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2016 – Study Question (Copyright)

Sarah MATHESON, Reporter General
John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General
Yusuke INUI, Ari LAAKKONEN and Ralph NACK, Assistants to the Reporter General
Linking and making available on the Internet

Responsible Reporter: Yusuke INUI

National/Regional Group	Italy
Contributors name(s)	Giorgio MONDINI, Alessandro Enrico COGO, Fabio GHIRETTI, Alessandro LA ROSA, Annalaura AVANZI, Silvia GRAZIOLI, Carlo SALA, Annamaria STEIN, Gianluca CAMPUS, Santina PARRELLO, Claudia BREZZI, Daniela DE PASQUALE, Elisa VITTONI and Beatrice CUNEGATTI
e-Mail contact	giorgio.mondini@mondinirusconi.it
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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.:

Italian Law no. 633, April 22, 1941 (hereinafter, "Italian Copyright Act") under Article 16 provides for protection of an author's making available right and basically reproduces the rule set forth under Article 8 of the WCT and Article 3 of Directive 2001/29/EC. Accordingly, the answers below take into consideration the recent decisions of the Court of Justice of the European Union (CJEU) which have interpreted the relevant provisions.

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?

no

Please explain:

Not applicable.

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:

The act of providing a user-activated hyperlink to the starting page of a website where a copyrighted work has been published with the authorization of the copyright holder and that is publicly accessible is considered a «communication» of the copyrighted work, as long as the work is published on that page of the linked website. No specific guidance has been given by Italian case law on this very issue but, quoting the CJEU decision of February 13, 2012, C-466/12, «Svensson», as is apparent from Article 3(1) of Directive 2001/29/EC, for there to be an «act of communication», it is sufficient that a work is made available to a public in such a way that the persons forming that public may access it directly, irrespective of whether they avail themselves of that opportunity. Therefore, if the work is published on the starting page of the linked website, linking to that page would amount to an act of communication. If this is not the case (i.e. the work is published in a page of the website other than its starting page), linking to the starting page does not amount to an act of communication.

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

no

Please explain:

Despite the act of linking being an «act of communication», it remains irrelevant under copyright law if such act of communication does not reach a «new public», i.e. a public which could not have access to the work directly on the site on which it was initially communicated (CJEU, «Svensson», § 27). Accordingly, the provision implementing Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, as referred to in that provision (CJEU, «Svensson»).

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:

Not applicable.

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)?

Actually, the CJEU did not state that - in circumstances like those of the «Svensson» case - the copyright owner can be deemed to have granted an implied license. It stated that in such circumstances the linker is not required to get a new license since the communication has not reached a new 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?

no

Please explain:

No, the answer would be the same as indicated under points 3 to 6, as long as the contents the communication to the public of which is under discussion, are freely accessible (i.e. there are no access restrictions on the linked website).

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, according to the CJEU ruling in the Svensson case (§ 29), linking (both surface and deep linking) is lawful also in the event, 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. In the Bestwater case the CJEU clarified that this reasoning implies that the use of the «framing» technique is also lawful.

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:

Considering that the decision in the Bestwater case refers to framing but in reality deals with a case of embedding, the answer is likely to be the same.

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:

To the extent that linking, framing and embedding fulfill the conditions stated above and therefore do not communicate the work to a new public, there is no reason to believe that the statements published on the linked website could be relevant under copyright law. However, they might be relevant as a source of contractual obligations for the users of the linked website.

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:

Yes. As stated in the Svensson decision at § 31, «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' authorization».

