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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.:

Background:

In the circumstances discussed herein, we understand that the alleged actions do not involve direct communication or reproduction of any work from the author's site by the linker but rather the provision of a link (i.e., a reference or pointer to an Internet address) by the linker which allows the user to access the author's site either directly or by display of copyright material framed in the linker's site or embedded into the linker's site. We understand that the copyright material is neither communicated nor reproduced by the linker.

Answer:

Yes. Canada does have a statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT.

The rights of the copyright owner in Canada include the right to communicate the work to the public by telecommunications. In 2012, the Canadian government enacted Section 2.4 (1.1) of Canada's *Copyright Act*, RSC 1985, c C-42 which states that the communication of a work to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public. The meaning of Section 2.4(1.1) has yet to be interpreted by the Canadian courts but the stated intent of the legislator was to implement Article 8 of the WCT.

Telecommunication to the public has been held to include communication over the Internet. The person who posted the work is the person who is deemed to have communicated it. A communication occurs each time a member of the public accesses the work from the source computer.

In *Entertainment Software Association et al. v. Society of Composers, Authors and Music Publishers of Canada* (hereafter *ESA*), 2012 SCC 34, the Supreme Court of Canada, Canada's highest court, examined the word "communicate". The nine member Supreme Court panel, split by a 5 to 4 decision, decided that downloading of a work for viewing later was not a "communication". This case was decided before the explicit introduction of the making available right in section 2.4 (1.1). However, the making available right was introduced only as a subset of the communication right and the Supreme Court has held that the communication right is a subset of the performance right and that there could not, in effect, be a communication if there was no "performance". In any event, a link does not *per se* effect either a download or a performance, i.e., there is no reproduction or communication.

Relevant provisions:

2.4 (1.1) Communication to the public by telecommunication

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

3 (1) Copyright in Works

For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.

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, this would not be considered a communication of the copyrighted work under current Canadian law. In the context of the performance of musical works, Canadian courts have held that hyperlinks represent electronic addresses. The person that merely supplies the link that must be activated by the user does not communicate the work or authorize the communication of the work by that act alone.

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

no

Please explain:

N/A. See (3) above: the act in question would not be considered a “communication” of the copyrighted work.

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:

No. Section 2.4(1.1) was only introduced in 2012 and has not been interpreted as such. Under the current body of case law it has been held that mere user-activated hyperlinking is a reference to another location and not a communication of the work.

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)?

As per answers (3)-(5) above, there would be no issue of infringement because the *Copyright Act* is not engaged. The mere user-activated hyperlinking to a third party website does not constitute a communication to the public by telecommunication.

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:

No. There would be no difference in the answers to these questions if the relevant act is deep linking.

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:

No. As long as the user is still required to click a link, and the link that is framed does not appear automatically, there would be no difference in the answers to these questions if the relevant act is framing.

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:

The Canadian Copyright Board has held that the person that creates an automatic hyperlink to a work authorized the communication of the work from the site to which the link leads. As such, if a website includes a link to a work subject to copyright and the link is embedded such that the work appears automatically without requiring any act on the part of the user, then the website host that has included the automatic link on their website authorizes the communication or reproduction of the work, which

may infringe on its copyright. There are specific exemptions for non-commercial or educational use and exemptions for service providers that provide mere transmission or search and indexing services.

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:

From a copyright perspective, it is not relevant whether or not there is a statement that prohibits the relevant act of linking or linking generally. User-activated linking would not constitute authorization. Automatic hyperlinking would be considered an authorization (see answer to question 9). There may be theories of contract or trespass or the tort of unlawful interference with economic interests that may apply but all these theories have limitations that would require that specific circumstances exist.

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:

Section 41.1 of the *Copyright Act* prohibits the circumvention of a technological protection measure that controls access to a work. The sections of the *Copyright Act* dealing with anti-circumvention have yet to be interpreted by the Courts with respect to linking.

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:

Under the current case law interpreting the right of communication to the public by telecommunication, the act of mere user-activated hyperlinking would not appear to constitute a communication of the copyrighted work. As such, there would not be direct infringement of the right to communication by telecommunication, and by extension no direct infringement of the making available right. On this basis, answers to questions 3, 4, 5, 6, 7, 8 and 9 remain unchanged. The right to communicate and (as far as is understood by current Canadian case law) the making available right is not engaged by the fact of merely **user-activated** linking to a third party server.

However, in the case of an embedded link, case law has held that an “automatic hyperlink” “authorized” the communication of the work from the site to which the link led. The party providing the link may thus be authorizing an infringing communication where the owner of the rights has not authorized the original communication or the “making available”.

The answer above relates to the person providing the link. However, in the case of the person accessing the link, the answer will depend on the particular factual circumstances. The upload without the authorization of the copyright holder is a direct infringement of the reproduction right. According to Section 27(2) of the *Copyright Act*, it is an infringement for any person to exhibit in public a copy of a work with the knowledge that it is protected by copyright. Therefore, the person accessing the link may infringe if they exhibit the work with knowledge.

- 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:

If a copyrighted work is made available on a webpage without any access restrictions, that work will generally be considered as having been made available to all members of the public. Case law has clearly indicated that the location of the server is not determinative as to whether Canadian copyright jurisdiction exists for works posted on the Internet from outside Canada. However, considerations as to whether the website is directed to Canada and Canadians will be relevant to whether copyright jurisdiction exists in Canada in respect of the Internet activity occurring outside Canada.

