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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.:

The Finnish Copyright Act (404/1961) provides for protection of an author's making available right in line with the Article 8 of the WCT.¹

Footnotes

- ¹ *We note, however, that the terminology used in the English translation of the Finnish Copyright Act (404/1961) differs rather confusingly from the terminology used in the Article 8 WCT and on the other hand the Directive 29/2001/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter "InfoSoc Directive"): in the English translation of the Finnish Copyright Act, the term "making available" is used as an umbrella term that covers inter alia the right of "communication to the public", which includes as its subset the "communication in a way which enables members of the public to access the work from a place and at a time individually chosen by them" (i.e. the making available right provided for in WCT article 8).*

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:

There is no relevant national case law on the matter.¹¹ The case law of the Court of Justice of the European Union (CJEU) however binds Finland. As considered in *Svensson* (C-466/12), providing a user-activated (clickable) hyperlink can be considered a "communication" of the copyrighted work.

Footnotes

1. [^] *The Finnish Copyright Council has, however, briefly elaborated on the issue in its ruling 4/2014. The said ruling makes a reference to the Svensson ruling of the CJEU and corresponds with it in its conclusions.*

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

no

Please explain:

There is no relevant national case law on the matter. The case law of the CJEU however binds Finland. As considered in *Svensson*, such act can be considered as a communication "to a public". However, we note that in order to qualify as "communication to the public" within the meaning of the applicable EU copyright legislation (essentially, the Infococ Directive article 3) requiring a permission from the right holder, the public at hand must be "new" as provided in the *Svensson* ruling

- 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:

There is no relevant national case law on the matter. The case law of the CJEU however binds Finland. As considered in *Svensson*, there is an infringement only if the communication is directed to a "new public". If there is no new public, there is also no infringement. Please see also our answer to question 15.

- 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)?

- 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:

There is no relevant national case law on the matter. The case law of the CJEU however binds Finland.

Based on the approach of the CJEU in *Svensson* concerning clickable links, we consider that the answers would not be different in case of 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:

There is no relevant national case law on the matter. The case law of the CJEU however binds Finland. As considered in *Svensson* and *Bestwater* (C-348/13), in case of framing (in particular, in case of clickable frame links) the answers to questions 3) to 6) would not be different.

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:

There is no relevant national case law on the matter. Neither has the CJEU clearly stated that the answers would be different if the relevant act is embedding.¹¹

Footnotes

1. ¹¹ *We note that we have only analysed the matter from the copyright perspective. It may be possible that other rights (such as unfair competition) could be invoked in this connection.*

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:

There is no relevant national case law on the matter. We assume that displaying such statements would not affect the evaluation made from the copyright perspective. Most likely the meaning of such statements would be evaluated from the contract law perspective.

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:

There is no national case law on the matter. The case law of the CJEU however binds Finland. As considered in *Svensson*, if such access restrictions are used, the communication would be directed to a new public and, thus, copyright infringement would be at hand unless other justification can be established. Also, we note that based on current case law, it is not clear how strong an access restriction would be sufficient in order to be relevant in establishing the existence of a "new public".

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:

There is no national case law on the matter. Neither has the CJEU directly stated that the answers would be different if the copyrighted work has been uploaded on the website without the authorization of the copyright holder. We assume, however, that it would be of relevance if the uploading was made without authorization of the copyright holder (see e.g. BGH, 09.07.2015 - I ZR 46/12 where the German Federal Court of Justice seems to indicate that it would be of relevance, whether uploading is made with or without the authorization). The issue may be further elaborated and clarified in the upcoming ruling of the CJEU in the *GS Media* case (C-160/15).

We assume, however, that in such case a copyright infringement might be at hand (i.e. such act might be considered communication to a "new public"). With regard to the act of "communication" and the "to a public" criteria discussed under questions 3 and 4 we assume that the answers would not be different.

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:

There is no relevant national case law on the matter. The case law of the CJEU however binds Finland. As considered in *Svensson*, a work would be considered as having been made available to all potential 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?

Please see our 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?

no

Please explain:

The Finnish copyright legislation does not make any difference between direct or indirect 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?

The group finds the balance established by the CJEU satisfactory. Various national laws outside of the realm of copyright (e.g. laws on unfair business conduct) also contribute to the overall balance.^[1]

The legal positions of some of the relevant parties may be described in the following terms:

A copyright owner exercises control over the first publication of a work and the subsequent communication of the work to any new public. The sharing of hyperlinks as such and without a new public being involved has not been considered 'communication of a work to the public' since the CJEU's ruling in C-466/12 Svensson, which established EU-wide rules for interpretation of linking. The ruling maintained a balance between the need of the public to communicate freely and the need of copyright owners to be able to commercially exploit their works.