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:

Communicating a work to the public online or making it available online without the authorization of the copyright owner is an infringement. Linking to such sources has been deemed unlawful by some Italian courts, who frequently referred in such cases to the concept of contribution to infringement (see q. 12): see Tribunale Milano, March 20, 2010, Sky Italia v Boizza; Tribunale Roma, August 19, 2011, and December 17, 2011, RTI c. Igor Miñan («Rojadirecta»); Tribunale Roma, July 2013, RTI + Lega Calcio c. L. Sofri («Il Post»); Cass. pen., July 4, 2006, n. 33945; Cass. pen., December 23, 2009, n. 49437 («Pirate Bay»). Moreover, the Italian Communication Authority has taken a similar position: see the decision of June 19, 2014, CSP 67/14. In any case, a preliminary ruling of the CJEU on this issue is expected this year.

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:

Yes. This seems to be the understanding of the CJEU in the Svensson case.

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?

Not applicable.

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:

Italian copyright law does not distinguish between direct and indirect infringement. However the decisions quoted in the answer to question 12) evoke the concept of contribution to infringement.

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

The court decisions and other sources indicated in the answer to question 12) have considered that

knowledge of the infringing nature of the sources and editorial activity and control on the list of links provided are relevant as the minimum criteria for the assessment of 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?

The Italian law system currently needs to be adjusted to the principles stated by the CJEU in the Svensson and BestWater cases, which adopt the "new public" criterion as the "watershed" to assess whether an act of linking, framing and embedding amounts to an act of making available to the public.

In our Group's view, however, exactly in order to strike a balance between the parties' interests and the right to free access to information on the Internet, abstract solutions such as those followed in one sense or the other by the CJEU are not advisable. On the contrary the matter should in our opinion be carefully assessed on a case-by-case basis, and the ensuing further distinctions should be introduced.

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:

See the answers to the questions below.

III. Proposals for harmonisation

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

yes

Please explain:

In view of the well-known transnational character of the Internet, harmonization 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:

It does seem acceptable to consider an "act of communication" every act that provides a direct access to a copyrighted work, as the ECJ did in the Svensson case. Accordingly, a hyperlink to the page where the copyrighted work is hosted should be considered an "act of communication" (no matter whether that page is the home page of the website or an inner page). As a consequence, a surface link pointing

to the home page does not amount to an act of communication if the work is not published on that page.

Framing and embedding go further, considering that they imply an appropriation of the copyrighted work in the linking website. Therefore, it does seem fair to consider them as an “act of communication”.

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

no

Please explain:

With reference to linking, in our Group’s view it may be agreed with the CJEU’s position that there is an act of communication to the public only to the extent linking allows access by a new public differing from the one of the original act of making available, namely, where the original work was made available on a website subject to restricted access, or is no longer available on the linked website.

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:

An act of linking should constitute infringement of the making available right if it makes the work available to a new public, i.e. a public which cannot access the work on the linked website due to the technological restrictions governing access to that website.

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:

Our Group does not entirely share the CJEU’s position as to the automatic extension of the principles governing linking to embedding as well. Unlike linking, embedding determines a misappropriation of the work, which is taken out of its original context and inserted into a different website, which therefore addresses users other than those originally intended by the owner of the linked website, thus possibly infringing both the author’s *droits moraux* and right to work re-elaboration and nullifying the website owner’s advertising investments.

Therefore, embedding may be regarded as lawful only where the owner of the website has concretely enabled the embedding of individual contents of the website into a different website by making the embed code available to the public. Otherwise, i.e., if the owner of the website has not published the embed code and the embedder has retrieved it by “cracking” the website hosting the relevant contents, anyone misappropriating such contents and presenting them as his own, infringes the corresponding copyrights.

Our Group considers that these issues are much less frequent with framing, insofar as the framed website, even though presented within the frame of another website, nonetheless preserves its integrity, so that hosting and hosted websites essentially are distinct and recognizable. If that is the case, framing should not be restrained on account of copyright but should rather be left to single States’ laws and/or regulations on unfair competition.

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:

It should be considered that various law systems, including the Italian one, make no distinction between direct and indirect infringement, except as elaborated by court decisions, therefore an attempt at harmonizing the direct or indirect nature of linking-related liability might encounter practical difficulties.