- 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?

See the answer to question 13 above.

- 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:

It is an indirect infringement of a copyrighted work for any person to exhibit in public for purpose of trade a copy of a work with the knowledge that the copy is infringing. Thus, the exhibiting of a work through the use of an embedded automatic link could constitute in itself an indirect infringement by the person accessing the work where such person knows or should have known that the work infringed copyright. Liability for authorizing indirect or secondary infringement does not appear to exist in Canada so it is not known if the linker would have any liability.

If a website host provided a link as part of a service that is primarily used to enable acts of copyright infringement, the website host may be held liable for copyright infringement under a new enablement section of the Act. This section has yet to be interpreted by the courts.

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

The answers to the questions above apply to indirect or secondary copyright infringement.

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?

One way in which Canada strikes a balance with respect to linking is to consider if the link is automatic

or user-activated. If a user must click on the hyperlink, then the link is considered to be a reference or a pointer to information, and as such, the link itself is not a communication of a work. If the hyperlink automatically links to a copyrighted work, then the link is considered to “authorize” the communication of the copyrighted work.

Another way in which Canada strikes a balance with respect to linking is through the statutory protection for the use of technical protection measures. If any hyperlink circumvents a technical protection measure that restricts access to a copyrighted work, then the creator of that link is in violation of Canadian Copyright law.

It is recognized that if a person posts a work on the Internet without technical protection or geoblocking tools then they are taken to have accepted that persons can, at the very least, provide a reference pointer to the location of the work.

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:

Canadian copyright law may be improved with a clear provision that prohibits providing a link to an infringing copyrighted work where the work is known by the link provider to be an infringing copy. Linking with knowledge to bootleg or to known infringing copies should be actionable in some circumstances.

III. Proposals for harmonisation

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

yes

Please explain:

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"?

no

Please explain:

N/A. See (20) above: the act of linking to a copyrighted work should not be a “communication”.

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:

An act of linking should not be a violation of the making available right except perhaps where the link is made, with knowledge, to a known infringing copy (answer to question 18 above).

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:

In any case, a link is technically not a communication, but rather a reference or pointer to a location. However, the following three cases should be treated differently:

- a) If the link automatically renders, without user interaction, to an unauthorized copy of a work, then the automatic nature of the link provides an impression that the linker authorized the communication or reproduction.
- b) If a person who provides a link did so with full knowledge that the link was to a third party website designed to provide the ability to download unauthorized copyrighted work on a third party website, then the provider of the link is aiding the infringement of copyright of that work.
- c) If a link circumvents a technical protection measure placed by a copyright owner to prevent access to a work, then the provider of the link is aiding infringement of copyright of that work.

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:

- a) An automatic link to a copyrighted work that is not authorized by the copyright owner should be considered as a direct infringement of the right to authorize a communication or reproduction of that copyrighted work.
- b) Intentionally providing a link to a third party's website to aid others to download a copyrighted work, that the linker knows is not authorized by the copyright owner, should be considered as an indirect infringement of the right to authorize the communication or reproduction of that copyrighted work.
- c) Circumventing a technical protection measure placed on a website by a copyright owner to limit access to a copyrighted work should be considered as a direct violation of the technical protection measure and an indirect infringement of the right to authorize that copyrighted work.

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. Such statements are not relevant to copyright law *per se*. See answers to questions 9 and 10. However, there may be contractual or other non-copyright legal considerations that are not relevant to this study.

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:

Restricted access to a website does not affect the technical fact that a link is a reference to a location and not a communication. See answers to questions 9 and 10. However, there may be ancillary considerations that are relevant, such as technical protection measures and/or contractual limitations that restrict access to a website.

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:

Consideration should be made to situations where a link is knowingly and purposively created to reference a website that is known to contain infringing copyrighted works and to enable the copying of such works.

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."

no

Please explain:

A subsequent act of unauthorized communication would be actionable, without regard to whether the communication reached the same or different set of persons as the original authorized communication. However, in Canadian law, merely providing a reference link to a work on the Internet which is activated only by an action by the user is not a communication or an authorization of a communication.

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:

In general, no such works should be considered as not having been made available to all members of the public, except perhaps where a work is placed on a website with a clear indication that it is directed to a single geographic area, and appropriate notices are in place concerning such restrictions. However, such notices or restrictions should not prevent linking.

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

Section 2.4(1.1) of the Canadian Copyright Act was enacted to implement Article 8 of the WCT. A user-activated link on a website is considered to be a mere reference or pointer to a web address, and thus, is not a communication or a making available of information. A link that automatically sends an end user to web content without user interaction is considered to be an authorization of the communication of the content referenced by the link. International harmonization is desirable as follows: a) a link is a mere reference or pointer to a web address and does not communicate or make content available to the public; b) an automatic link to a copyrighted work that is not authorized by the copyright owner should be considered as a direct infringement of the right to authorize a communication or reproduction of that copyrighted work; c) intentionally providing a link to a third party’s website known to be used by others to download a copyrighted work without authorization by the copyright owner should be considered as an infringement of the right to authorize the communication or reproduction of that copyrighted work; and d) circumventing a technical protection measure placed on a website by a copyright owner to limit access to a copyrighted work should be considered as a direct violation of the technical protection measure and an infringement of the right to authorize that copyrighted work.