The public has enjoyed the possibility to share hyperlinks and the possibility to access unprotected online publications without infringing copyright also prior to the CJEU's ruling in Svensson. The group holds that access to publicly available information on the internet is important and notes that it should be recognized as one of the ways in which the internet can serve to contribute to the realization of freedom of speech.

Broadcasting companies exercise control over transmissions and retransmissions and can prohibit the use of different technical means in the communication of their broadcasts to the public.^[2]

The group also noted that a significant portion of online content is nowadays created by **private individuals** who are, in practice, required to accept the terms and conditions of content sharing platforms. The group finds contractual freedom desirable but notes that the discrepancy in negotiation powers between a content sharing platform provider and an individual content creator, may lead to unbalanced possibilities to commercially benefit from works. However, any possible problems arising out of this imbalance should, in the group's opinion, be addressed through other means than the linking rules of copyright law, e.g. as a part of consumer protection.

Footnotes

1. [^] *However, due to a lack of case law on the subject it is not entirely clear to what extent these supplementary rules allow a right holder to prevent linking related activities.*
2. [^] *Every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question (judgment in *ITV Broadcasting and Others*, C?607/11, EU:C:2013:147, paragraph 24).*

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:

The group finds contractual freedom desirable and identified no shortcomings in the balance and in the realization of rights of any relevant group that should be addressed further by the linking rules in the copyright law. The group finds that copyright law should not restrict possibilities to create new methods of commercial use of works nor should it prevent access to information or discussion.

With a view to strengthening the possibilities of stimulating new business that leverages the value embedded in existing copyrighted works, as well as to reducing unnecessary barriers to well-

functioning transnational content markets, the exceptions to copyright should be harmonized, and certain widening could be considered. The interests of users, business and authors should be taken into account, however, noting that increased availability of e.g. limited pieces and portions of works likely results in recurring increase in the usage of the full works. Also, the principle of restrictive interpretation of license grants (in dubio pro auctore) should be reconsidered, taking into account that works often cannot benefit of distribution under new technologies, since existing license arrangements are normally interpreted to not cover emerging technologies.

III. Proposals for harmonisation

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

yes

Please explain:

Finnish law is quite well able to provide answers to various linking related questions and typically provides for reasonably foreseeable outcomes in practical situations. At the same time, the law is rather complex in nature.

The linking rules of the Finnish copyright law are in process of being harmonized in particular by the CJEU's case law. The group welcomes the digital single market aim of the EU as well as more comprehensive set of European legislation and case law that is expected to follow in suit.^[1]

The group is also *a priori* open to proposals for international harmonization with some reservations with respect to ensuring the survival and continuance of an appropriate balance between the relevant parties.

Footnotes

1. [^] *While such harmonisation may, in the short run, lead to a less foreseeable situation as a result of changes being effected to applicable rules, the group finds that harmonisation would involve benefits from the viewpoint of businesses operating throughout Europe and also globally.*

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 group finds it desirable to continue operating with the definition established by the CJEU for the concept of 'communication to the public'. Thus, an 'act of communication' should refer to any transmission of protected works, irrespective of the technical means or process used.

Prior to the CJEU's ruling in Svensson, it was commonly held that the hyperlinks correspond to address or availability information and that provision of a hyperlink would not constitute an act of transmission or communication of a work as such.

The group finds the CJEU's established interpretation that linking may be communication to the public satisfactory from the viewpoint of maintaining a balance between relevant parties, but there are nevertheless some concerns with respect to deviation from the literal meaning of 'transmission of a work'. The gap between the actual nature of the act of linking and its legal construction is potentially

liable to lead to confusion among internet users.

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

yes

Please explain:

The group finds it desirable to continue operating with the definition established by the CJEU for the concept of 'communication to the public'. An act of linking should be considered to be directed 'to the public' when a substantial and/or undefined group of potential viewers is involved. However, in order for a 'communication to the public' to be at hand, it is also required that the relevant communication targets a *new* group of people (*i.e.* a 'new 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?

yes

Please explain:

Unauthorized communication of a work to a new public should constitute an infringement provided that none of the exceptions or limitations to copyright applies.

