Copyright aspects of embedding, framing and hyperlinking - Introduction

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Technical background

Embedding, framing and hyperlinking have certain common characteristics:

- The copyright protected content is on a third-party website;
- Transmission of the copyright content is from the third-party website to the end user’s computer;
- The end user is aware that he/she is on a third-party website when clicking a hyperlink;
- The end user may not be aware that he/she is on a third-party website when the copyright content is framed;
- The end user cannot know that he/she is on a third-party website when the copyright content is embedded.
• Solution in the US: application of fair use exception under section 107 of the Copyright Act of 1976 - May 16, 2007, Perfect 10, (9th Cir. 2007)
The Copyright issue

• The issue under copyright

Are embedding, framing and/or hyperlinking acts that require the authorization of the copyright owner?

If the copyright content was lawfully made available on a third-party website, do embedding, framing and/or hyperlinking require another authorization?

If copyright content was unlawfully put on a third-party website, do embedding, framing and/or hyperlinking constitute acts of infringement?
The Copyright issue

• Why it matters

Internet navigation would not function smoothly without hyperlinks: alternatives to the free use of hyperlinks would be either the use of references instead of hyperlinks or a « copyright hold-up » on hyperlinks.

Business models based on aggregating copyright content or making it (immediately) accessible can be very lucrative:

« The categorizing and embedding of copyright content takes away a lot of the effort having to look for the relevant files … The object of using… embedding and/or framing … as opposed to using normal hyperlinks is [that]… it will keep the visitor on the relevant website and allows the [website owner] to generate revenues from advertising … Especially in the context of linking to an illegal source, it is often the case that the content that is referred to is very hard to find by searching yourself. » (Article by the general counsel of Buma/ Stemra, March 29, 2013)
The Copyright issue

The revenues of aggregators and search engines are arguably generated on the basis of the value/attractiveness of the embedded, framed and/or hyperlinked copyright content together with the value/attractiveness of the platform using the copyright content.

Copyright owners do not receive any income from this lucrative exploitation of their works.

Copyright owners have ordinarily received income from making available their copyright content on the internet (lawful content).
The Copyright issue

Embedding, framing and/or hyperlinking **do not interfere** with the normal exploitation where the copyright content was lawfully posted without protection. (?)

They **may interfere** with normal exploitation where the copyright content was posted for certain commercial uses such as advertising.

They **do interfere** with normal exploitation where the copyright content was posted with restrictive access.
AIPPI POSITION

Resolution adopted at ExCo Hyderabad, October 18, 2011, Question Q216B

Considering that:

“Linking to and from websites is an essential feature of the Internet. User-activated hyperlinking is the most common way to make one’s own content or third party content available to a wide number of Internet users. It is not always clear whether the provision of a user-activated hyperlink is actionable under the copyright laws of the various jurisdictions.”

Resolves that:

“3) Providing user-activated hyperlinks to a copyright work, in and of itself, should not be considered a reproduction of the work. Also, providing such hyperlinks to a copyright work that has already been made available to the public on the Internet with the authorization of the relevant rights holder does not, by itself, constitute a further act of making such a work available to the public. However, providing hyperlinks may attract liability by contributing to acts of copyright infringement in relation to the targeted work.”
Article 3(1) of Directive 2001/29

“Right of communication to the public of works (...) - 1. Member States shall provide authors with the exclusive right to authorize 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.”

Article 3 (1) of Directive 2001/29/EC of 22 May 2001

“This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.”

Recital 23 in the preamble of Directive 2001/29/EC
The CJEU position in a nutshell

Case C-306/05 SGAE [2006] (SPAIN):

“[T]he Directive does not define ‘communication to the public’ (...) In those circumstances, and in accordance with settled case law, its meaning and its scope must be determined in light of the objectives pursued by the Copyright Directive and of the context in which the provision being interpreted is set (...) in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty.”

Nils Svensson vs. Retriever Sverige AB, February 13, 2014, C-466/12:

"The provision of clickable links to protected works must be considered to be "making available" and, therefore, an "act of communication", within the meaning of [Article 3(1) of the Directive]."
The CJEU position in a nutshell

• “26. [G]iven that access to the works on that site [the site linked to] was not subject to any restrictive measures, all Internet users could therefore have free access to them.”

• “27. In those circumstances, … the users of the site managed by the latter [the site with the hyperlink] must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorized the initial communication. (…) 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.”

• “ 29. Such a finding cannot be called in question (…) 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. “

• “30. That additional circumstance in no way alters the conclusion … [S]ince there is no new public, the authorization of the copyright holders is in any event not required for such a communication to the public.”
The CJEU position in a nutshell - suite

• “31. On the other hand, where a clickable 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 (…) and accordingly the holders’ authorization is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorization.”

• “41. Article 3(1) … must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.”
Pending requests for preliminary rulings by the CJEU

Case, C-279/13, C More Entertainment, [lodged on 22 May 2013], (Sweden) :

Does the expression “communication to the public”, within the meaning of Article 3(1) of the Information Society Directive, include measures to make available on a website open to the public a clickable link to a work which is broadcast by the holder of the copyright in that work?

Is the manner in which the linking is done relevant to the answer to question 1?

Is it relevant if the access to the work to which the linking is done is in any way restricted?

May the Member States give wider protection to the exclusive right of right holders by enabling “communication to the public” to cover a greater range of acts than provided for in Article 3(1) of the Information Society Directive?

Case, C-348/13, BestWater International, [lodged on 25 June 2013 ], (Germany) :

Does the embedding, within one’s own website, of another person’s work made available to the public on a third-party website, in circumstances such as those in the main proceedings, constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC, even where that other person’s work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication?
What in principle matters is not how such a communication is effected, but rather that (i) the act of an individual person, directly or indirectly, (ii) has the distinct effect of addressing the public, irrespective of the tool, instrument or device that the individual has used to bring about that effect, and (iii) that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright.

It is totally irrelevant if the public thinks, perceives or senses that it has been directed to another website or if it believes that the access to the protected materials happened on the website that it has logged on to.
• [L]inks which lead directly to specific protected material, thereby using its unique URL, fall normally within the framework of a copyright use. This kind of linking is thus a “making available”.

• [T]he open source availability of a work has no impact on the status of a communication as a copyright relevant act.
• 35. Clearly, hyperlinking involves some sort of act – an intervention. But it is not, for that reason alone, an act of communication. This is because there is no transmission.

• 36. “… Hyperlinks ... share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content.” (quoting the Supreme Court of Canada)
• 39. « … HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser.” (quoting USCA, Perfect 10 vs. Google, 2007)
43. … conflating communications of locations with communications of works has potentially absurd consequences.

55. … Just as an improved search-engine that improves the ability of users to locate material for which they are searching should not be required to obtain permission as a matter of copyright law, so providing links or access to material already publicly available should not be regarded as an act that requires any authorization.
[B]y framing and/or embedding content a ‘new audiovisual product’ is often created. … In the examples that have been given concerning embedded and framed content, individual files are bundled, categorized and offered to the consumer in an easily accessible manner. In such a case there is no doubt that the audiovisual product that is offered is new, and consequently also reaches a different and new public.

[S]ites that present content within the context of their website often clearly do that to derive profit from it. The profits will most often be gained from advertising and the sale of market data.