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## 2016 – Study Question (Copyright)

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Linking and making available on the Internet

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|-------------------------|---|
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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.:

In Article 23(1) of the Copyright Act that provides for protection of the making available right, "making available" is included in the concept of "automatic public transmission":

The author of a work has the exclusive right to transmit to the public that work (this includes the right to make the work available for transmission, if the work is to be transmitted to the public via automatic public transmission).

Article 23(2) also stipulates:

The author of a work has the exclusive right to publicly communicate the work being transmitted to the public through a receiver.

In connection with the making available right, the Japanese Copyright Act: (1) does not specify any types of works, (2) uses the expression "transmission" to the public, not "communication" to the public, and (3) explicitly employs the concept of "automatic public transmission server" to define the making available right, unlike Article 8 of the WCT:

...authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Also, "making available for transmission" under the Japanese law is interpreted as not including the act

of real transmission of works after being uploaded (Supreme Court decision on MANEKI TV case, dated 18 January 2011, Minshu Vol.65, No.1, page 121).

In the Japanese Copyright Act, the relevant terms mentioned above are defined as follows:

**Transmission to the public** (Article 2(1) (vii)-2)

Making a "transmission to the public" means making a transmission of wireless communications or wired telecommunications with the objective of allowing the public to receive them directly (excluding transmission (unless this constitutes the transmission of a work of computer programming) with telecommunications facilities one part of which is installed on the same premises as the other parts (or, excluding, if two or more persons occupy the same premises, transmission with telecommunications facilities both ends of which are installed within the area the same person occupies));

**Automatic public transmission** (Article 2(1) (ix)-4)

"Automatic public transmission" means a transmission to a member of the public (excluding one that constitutes a broadcast or cablecast) that is made automatically in response to a request from the member of the public.

**Making available for transmission** (Article 2(1) (ix)-5)

"Making available for transmission" means making it ready to be transmitted via automatic public transmission, through either of the following actions:

(a) recording data onto a recording medium which an automatic public transmission server that is connected with a public telecommunications network uses for transmissions to the public (an automatic public transmission server is a device with a function that allows it to send automatic public transmissions of data which is recorded onto the area of its recording media that is used for automatic public transmissions (hereinafter in this item and Article 47-5, paragraph (1), item (i) referred to as a "recording medium for public transmissions") or of data that is input into it, through its connection with a public telecommunications network; the same applies hereinafter); adding a recording medium onto which data has been recorded to such an automatic public transmission server as its recording medium for public transmissions; converting a recording medium onto which data has been recorded into such an automatic public transmission server's recording medium for public transmissions; or inputting data into such an automatic public transmission server;

(b) connecting an automatic public transmission server onto whose recording medium for public transmissions data has been recorded or into which data has been input, to a public telecommunications network (if this is done through a series of actions such as connecting cables, starting up the automatic public transmission server, and booting the programs for transmission and reception, connecting means the last action in the series).

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:

As described in our answer to Question 1) above, in line with Article 8 of the WCT, Article 23 of the

Japanese Copyright Act provides for a right of "transmission to the public" (including "making available for transmission" if the work is to be transmitted to the public via automatic public transmission).

"Transmission to the public" consists of "automatic public transmission" which refers to a direct transmission made automatically in response to a request from a member of the public through wireless or wired telecommunications, and "making available for transmission" which is the act of enabling information to be automatically transmitted to the public by recording or entering the information in a server connected to the network.

The act of simply providing a user-activated hyperlink to a copyrighted work that has been uploaded to a website with the authorization of its copyright holder does not correspond to "making available for transmission" (i.e. recording or entering the information in a server connected to the network) or "automatic public transmission" (i.e. transmitting a copyrighted work automatically in response to a request from a member of the public).

Thus, the "act of providing a user-activated hyperlink..." in this question would not be considered a "communication" of the copyrighted work in essence, although the Japanese Copyright Act provides for "making available for transmission" or "automatic public transmission," instead of "communication."

4) If yes, would such an act be considered as 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?

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)?

N/A

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:

As described above, under the Japanese Copyright Act, "making available" is defined as the act of enabling information to be automatically transmitted to the public by recording or entering the information in a server connected to the network. Any types of linking do not involve the act of "making available," i.e. recording or entering information in a server. Consequently, if the relevant act is deep linking, there will be no difference in our answer to the question whether the making available right may be infringed.