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:

Note: Yes meaning "should be treated equally"

The relevant 'act of communication' should refer to any transmission of protected works, irrespective of the technical means or process used provided that the communication reaches a new public.

Infringing use should be assessed based on the visual manifestation of the act of linking and not the technical means used to achieve the said result. The group finds that copyright owners should have control over ownership information of their works. Links made in a manner, that is liable to mislead internet users to believe, that the content would be provided by another source, should continue to be considered potential infringements of moral rights and other regulation relating to misrepresentation. Linking could also be made in a manner that is deemed to create a modification of a work, in which case its communication to any public would require a separate authorization from the copyright owner.

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:

The Finnish copyright system currently does not differentiate between direct and indirect infringement. The group does not find it appropriate to consider, in the context of this study question, whether deviating from the established system is warranted. As a result, the group finds that a simple finding of infringement is sufficient.

Despite the lack of differentiation between direct and indirect infringement, it may be noted that sanctions for copyright infringement are weighed according to e.g. the perpetrator's degree of contribution to the infringement. In this sense, the current system enables a balanced decision to be reached. For example, the remedy for inadvertent infringement may include reasonable compensation for use and removal of the infringement, whereas the potential for liability for damages is triggered by negligence or wilful misconduct.

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 group finds that communication of the work to the public (here: internet users) should be interpreted as authorization to access the work by the same public.

Contractual freedom is desirable with respect to linking. Copyright owners should be able to agree about negative and positive contractual obligations and restrictions related to the use of their works provided, however, that there is a genuine act of acceptance by both parties. The act of linking could be contractually prohibited but it would require an act of acceptance which could not be automatic (so as to *de facto* extend the exclusive right to a work).

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:

A work is not 'communicated to the public' if no new public is receiving it. The intent to limit the public's access to the work as well as any measures undertaken to limit the public's access to the work should be taken into consideration in making the assessment if a new public is at hand.

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:

The answers remain unaffected.^[1]

Footnotes

1. [^] *An act of linking constitutes an 'act of communication' that is directed 'to the public'. As far as the 'new public' criterion is concerned, it should, by definition, be deemed fulfilled when the original uploading was not authorized by the copyright owner (please see the definition established in question 28 and answers to questions 23 and 24). The subsequent communication would continue to lack the authorization.*

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, only communication to a 'new public' constitutes an infringement.

The group proposes that 'communication to a new public' should be defined in line with the definition employed by the CJEU in its recent case law. If a subsequent public is different from the public at which the original act of communication of the work was directed, it is outside the scope of initial authorization and an act of communication to a new public should be at hand.

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:

Yes. Any undertaken access restriction measures as well as intent to limit the communication to a specific public should be taken into consideration in making the assessment if the work has been communicated to all members of the public that have access to the Internet.

The law should enable protection of content that is initially communicated to a limited public by use of an unprotected link that could not be without difficulty found and accessed by all internet users (e.g. a link to a picture on an image uploading site that is nigh impossible to access without a direct link).

A copyright owner should also have the possibility to fix any technical errors in initial act of communication without losing its exclusive right to decide about further communication of the work regardless of unintentional and temporary opportunity for the public to access the work.

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

The law should respect and enable free communication without restricting the possibility to current and future commercial use of online computer programs, databases, photographs or any works whether in the form of webpages or otherwise. The group finds it undesirable to have different linking rules for different kinds of content as the kind of differentiation would be liable to cause confusion amongst the public. Copyright legislation should rather be simplified than made more complex.

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

Summary

The Finnish Copyright Act provides for protection of an author's making available right in line with the Article 8 of the WCT. With respect to the specific questions around linking in this context, there is no relevant national case law on the matter. However, CJEU case law binds Finland and determines the approach on this matter, as well (see e.g. Svensson, C-466/12).

The Group finds the balance established by the CJEU satisfactory. Various national laws outside of the

realm of copyright (e.g. laws on unfair business conduct) also contribute to the overall balance. The Group finds that copyright law should not restrict possibilities to create new methods of commercial use of works nor should it prevent access to information or discussion. On a more general note, with a view to strengthening the possibilities of stimulating new business that leverages the value embedded in existing copyrighted works, as well as to reducing unnecessary barriers to well-functioning transnational content markets, exceptions to copyright should be harmonized, and certain widening could be considered. Also, the principle of restrictive interpretation of license grants (*in dubio pro auctore*) should be reconsidered, taking into account that works often cannot benefit of distribution under new technologies, since existing license arrangements are normally interpreted to not cover emerging technologies.