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2016 – Study Question (Copyright)

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Linking and making available on the Internet

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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?

yes

Please explain.:

Yes, the Austrian copyright act provides for in Section 18a UrhG[1] the protection of an author's making available right. This provision transposes Article 3[2] of the 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 (InfoSoc-Directive).

Footnotes

1. ^ *Section 18a: The author has exclusive right to make the works available to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.*
2. ^ *Article 3 (1): Member States shall provide authors with the exclusive right to authorise 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.*

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?

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:

No. Prior to the decision of the CJEU in Svensson, the Austrian court has already decided that the provider of links (“Linksetzer”), who refers to legally published content on the internet, without the circumvention of technical measures implemented by the author to protect against uncontrolled access by the public, does not infringe the authors right under Section 18a Austrian Copy Right Act (UrhG).[1] Since the judgment of CJEU in Svensson it is clear that the act of providing user-activated hyperlinks to a website to which a copyright-protected work has been uploaded would not be considered a communication of the work under Austrian law.

Footnotes

1. ^ *see Austrian Supreme Court 20 September 2011, 4 Ob 105/11 m.*

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

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?

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)?

“Making available” in the sense of Section 18a UrhG requires a respective power of disposition and control concerning the access to the work. Only the person, who controls the original work or copies thereof, can provide it to third parties in such a way, that he controls the access. However, the one who neither provides a work for download nor transmits the copies of a work on demand, and hence, only provides a link, which assists the user to view the work on its original site, only supports the facilitated access to a file on a certain original site, but without making it available in the sense of Section 18a. Under these circumstances the provider of the hyperlink has no such power of disposition and control over the access to the work, particularly not, because the file could be deleted from the website without his consent, whereby the link would then be dead.[1]

Footnotes

1. ^ *see Austrian Supreme Court 20 September 2011, 4 Ob 105/11 m*

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 Austrian Supreme Court does not distinguish between hyperlinking, inline-linking or framing.[1]

From the European case law can be concluded that it is irrelevant through technical form of linking the user refers to the content of a third party website.[2]

Footnotes

1. ^ *see Austrian Supreme Court 20 September 2011, 4 Ob 105/11 m*
2. ^ *See CJEU 21 October 2014, C-348/13, Best Water; CJEU 13 February 2014, C-466/12, Svensson.*

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?

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?

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?

yes

Please explain:

This question has not yet been clearly answered by the High Courts. The Austrian Supreme Court requires “technical protection measures” for limiting the access only to a certain public, why just the statement to disagree with linking would obviously not to be deemed as sufficient. The CJEU refers to “any restrictive measures” (see C-466/12), which must comply with certain technical minimum requirements, but does not require “effective technical measures” in the sense of Article 6 InfoSoc Directive (e.g. login credentials, encryption techniques). However, considering that just a statement under the terms of use would not limit the relevant public (the users that can access the content), the current case law evokes the interpretation that solely a statement could not prohibit linking effectively.[1] This result could also be concluded from the fact that solely statements in Terms of Use, which are not expressly accepted by the website visitor, do not become a legally effective contractual declaration under Austrian contract law.

Footnotes

1. ^ *See e.g. Appl, Hyerlinking and embedded content in the view of the CJEU, MR 2015, 151.*

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?

yes

Please explain:

Yes. In the sense of the CJEU in the case Svensson, this would make a difference, because then the public targeted by the initial communication would not consist of all potential visitors to the site due to the site restrictions. Hence, the work would be presented to a new public and therefore, the authorisation of the copyright holder would be required for this communication.

The Austrian Supreme Court does not distinguish between the certain action of providing the content and the relevant public of this provision. However, as the court refers to the circumvention of technical

measures, it can also be concluded that the providing of a link to a work on a website with required subscription constitutes a breach of the author´s rights.

However, it has not yet been qualified of which nature these required measures must be. Even if the CJEU stated that “This is also the case where the restriction is not a technological hindrance”, what indicated that a technical measure is not required, there remains uncertainty about this criteria.

