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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, art. 18. Par. 10 of the Law on Copyright and Related Rights (LCRR) transposes almost literally the text of Art. 8 of the WCT.

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?

yes

Please explain:

b. It should be noted that court practice in Bulgaria has not dealt with these questions so far at all,

therefore all replies to the questions below constitute an interpretation of the current law as we feel it should be made. It is not backed by any Bulgarian court practice. It should also be pointed out that Bulgarian courts largely observe the relevant European court practice and follow it.

In accordance with European practice we believe that the act of “communication” should be interpreted broadly (see, to that effect, Svensson and Others, as well as C-466/12) Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-9083, paragraph 193). A clickable hyperlink to protected works published on another site and accessible without any further restrictions, grants users of the first site direct access to those works, therefore it should be considered “communication”.

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

yes

Please explain:

As for communication “to the public” in the current case where the work is originally published on a website without any restrictions we believe that the view of the CJEU on the Svensson and Others case should be followed. There is no “new public” to which the copyrighted work is communicated. The work is already accessible for every single Internet user hence the act of framing of the work on another website does not broaden the circle of the public, which may access it.

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)?

Infringement would be denied based on the fact that the elements of the offence are not fulfilled, since there is not communication “to the public”.

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?

yes

Please explain:

If the relevant act is deep linking the approach should still remain the same.

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?

yes

Please explain:

If the relevant act is framing the approach should still remain the same.

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:

In the case of embedding, the matter should be treated identically as in the other matters, described above.

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:

In such cases, linking would have to be considered a direct infringement, as it will specifically contradict the intent of the copyright holder to “communicate” the work only to the users of a specific website (the one where the work is actually uploaded). Obviously, permission will not be granted for the linking and hence it will have to be considered infringement, since in this case there is a new public. The intent of the copyright owner, who willingly uploaded a work to a site which imposes such a restriction, is obviously to not have his/her work communicated in another way.

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:

This event would have to be addressed very similarly to the previous one, concerning the prohibition of linking. Again, it would have to be considered, that the copyright owner’s intent was to restrict access to his/her work only to the users of a specific website, which are more or less regulated and accounted for through registration. To that regard, if the linking is made in a way that “sidesteps” that restriction, it would have to be considered as a direct infringement. An exception could be made if the link leads to a log-in request (i.e. that the user would have to first subscribe to the second website, as if he/she was accessing it directly and not through a link) or in other way complies to the intended restriction.

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:

In such a case, the action of linking (regardless of its form) should be considered “communication” and “to the public”. It will be, in all circumstances, considered as a direct infringement, as this communication will always be unauthorized. There is no doubt that the linked-to website will be infringing, as it is communicating to the public a copyrighted work without the author’s consent. Precisely due to the lack of authorization by the author to communicate his/her work to the public the linking website will also be in direct infringement. Since the author did not agree to the initial communication of the work there is no “exhaustion” of rights that can be claimed with regard to the circle of the public, which is able to access the first website (the one on which the work was initially uploaded), respectively the second (the one containing the link).

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:

The Bulgarian LCRR does not make a definitive distinction in the cases of making available on the internet with regards to territory. Therefore, should a copyrighted work be made available without any restrictions on the Internet, it would have to be considered as having been made available “globally” to all members of the public that have access to the internet.

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?

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?

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

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?

Given the basically “general” provision without further detailing (providing that the copyright owner is the one who can decide whether to give permission for the work to be made available on the internet), it is down to that copyright owner to retain (or relinquish) control over the linking by others, mostly through the conditions under which a work is uploaded and made available on the internet. It is up to the copyright owner to decide if any restrictions to linking (in general or any of the subtypes) are to be applied. This can be controlled either contractually (when uploading the work to a website that belongs to a third party, the copyright owner can request such limitations to be imposed), or, as the case may be where the copyright owner uploads the content to his own website - by the owner himself. The public, in fact, is protected as the actual access of the work leads to no liability (the provider of the content would be the liable party, in case that provision was unauthorized). And it is up to content providers to make sure that they only provide content (within the circumstances described above) which they are legally authorized to provide (either directly, or through linking).

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:

In fact, given the very dynamic way that “making available on the internet” and the diverse methods of “linking” which may well soon be outdated and new ones might appear, it is probably better if no changes to the law are made as of now. Any attempt to detail the ways of making available or linking could in fact result in an opposite effect and actually damage the interests of copyright owners and/or other parties in the process. What would be beneficial is a constructive and active approach by the

authorities who apply the law and the build-up of detailed practice covering different examples of linking.

III. Proposals for harmonisation

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

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?

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.

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.

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."

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?

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

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

Summary