under copyright law.

Using the new public criterion after the development in *Renckhoff* to examine whether enabling consumption from a different website infringes the exclusive right concealed the relevant considerations and led to far-reaching conclusions. Posting a work on a website freely accessible to the public in no way makes an effort to restrict internet users’ access to that work. Seen from the perspective of the public, such an act amounts to communicating a work to an undefined circle of persons who happen to visit that website, and that public cannot be determined in advance. It is possible to either set access restrictions and turn the work into one that is not freely available or set restrictions surrounding the consumption of the otherwise freely available work, in this case, preventing it from being framed. The latter situation can hardly be examined from the new public perspective.⁷⁹

Complicating it further, the Court connects the existence of the new public with the adoption of technical means preventing framing. In the operative part of the judgment, the CJEU ruled that framing of works constitutes a communication to the public where it circumvents measures designed to prevent it. It permits the assumption that the framing of works in the absence of any such measures does not infringe the right of communication to the public. The very existence of the infringement is tied to technical means. These means express the will of the right holder, which, in turn, is protected by relying on the right holder’s ability to confine the envisaged public to the visitor of a particular website hosting a publicly available work.⁸⁰

⁷⁸ *Ibid.*, paras. 47–48. See also part 3 on *Renckhoff*.

⁷⁹ See Ohly on the CJEU providing control over subsequent uses such as framing through the new public concept, Ohly (2021), p. 771.

⁸⁰ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, paras. 42 and 46.

4.2 “If Not ... Then ...” or Is Reward the Real Issue Here?

In line with *Renckhoff*, in *VG Bild-Kunst* the CJEU uses the argument that not requiring authorization from the right holder, in this case, would amount to the exhaustion of the right of communication to the public, precluded under Art. 3(3) of the InfoSoc Directive.⁸¹ *VG Bild-Kunst* presented a good opportunity for discussing exhaustion, as it clearly concerns secondary communication, relying on the authorized communication.⁸² However, it would be much more convincing if the Court actually discussed what it meant by exhaustion, especially since there was no mention of it in *Svensson*.

The “exhaustion” argument is immediately followed by another two “if not ... then ...” statements. First, if framing does not require authorization, the right holder would be deprived of the appropriate reward, contrary to the specific purpose of intellectual property, which is to protect commercial exploitation and enable an appropriate reward for each use of a work.⁸³ The CJEU refers here to *Renckhoff* and the case law cited there without comparing the circumstances of a new independent upload to the framing of an already available copy in *VG Bild-Kunst*.

Second, if framing does not require authorization, then the need to safeguard a fair balance between the right holder and Art. 17(2) of the Charter and the interests and fundamental freedoms of users under Art. 11 on the freedom of expression and information would be disregarded.⁸⁴ The Court makes the statement “by analogy” to *Renckhoff*, disregarding the fact that the conclusion in the latter was reached on the basis of distinguishing between an unauthorized independent publication (upload) of a work and hyperlinking to a work already made lawfully available.⁸⁵ This statement therefore appears rather blunt in the absence of any further discussion.

Referring to both the appropriate reward objective and Art. 17(2) of the Charter signifies the weight given to considerations related to economic exploitation. Given the circumstances of the case, it raises the question of whether the ability to obtain a reward is the central element. On the one hand, if framing by circumventing the technological protection measures against it requires authorization, right holders can employ such measures to force parties wishing to frame their works on a different website to conclude a licence against payment. On the other hand, if the right holder wishes to disseminate a work freely online and reach the widest audience, restricting framing might not be their default strategy.

A reward can be obtained indirectly, e.g. by advertising on a website hosting a work. In this case, the right holder might wish to restrict the framing of a work on other websites in order for the public interested in that work to pay a visit to the original website, resulting in compensation. However, here too, the right holder

⁸¹ *Ibid.*, paras. 50–52. See also on this, Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, para. 57.

⁸² See the discussion on “exhaustion” in *Renckhoff* in part 3.

⁸³ CJEU, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (2020), Case C-392/19, para. 53.

⁸⁴ *Ibid.*, para. 54.

⁸⁵ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018), Case C-161/17, paras. 40–41.

might be dependent on a third party operating a well-visited website (e.g. a content aggregator) to get visibility and redirect visitors to that original website. Hence, it might be desirable to selectively allow the framing of a work on particular third-party webpages.⁸⁶

This also raises a question of the relation between the right holder and the internet platforms hosting works. Advocate General Szpunar distinguished in his opinion between clickable links and framing of works when it comes to balancing the interests at stake since links contribute “to the monopolization 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”.⁸⁷ On the one hand, the statement illustrates the essential autonomy for the right holders to be able to control such acts to obtain a reward. On the other hand, in many cases, the right holder would need to rely on some intermediaries precisely to enable obtaining such a reward. As a reaction to the AG’s statement, the question can be asked whether the increasing employment by service providers of measures to prevent framing of otherwise freely available works with reference to copyright could lead to a further monopolization.

