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2016 – Study Question (Copyright)

Sarah MATHESON, Reporter General
John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General
Yusuke INUI, Ari LAAKKONEN and Ralph NACK, Assistants to the Reporter General
Linking and making available on the Internet

Responsible Reporter: Yusuke INUI

National/Regional Group	Argentina
Contributors name(s)	Jorge OTAMENDI and Juan G. POZZO
e-Mail contact	joo@gbreuer.com.ar
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I. Current law and practice

1) Does your Group's current law have any statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT?

no

Please explain:

Not specifically as the notion of “making available right” but the “right to public execution or representation” (art. 2°, Act No. 11723 and art. 50° Act No. 11723).

2) If no, does your Group's current law nevertheless protect the making available right or a right analogous or corresponding thereto? If so, how?

yes

Please explain:

There's no specific rule though we believe that making available a third party work should be considered illegal once the owner notifies that the work in question is being illegally reproduced.

3) Under your Group's current law, if:
a) a copyrighted work has been uploaded to a website with the authorization of the copyright holder;
and
b) is publicly accessible (i.e. there are no access restrictions),
would the act of providing a user-activated hyperlink to the starting page of the website to which the work has been uploaded be considered a "communication" of the copyrighted work?

no

Please explain:

4) If yes, would such an act be considered as communication "to the public"?

no

Please explain:

5) If yes, does that constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply?

no

Please explain:

6) If the answer to question 5) is no, on what basis would infringement be denied (e.g. by application of the theory of an implied license)?

There are no antecedents in this area. Anyway, connecting the public to a website to which anyone can access simply, should not be considered an illegal act since there is no illegality in the display of such work in that website.

7) If the relevant act is deep linking as described in paragraph 11) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answer would not be different.

8) If the relevant act is framing as described in paragraph 12) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answer would not be different.

9) If the relevant act is embedding as described in paragraph 13) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answer would not be different.

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

11) If the copyrighted work has been uploaded on the website with the authorization of the copyright

holder but the access to the work has been restricted in some way (e.g. a subscription is required in order to access the copyrighted work), would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

12) If the copyrighted work has been uploaded on the website without the authorization of the copyright holder, would the answers to questions 3) to 9) be different? If yes, how?

yes

Please explain:

But only if the provider is duly notified that the link he is providing leads to an infringers site

13) Under your Group's current law, if a copyrighted work is made available on a webpage without any access restrictions, would that work be considered as having been made available to all members of the public (i.e. globally) that have access to the Internet?

yes

Please explain:

There are no antecedents but an affirmative answer seems logical.

14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

Because it shows no intention of the owner's rights to restrict or to aim to specific target its publication.

15) If under your Group's current law the circumstances described above do not constitute direct infringement, would any of those circumstances support a finding of indirect or secondary copyright infringement?

yes

Please explain:

Knowing that an illegal copy is being reproduced, would make the provider of the link an accomplice of the infringer.

16) If yes, please identify the circumstance(s) in which indirect or secondary copyright infringement would be applicable.

If the provider is previously notified of the illegal character of the work in the other website.

II. Policy considerations and proposals for improvements of the current law

17) How does your Group's current law strike a balance between a copyright owner's ability (or inability) to

control the act of linking by others to their copyrighted work and the interests of the copyright owner, the public and other relevant parties?

There are no provisions in the law or in court cases.

18) Are there any aspects of your Group's current law that can be improved? For example, by strengthening or reducing the copyright owner's control over linking?

yes

Please explain:

A new provision should be introduced in the law, since there is none today. Illegality should result only after the link provider is notified of the illegal copy that can be reached though the provided link and the provider does not illuminate it for its website.

III. Proposals for harmonisation

19) Does your Group consider that harmonisation in this area is desirable?

no

Please explain:

Not necessarily.

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

20) Should an act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) to a website containing a copyrighted work be considered a "communication" of the copyrighted work?

no

Please explain:

21) If yes, should such an act of linking be considered a communication "to the public"?

22) If yes, should such an act of linking constitute infringement of the making available right, assuming no exceptions or limitations to copyright protection apply?

23) Having regard to your answers to questions 20) to 22), should different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) be treated equally or differently? If yes (in any case), why?

24) If yes in any case, in relation to each such case, should the finding be one of direct or indirect infringement? If yes (in either case), why?

25) Do your answers to any of questions 20) to 24) depend on whether the website expressly displays a statement that prohibits the relevant act of linking or linking generally? If yes (in any case), please explain.

26) Do your answers to any of questions 20) to 24) depend on whether the public's access to the work uploaded on the website is limited in any way? If yes (in any case), please explain, including limitations that should be relevant.

no

Please explain:

27) Do your answers to any of questions 20) to 24) depend on whether the copyrighted work has been uploaded on the website without the authorization of the copyright holder? If yes (in any case), please explain.

yes

Please explain:

As said before, the provider should be notified about the illegal copy in the site of the supplied link.

28) If there has already been an authorized communication of the copyrighted work directed to certain members of the public, should a finding of infringement of the making available right depend on a subsequent act of unauthorized communication of the said work to a "new public"? If yes, please propose a suitable definition for a "new public."

yes

Please explain:

As said before, the provider should be notified about the illegal copy in the site of the supplied link.

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

no

Please explain:

30) Please comment on any additional issues concerning linking and the making available right you consider relevant to this Study Question.

While there are no specific provisions on the Argentine's law regarding the eventual illegality of the act of linking pages of copyrighted works, in 2014 our Supreme Court on case "María Belén Rodríguez vs Google Inc. et al" (file number 99.613/06) has ruled that Google and other ISPs are not liable for the content of third parties if the ISP does not have knowledge of the allegedly infringing material or, having such knowledge, acts expeditiously to remove access to such material. That means that any intermediary that is aware (by an appropriate notice) of an "undoubtedly illegal situation" provoked by a third party (a copyright violation for example) is obliged to cease the communication of that link. Failing to do so, would turn the intermediary as legal responsible for any damage.

Please indicate which industry sector views are included in part "III. Proposals for harmonization" of this form:

This kind of matter should apply to a wide spectre of industries. Although some highlights can be made on Entertainment, Music, News and Communications, Retail and Biotechnology.

Summary

In Argentina the mere act of linking would not constitute an act of coyright violation unless that circumstances are not duly notified to the direct responsables or intermediaries.