That said, our Group believes that linking, framing and embedding should be treated as an act of direct infringement if they make available the copyrighted work to a public that could not have direct access to it through the linked website. Moreover, linking, framing and embedding should be considered as acts of indirect infringement if they provide access to works which were made available unlawfully on the linked website, at least where the conditions enumerated under question 16) are fulfilled. In such cases, indirect liability would allow addressing the issue with greater flexibility and taking into due account the subjective conditions and fair practice to be required of the linker.

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:

It is our Group's opinion that, where an activity does not *per se* amount to infringement of a third party's copyright insofar as it does not infringe any rights granted by the law, it cannot be regarded as an infringement merely on account of its having been expressly prohibited by the copyright owner.

Our Group further believes that attaching relevance in that respect to the website owner's consent, with the ensuing burden to establish website use conditions case by case, would risk jeopardizing the smooth functioning of the web and availability of information on the Internet.

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:

Our Group considers, in line with the answer to question 21), that in the presence of access restrictions linking is unlawful, as it implies communication of the work to a new public. In this perspective, all technological measures limiting access to a website, including identification systems through the use of passwords and geo-blocking systems, 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.

yes

Please explain:

In principle, we believe that two apparently opposite interests need to be carefully considered: on one

side, to avoid encouraging activities facilitating online piracy, as is the case with numerous link aggregators; and, on the other, to avoid classifying as unlawful (although not necessarily giving rise to liability for damages) acts performed daily by Internet users in good faith and without the practical possibility for them to check their sources.

Our Group therefore believes that, to date, the most reasonable solution to strike a balance between these two opposite interests, is to apply the general principles on contribution in a third party infringement, hence secondary infringement, and thus qualify as infringement any act of linking to a work uploaded without the author's consent whenever the linker is aware of the unlawful character of the source, either because he has been warned by the copyright owner or because he should have had knowledge of the unlawful character of the source, as typically is the case with aggregators of links to pirated movies and sports events.

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:

See answers to questions 21) and 26). We propose the following as a suitable definition of "new public":

A "new public" means a public who, through the linker's intervention, can have access to the work without complying with the access restrictions and/or conditions set by the owner of the linked website.

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 our Group's opinion, in view of extraterritorial nature of the Internet, there should be no reasons to deny that, if a work has been uploaded on a website without access restrictions, it should be considered as having been made available to all members of the public that have access to the Internet, without territorial limitations

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

No comment

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

No industry sector views are included.

Summary

The Italian law system needs to be adjusted to the principles stated by the **CJEU** in the **Svensson** and **BestWater** cases, which adopt the “**new public**” criterion as the “watershed” to assess whether an act of linking, framing and embedding providing direct access to the work amounts to an act of making available to the public.

In our Group’s view, however, in order to strike a balance between the parties’ interests and the right to free access to information on the Internet, abstract solutions are not advisable. On the contrary the matter should in our opinion be carefully assessed on a case-by-case basis, and the ensuing further distinctions should be introduced:

a) **linking** should be considered an act of communication to the public and therefore a **direct infringement** only to the extent linking allows access by a new public (i.e. a public which, through the linker’s intervention, can have access to the work without complying with the access restrictions and/or conditions set by the owner of the linked website) differing from the one of the original act of making available;

b) **embedding** may be regarded as lawful only where the owner of the linked website has concretely enabled the embedding of individual contents of the embedded website into a different website by making the embed code available to the public;

c) **framing** should not be restrained on account of copyright but should rather be left to single States’ laws and/or regulations on unfair competition;

d) **displays** on the website that prohibit the relevant act of linking or linking generally are irrelevant;

e) should be qualified as **indirect infringement** any act of linking to a work uploaded without the author’s consent whenever the linker is aware of the unlawful character of the source, either because he has been warned by the copyright owner or because he should have had knowledge of the unlawful character of the source;

f) if a work has been uploaded on a website without access restrictions, it should be considered as having been made available to all members of the public that have access to the Internet, without territorial or other limitations.