Summing up, there are good reasons for allowing copyright holders to prevent framing, inter alia, to enable appropriate remuneration and sustain control over a work’s exploitation and presentation.⁸⁸ However, the Court’s analysis leaves out another important aspect of the case, namely the extent to which copyright’s objective of securing an appropriate reward overrides other relevant considerations, such as a work’s dissemination and consumption. Pointing in the direction of securing the right holder’s control over any circumstance of a work’s dissemination, and in the absence of any closer discussion of the envisaged balance, the judgment further endorses technological measures to limit a work’s lawful consumption.

5 Conclusions: New Public or Control Over Consumption?

Copyright holders enjoy broad control over the online communication of a work. The objective of a high level of protection of the EU copyright *acquis* is reiterated in the CJEU case law. The latest “linking” judgment in *VG Bild-Kunst* fits neatly into the picture. The Court’s reasoning nevertheless merits some scrutiny. The interpretation of certain concepts, notably the “new public” and “exhaustion”, deserves a closer look. Not only did it conceal the pressing issues at stake, but likely also undermined further discussion on the boundaries of right holders’ control over the authorized communication of a work.

⁸⁶ Whereas it is technically possible to selectively allow framing from particular webpages, it necessarily implies a burden of keeping track of allowed websites and potentially results in missing some of the opportunities of promoting one’s work.

⁸⁷ Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, paras. 115–117.

⁸⁸ Framing a work on a different website would interfere with the presentation of a work and might also be breaching the author’s moral rights. An example might be the intention of an author to present a work on a particular website in particular circumstances in some particular way.

While examining whether linking which circumvents restrictions on framing reaches a new public in *VG Bild-Kunst*, the CJEU, on a few occasions, seemingly equated the communication of a work on a website with restricted access with communication on a publicly available website with measures in place to restrict framing of a work on a different website. The two situations are ultimately different. The interpretation of the new public criterion in *Renckhoff*, however, led the Court to reiterate that the public to which a work is communicated comprises visitors of a particular website only and not of the whole internet public. This expansive interpretation of the criterion moves it further away from capturing an unauthorized public to controlling the circumstances of a work's consumption.⁸⁹

The judgment raises the question of how far-reaching the right of communication to the public is and how far it should stretch over the circumstances of a work's consumption. Endorsing the interpretation of the new public in *Renckhoff* takes the criterion to the extreme and conceals the relevant normative considerations. As an alternative to construing the notion of who was targeted by the initial communication and how the framing of a work targets the same or a new public, the way forward could have been to recognize that the public as a circle of persons is not an issue or is not of help. Acknowledging the right holder's interest in controlling the circumstances of communication and assessing whether such control would be justified given the various rationales of copyright would provide a sounder ground for legitimizing the conclusion reached.

Examining the desirability of the right holder's control over the circumstances of a work's consumption would make room for discussion on balancing the need to protect a work's economic exploitation vis-à-vis other objectives such as a work's dissemination. The CJEU briefly acknowledged the relevance of the reward aspect of the case without, however, exploring the notion of its appropriateness, as is explicitly provided in recital 10 of the InfoSoc Directive. Any economic interests in restricting framing of otherwise publicly accessible works could be supplemented by the author's overall vision for the work's communication, e.g. being confined to the context of a particular website. The balance between control over the work's exploitation and the public's ability to engage with freely available works cannot be reduced to subtraction of the targeted public from the reached public.

Although the CJEU refrained from qualifying any framing as an infringement of the right of communication to the public, the decision certainly points in the direction of the right holder's vast control over the exploitation and consumption of a work. Whereas the outcome could be justified, the reasoning could prove troublesome for further development. Various practical questions are raised by the judgment. How should circumventing the measures imposed independently by a third party operating a website be treated?⁹⁰ Should Facebook allow its users to

⁸⁹ That the issue at stake in *VG Bild-Kunst* concerned controlling the circumstances of access rather than access was also noted by AG Szpunar. See the statement that "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", Opinion of the Advocate General in *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, Case C-392/19, para. 85.

⁹⁰ On this question, as well as questions related to licensing, see also Schwemer (2021), pp. 625–642.

restrict the framing of their otherwise publicly available posts on other webpages, such as Twitter?

It is therefore argued for a revision of the scope of application of the new public criterion and clarification of the non-exhaustion provision under Art. 3(3) of the InfoSoc Directive. First, the new public criterion ought to be restricted to i) acts that constitute secondary communication, dependent on the availability of a work elsewhere, and ii) acts that concern the access to a work in its strict sense. Second “if not ... then ...” statements referring to non-exhaustion of the right of communication to the public ought to be examined for their added value and for silencing the discussion of an appropriate balance to be maintained under copyright law. This would mean that the assumption of the intended public being confined to the visitors of a particular website must be revised. Further, the reasoning in *VG Bild-Kunst* should be viewed as concerning control over the circumstances of a work’s communication and how framing interferes with this, rather than the fictional new public reached by framing.

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