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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 Estonian Copyright Act (hereinafter also as CA) contains statutory provisions that provide for the protection of author's making available right, in line with Article 8 of the WCT, which are the following:

§ 13. Economic rights

(1) An author shall enjoy the exclusive right to use the author's work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons and to receive income from such use of the author's work except in the cases prescribed in Chapter IV of this Act. The author's rights shall include the right to authorise or prohibit:

...

9^{1}) making the work available to the public in such a way that persons may access the work from a place and at a time individually chosen by them (right of making the work available to the 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:

See the answer to the question above.

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. As a member of the European Union, Estonian copyright law and practice follow the instructions and court decisions of the European Union and thereby applies the principles and reasoning set forth by Court of Justice of the European Union (hereinafter CJEU) in various court decisions that have analysed the act of linking and the making available right, incl. *Svensson* (C-466/12), *Bestwater* (C348/13) *etc.* As the CJEU has made clear in its decisions that the above described situation would constitute as “communication” of the copyrighted work, then the same reasoning would apply in Estonia.

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

no

Please explain:

No, as there is no “new public” as explained in the *Svensson* decision.

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, see the answer to the question above.

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 on the same basis as found in the *Svensson* decision of the CJEU, i.e. there is no “new public”. From this it is possible to interpret that that infringement would be denied through the application of the theory of an implied license, i.e. by making the copyrighted work freely available on the webpage where it was published the copyright holder has also consented to the act of linking by third parties.

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. As explained by the court in *Svensson* ("*Such a finding cannot be called in question were the referring court to find .... that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site*.") deep linking would lead to the same result of no "new public" which means that infringement would be denied.

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 the CJEU confirmed in the *Bestwater* decision that the same principles found in the *Svensson* decision would also be applicable when the linking method in question 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?

no

Please explain:

No, as the CJEU confirmed in the *Bestwater* decision that the same principles found in the *Svensson* decision would also be applicable when the linking method in question is embedding.

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:

Currently neither the Estonian law nor the relevant case law has provided an adequate answer to this question. In case of any future instructions and guidelines (incl. case law) on the EU level, Estonia will presumably follow these also in its practice on the national level. In this matter our Group is inclined to presume that such instructions and guidelines will lead to the conclusion that the act of linking to content with such explicit statement would most likely infringe the making available right. At least in the event when such statement that prohibits the relevant act of linking (or linking generally) existed at the moment when the relevant act of linking was carried out.

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:

The provision of clickable links to the copyrighted work would still be deemed to be an "act of communication". The question of infringement of the making available right work comes into question when analysing the second criterion of the concept of communication to the public, i.e. whether the communication was to the "public". If the link somehow circumvents the restrictions placed on the work (e.g. paywalls), then that would constitute as making the copyrighted work available to a different, i.e. a "new public", compared to what was originally intended by the copyright holder. As explained by the CJEU in the *Svensson* decision, if the link "*constitutes an intervention without which*

those users would not be able to access the works transmitted", then the "new public" criterion should be deemed fulfilled as there is a new public which was not taken into account by the author of the work when authorising the initial communication. In such case the court may find an infringement of the making available right.

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:

It is difficult to say. The facts of the main case and the reasoning of the court in the *Bestwater* decisions leads to the assumption that it does not matter whether the copyrighted work was uploaded on the website with or without the authorisation of the copyright holder as what is important for the establishment of the infringement of the making available right is to ascertain whether there is a "new public." But as there is no clear Estonian or CJEU's case law regarding this matter, it is presently not possible to provide a clear answer to this question. It is hoped that a more in-depth analysis of this matter will be received from the CJEU in the GS Media case (C-160/15).

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 definition for "public" in the Estonian Copyright Act is the following: "unspecified set of persons outside the family and immediate circle of acquaintances". (CA § 8(2)) According to the new legislative draft of the Copyright Act[1], the definition of "public" is to be slightly amended and the word "unspecified" shall be taken out from the definition. The reasoning behind this retraction lies within the development of online social networking, e.g. Facebook where the audience composes of a *specified* set of persons. The interpretation of the aforementioned current definition of "public" in Estonia thereby follows the regulations and practice of the EU (*Svensson*: "*it follows from Article 3(1) of Directive 2001/29 that, by the term 'public', that provision refers to an indeterminate number of* ***potential recipients*** *and implies, moreover, a fairly large number of persons (SGAE, paragraphs 37 and 38, and ITV Broadcasting and Others, paragraph 32*"). In *Svensson* the court found that the public targeted by the initial communication consisted of "all potential visitors to the site concerned". By this logic, the answer to the question would be that such copyrighted work would not be considered as having been made available to **all** members of the public (i.e. globally) that have access to Internet but only to members of the public that are **potential** visitors of the webpage where the work was made available.

Footnotes

1. ^ *Explanatory text of 21.97.2014 to the draft of the new Copyright Act (presumably will enter into force in 2017).*

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 the question above. As explained above, it seems that such communication would

be considered as directed only to certain members of the public – i.e. to the potential visitors of the webpage. That would mean, for example, that people living in a certain country or region that do not have access to the webpage and to the content therein might not be considered as the members of the public that were targeted by the initial communication of the copyright holder.

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:

There is no specific regulations and practice regarding this matter in Estonia. Theoretically it is possible that secondary infringement might arise in certain cases.

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

See the answer to the question above.

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?

In this matter, the Estonian case law and practice will probably follow closely the logic and approach of the CJEU.