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?

no

Please explain:

There are until now no such experiences in Austria resulting from case law. However, under consideration of the “new public” as criteria for the qualification as relevant use, it cannot be excluded that under these circumstances linking to such content would be qualified as illegal, because the copyright holder did not agree with the provision of the content and hence, did not disclose himself the content to the online community.

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?

no

Please explain:

Not yet decided by Austrian courts.

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?

Not yet decided by Austrian courts.

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:

The Austrian Supreme Court has not yet dealt with this question. However, there are legal opinions that the embedding of resources that are stored on third party websites (i.e. framing) must be qualified as making available under Section 18a UrhG, because this must be regarded as “further making available” and hence, would constitute a secondary use which requires the consent of the author.[1] This secondary use is compared with the integral, ergo the simultaneous, comprehensive and unmodified retransmission of TV programs in cable networks (Section 59a UrhG).[2]

Footnotes

1. ^ *See e.g. Stomper-Rosam, Copyright and links, MR 2013, 227.*

2. ^ *See Walter, Hyperlinks and search engines, MR 2011,313.*

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

See question 15. There are until now no such experiences in Austria resulting from case law.

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?

Considering that actually the prevailing court practice does not qualify linking as copyright infringement, there are no discussions about balancing the interests between copyright owner and the public. However, if the relevant action of linking should constitute an infringement under the certain circumstances, Section 87b Para 3 UrhG allows information claims of the right holder against the Internet access provider to identify infringing users if there is an obvious rights infringement.

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?

III. Proposals for harmonisation

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

yes

Please explain:

Regarding internet facts harmonization is welcome, because the internet is only single digital market and harmonization is required to reduce competitive disadvantages. In Europe the several decisions of the CJEU regarding the interpretation of the European Union’s Directive 2001/29/EC already support the harmonization of legal aspects of the information society.

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?

yes

Please explain:

The qualification as communication triggers the legal question under which circumstances such use infringes the interests of the author.

The CJEU solves this issue with the reference to the “new public”. However, as already stated above (see question 12), then the question arises whether all providers of links to an illegal uploaded content infringe the rights of copyright holders, considering that under these circumstances there exists no “public” to which the content was originally presented by the author

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?

no

Please explain:

Linking should also not be qualified as infringement of the making available right, because from a technical perspective the linking does not extend or reproduce the information provided somewhere on internet, and hence the commercial interests of a copyright holder are not infringed.

However, as from the Austrian Supreme Court and from the CJEU follows, this requires that the copyright holder has not implemented any protection measures on the website. This argument could also be interpreted as if the author has implicitly consented to the use of the content through uploading without restrictions. However, considering that also Browsing und Proxy Caching as essential technical functions of the internet (similar to linking) can be performed without consent (Article 5 Para 1 InfoSoc Directive), an infringement of a use rights through links must be rejected, However, it could be argued that secondary use rights can be infringed (see question 25).

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?

yes

Please explain:

Considering that hyperlinking requires a separate action by the website visitor, in contrast other forms of linking do not, because the content is directly included in the hypertext of the website, and hence, it is incorporated as such, it could be argued that a different treatment in the sense of a subsequent communication would be appropriate (see answer to question 15).

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?

yes

Please explain:

Should be an indirect infringement.

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.

yes

Please explain:

If certain links are qualified as potential infringement of the author´s rights in the sense of a secondary use, then there would be a room for arguing that the uploading without restrictions (not depending whether technical or not) implies the consent to such a use. Under these circumstances the right holder should be able to prohibit the subsequent communication of his content (by framing and similar techniques for embedding content), provided that the prohibition becomes subject to a valid agreement with the visitor of his website.

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.

yes

Please explain:

See question 25.

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:

See question 25.

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:

New Public means, a public that was not taken into account by the copyright holders when they authorised the initial communication to the public (as defined from CJU in Svensson, paragraph 24 of the decision)

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.

N/A

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

Summary