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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.:

Czech Copyright Act

Article 11 (1) The author shall have the right to decide about making his work public.

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:

Czech Copyright Act

Article 11 (1) The author shall have the right to decide about making his work public.

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:

Yes it will be communication of the copyrighted work, because it will meet the requirements to be communicated to the public. The linking entity provides new technical access (direction) to the artwork being published originally on other place.

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

yes

Please explain:

Yes, provided the link is on the publicly accesible website, it is considered for 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?

no

Please explain:

No it is not, provided the original source is publicly available, there is no restriction that would be circumvented, then it is not considered for the infringement.

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)?

It is considered for exhaustion of rights, if the new link communicate it to the same public as the original publication, then no new public got involved and original rights were already exhausted.

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, if the original deep link is publicly available, then publication of such deep link of the third party website does not make it available to new public, it might make the access easier eventually, but not to different scope of public.

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 exact technical method of hypertext linking of the third party context is not important

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 exact technical method of hypertext linking of the third party context is not important

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:

no, exhaustion of right cannot be prevented, it is based on the law, not contractual consequence that can be prevented

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:

On the other hand, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.

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:

if the original publication was not legal, the rights could not have been exhausted at all

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 public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.

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?

no

Please explain:

If no change has been made by the linking that copyright rights were exhausted

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

Theoretically there could be considered eventual damage by the way where is the linking made.. e.g. the context of the other content of the third party site resp. if the site containing the link would contain such an inappropriate content that including the link to content in question might damage e.g. authors reputation or good name..

## 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 is no limitation of the cross 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?

no

Please explain:

the owner making the copyrighted work public exhausted his rights toward the way of publication and the public targeted

## III. Proposals for harmonisation

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

no

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?

yes

Please explain:

if the original was communicated, linking to it follows the original communication and extend resp. repeat it only

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

yes

Please explain:

making available to unlimited number of web users is 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:

no, rights were exhausted

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?

no

Please explain:

no, the form of reference cannot anyhow affect the previous exhaustion of rights

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?

no

Please explain:

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:

the exhaustion cannot be prevented by any unilateral activity

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:

if the link communicate the refered content to broader group of persons, the exhaustion of rights is not applicable to the part of persons who have no access the the original publication

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:

unauthorized upload cannot exhaust the rights in any way

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 = public that had no access to the original authorized upload

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.

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

Summary

The legal regime the online content linking in the Czech Copyright law is completely harmonized with the directive 2001/29/ES and the judicial praxis is fully compatible with the C-466/12 Svensson vs. Retriever Sverige AB decision of CJEU.