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:

Improvements to the Estonian Copyright Act are already on the way in the form of the draft proposal for a new copyright and related rights act as mentioned above. These improvements, however, do not deal with the problems with linking per se and thereby leave the matter of how much control should the copyright owner have over linking unanswered. Our Group is of the opinion that copyright owner’s control over linking should be further achieved mostly by technical means and through the case law of CJEU (as the case law in Estonia regarding this matter is, and most likely will also remain to be in the future, lacking or scarce) and not through additional statutory laws.

III. Proposals for harmonisation

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

yes

Please explain:

Yes. Considering the international nature of online content and linking, our Group feels 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?

yes

Please explain:

The European case law has already decided on this matter in its recent case law, in particular in *Svensson*. In *Svensson* the CJEU remarked that the provision of clickable links to protected works published without any access restrictions affords users direct access and therefore such links must be considered as “making available” and therefore an “act of communication” within the meaning of Article 3(1) of Directive 2001/29. Whether the members of the public avail themselves of that opportunity is irrelevant. This approach was echoed in the *Bestwater* decision regarding embedding and framing.

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

yes

Please explain:

Due to the different forms of linking, our Group is of the opinion that the question whether an act of linking is a communication “to the public” should depend on the specific circumstances of each act of linking. For example, whether the act of linking makes the work available to a new public which was not originally taken into account by the copyright holder (e.g. circumventing paywalls).

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?

yes

Please explain:

See the answers to the questions above. In the light of today’s information society our Group, in general, concurs with what has been stated in the *Svensson* decision that no infringement should be found if there is no “new public”. Infringements of the making available right might, for example, be found in cases when the act of linking is carried out when knowingly providing illegal content (copyrighted work that has been made available on the website without the author’s authorisation) or when the act of linking circumvents the restrictions on the website (e.g. paywalls) and thereby makes the copyrighted work available to a “new public”. The exact boundaries between the acts of linking that are infringing and the acts of linking that are not infringing should be outlined by the (harmonised) guidelines and instructions.

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:

Our Group is of the opinion that even though the case law from the CJEU seems to be more inclined to treat these different forms of linking equally in terms of determining whether there has been an infringement of the making available right, there are inherent differences to these forms of linking that should be considered. As pointed out by the Association Litteraire et Artistique Internationale (ALAI) in its report and opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the Internet, an implied license approach which would treat all of the aforementioned acts of linking equally does not sufficiently regard the author's business interests, i.e. the possibility for revenue from the advertising on the website where the copyrighted work is made available. Therefore, it could be more beneficial if different forms of linking were to be treated differently when analysing the possible infringements to the making available right.

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:

If any infringement is to be found at all due to the act of linking, then such infringement should constitute as direct infringement of the copyright law. If there is no infringement of the making available right, then the basis of liability (if any) should be left to the direction of the national laws.

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:

Considering the copyright holder's right to make decisions regarding the use of its own work, then our Group is of the opinion that such explicit statement (of the copyright holder) that prohibits the relevant act of linking or linking generally could be regarded as infringement of the making available right.

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:

Our Group is of the opinion that the act of linking should not circumvent the restrictions (e.g. paywalls) put on the website where the work is uploaded.

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:

Our Group is of the opinion that the legality of the act of linking should not depend on whether the copyrighted work has been uploaded on the website with or without the authorisation of the copyright holder. If the legality of the act of linking is dependant on the authorisation of the copyright holder, then it would put unjust burden on the person carrying out the linking as he or she would have to use

extraordinary means to ascertain the legality of the copyrighted work before each act of linking. Furthermore, it would be almost impossible to determine the legality of the uploaded copyrighted works after the act of linking (as the copyright holder can rescind its authorisation at any point meaning that its legal status may change in time). Binding the act of linking with the legality of the copyrighted work would therefore jeopardize the dynamic nature of the Internet and threaten the essence of the act of linking. Other problems regarding this issue have been outlined in the Computer & Communications Industry Association Comments on the GS Media Case (C-160/15).

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, our Group accepts what has already been stated in the *Svensson* decision including the definition of the "new public" therein: "*a public that was not taken into account by the copyright holders when they authorised the initial communication to the 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?

yes

Please explain:

Our Group is of the opinion that such work should be considered as having been made available to all members of the public that have access to the Internet and the site concerned that are considered as potential visitors of the webpage. That means that the copyrighted works should be considered made available only to those members of the public that actually have or might have access to the webpage where the copyrighted work was uploaded.

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

One example of other potential problems with linking and the making available right include situations when the webpage owner has decided to apply its terms and conditions to the webpage, where the copyrighted works has been uploaded to, in a manner that the user of the webpage would have to accept its terms and conditions prior to the access to the uploaded work. Meaning that with linking it would be possible to circumvent the acceptance of such terms and conditions.

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

Summary

The Estonian Copyright Act does recognise the making available right but national case law has yet to provide instructions on how this principle should be applied regarding different forms of online linking. But as a member of the European Union, Estonia follows the rules and regulations as well as the case law that stems from the European Union and thereby is likely to follow the approach and logic argued

by the Court of Justice of the European Union regarding the making available right and the different forms of linking.

Considering the vastness and the rapid growth of Internet and the content therein which does not recognize physical boundaries, this area of copyright is in a need of harmonisation and more specific guidelines. As this copyright area is within the bounds of technical means then our Group is of the opinion that the harmonisation could be achieved through a two-fold approach: legal measures through the application and interpretation of existing laws, and technical measures that would provide the means to restrict content from unwanted linking and therefore make it easier for both parties involved – the copyright owner and the person who is carrying out the act of linking – to navigate in this area of copyright law.