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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?

no

Please explain:

Not directly (please see answer to question #2 below).

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?

no

Please explain:

The Copyright Act provides for an umbrella provision in its section 29, item X, whereby any form of use (or mode of exploitation in a direct translation) is protected by the law, whether now existent or devised in the future. Therefore, the Group understands that the making available right falls into that broad category. In addition, the reproduction (section 29, I) and communication (section 29, VIII) rights can be used to obtain a similar effect, as well as the specific provision of section 29, VIII, (i), which protects the direct or indirect use of the work by means of optical systems, telephone or other lines, cables of all kinds and such comparable means of communication as may be devised in the future. Furthermore, article 105 of the Copyright Act considers as a civil tort the transmission and retransmission by any means or process, and the communication to the public of works carried out in violation of the rights of the owners.

Finally, the Criminal Code considers it a crime (section 184, paragraph 3) the non-authorized offer to the public of any work protected by copyright.

Therefore, in the Group's view, the making available right has analogous protection in Brazil.

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. The Group considers that the mere presence of a use-activated hyperlink to the starting page should not amount to "communication" of the copyrighted work.

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

no

Please explain:

N/A

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:

N/A

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)?

N/A

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:

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:

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?

yes

Please explain:

Yes. The Group believes that the act of embedding should be considered a “communication” of the copyrighted work, since the work is visually available and displayed in the agent’s webpage.

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?

no

Please explain:

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:

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?

If there are no restrictions, the answer to question #13 stands. If there are restrictions, then the nature of such restrictions will need to be analyzed.

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:

Yes. However, the Group believes that this answer needs a better qualification than a simple yes or no. Under the Copyright Act currently in force, the theories of indirect or secondary copyright infringement rely upon sections 104 and 105 of the law and are restricted by the individuals who aid in any way in the chain of infringement. Further, the law requires a “for profit” or “for gain” qualification, which may not be always present. There are other non-copyright theories that can have the same result, though, with a broader reach, namely the “unjust enrichment” theory under our civil law and the “unbalanced benefits” under our contractual law, but they are outside the scope of the questions posed by the AIPPI.

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

Please see answer to question #15.

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?

The Group believes that there are no express mechanisms in the Copyright Act to strike such balance, but the limitation of rights provision set forth in section 36 of the Act generally allows the use of a copyrighted work without prior and express authorization under specific situations. In addition, the Constitutional right of free speech and citation may also come into play.

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:

Yes, content made available through the internet have virtually no territorial boundaries. Content made public on the internet can become instantly accessible in the entire globe, having a potential to harm rights' holders if used without authorization. A harmonized protection system can be an effective instrument to fight the undue use of copyrighted works, preserving commercial value of original copyrighted works.

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:

It is the opinion of the Group that the acts of hyperlinking to the starting page, deep linking and framing should not be considered a "communication" of the copyrighted work, since the copyrighted content is not displayed on the server that contains the hyperlink, only the electronic address (URL) that directs to the copyrighted work. However, the act of embedding should be considered a "communication" of the copyrighted work, since the work is visually available and displayed in the agent's webpage.

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

no

Please explain:

It is the opinion of the Group that the acts of hyperlinking to the starting page, deep linking and framing only refer to content of other websites through the practice of linking, thus not retransmitting the content and, therefore, there should be no communication “to the public”. Only the original website, which contains the work, is communicating the work to the public. However, the act of embedding could 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:

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:

The acts of hyperlinking to the starting page, deep linking and framing should be treated equally, because such forms of linking only lead to a particular page within another website containing the work. Embedding should be treated differently, since the content of the original website is displayed directly from another site, as if the agent was the owner of the work/content displayed.

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:

The answer depends on whether the initial upload of the work was made with or without the authorization of the copyright owner. For instance: embedding a content which has been inserted in the original website without the permission of the right holder constitutes 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.

no

Please explain:

No, however, possible sanctions to the acts of linking (damages to be set by a court of law) could be worse in the event a website to which a copyrighted work is initially uploaded contains a statement that expressly prohibits the act of linking, as the agent may not claim that he ignores such a prohibition.

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:

No, they do not depend.

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.

no

Please explain:

No, because the subject matter under analysis is the act of linking and not if the initial upload of the copyrighted work was made with or without authorization of the copyright holder. This will only affect the analysis in regard to the practice of direct or indirect infringement.

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:

Yes. As the copyright holder should control the distribution of the work, a suitable definition for a "new public" could be a targeted audience not originally authorized/reached by the copyright owner. The Group understands that this concept only applies in cases where the public originally had restricted access to the work and someone freely *links* the content to other internet users making the work available to a "new public or audience". As occurred in Svensson, we also understand that once all internet users have free access to the copyrighted work, there should be no "new public".

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:

No, in case a copyrighted work is made available on a webpage without any technical access restrictions, it should be considered that the work is made available to all members of the public who have access to the Internet. We understand that, although there is a possibility of having a contractual restriction, an effective restriction in those situations is only feasible through the use of technical tools.

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