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 reason for this answer is the same as that in 7) above.

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 reason for this answer is the same as that in 7) above.

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 difference in our answer to the question whether the copyright may be infringed or not. However, if someone provides a link on a website where the statement that prohibits the relevant act of linking or linking general and also he/she consents to the prohibition of the relevant act and/or the linking generally there may be a problem of breach of the contract.)

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:

(Because access to the copyrighted work will not be obtained merely by providing a link.)

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:

However, there is a special case where the plaintiff filed a request for disclosure of information on a blogger who provided a hyperlink (and a password) to a comic downloading website where the comic book had been uploaded without the copyright holder's authorization. According to the court's decision [1], infringement may be constituted if the person who provided a hyperlink worked actively with the one who uploaded the copyrighted work without the copyright holder's authorization or if the person who provided a hyperlink also uploaded the copyrighted work.

In the copyright infringement case mentioned in 24) of the Study Guidelines, it was not clear whether the copyrighted work in question had been uploaded with or without explicit/implicit consent from its copyright holder, when judged from its form and content. Also, the alleged infringer removed the link in response to a protest from the copyright holder. As a result, this act was not found to be contributory copyright infringement by the third party. According to this decision, if it is obvious (from its form and content) that the copyrighted work in question had been uploaded without consent from its copyright holder or the alleged infringer continues to provide the link despite a protest from the copyright holder, a court may find that such act consists contributory copyright infringement.

(An injunction against such a contributory infringer may be granted if this person is found to play a central part in the infringement. However, the grant of an injunction will be less likely if the act of infringement cannot be stopped by removing the link.)

[1] Tokyo District Court decision 2013 (Wa) No.20542, dated 17 January 2014

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?

no

Please explain:

N/A

In Japan, there has not been debate about this question (whether the public can be segmented based on how a copyrighted work is posted on a webpage).

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?

The question in 13) has not been discussed in Japan. In the past cases, the courts have not determined whether the communication is directed only to certain members of the public. However, when deciding on the governing law, the following are taken into consideration: (i) whether the work in question was accessed by people living in Japan; and (ii) whether the work in question is expressed in Japanese.

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:

There are circumstances that may lead to a finding of indirect or secondary copyright infringement.

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

If a third party provided a link to a copyrighted work that had been uploaded without a legitimate right ("illegally uploaded content") while knowing the fact of uploading without a legitimate right or not knowing the fact due to negligence, he/she may be liable for an act of tort.

**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 Japan, a copyright holder basically cannot control the act of linking by others to his/her copyrighted work. By making his/her work accessible to everyone, the copyright holder gets benefit from its increased exposure and dissemination. In return for this benefit, copyright holders are not allowed to

control said act of linking by others. However, they can limit the availability of their works to certain members of the public by technical means.

Even if his/her copyrighted work is illegally uploaded and a third party provides a link to it, it is not considered possible for the copyright holder to seek injunction against the third party, except in certain circumstances (see our answer to Question 12) above). There are various opinions as to when (under what circumstances) an injunction is available.

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:

It is desirable that our current law be clearer about the permissibility and the permissible scope of embedding links.

It is necessary to prohibit, to certain extent, the so-called "reach sites" which collect many links to unauthorized contents, and the Japanese Government just started to consider enactment of such prohibition.

### III. Proposals for harmonisation

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

yes

Please explain:

Since this issue is related to the Internet that goes beyond national boundaries, 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:

An act of linking should be considered a "communication" in certain circumstances. In certain circumstances a copyrighted work shall be considered to be communicated by the person who set up the website on which the link is provided but in other cases that shall be considered to be communicated by the person who set up the destination website of the said link.

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

yes

Please explain:

Such an act should be considered a communication to the "public" (No need to use the concept of "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:

In the context of the Internet, especially in the World Wide Web, the making available right should be interpreted as including "a right of the copyright holder to control in what manner his/her works are displayed." The finding of infringement of the making available right should be based on whether such right of the copyright holder is infringed.

Based on this test, the acts of hyperlinking and deep linking would not constitute infringement: with a click on the link in these cases, a member of the public is transited to the website on which the work is originally posted by a person (hereafter the "original communicator"). In this case, the communication to the member of the public is viewed to be still done by the original communicator. Therefore, the original communicator's making available right is considered not to be infringed.

On the other hand, in the cases of framing and embedding, a member of the public views the work which the original communicator tries to communicate on a website of another person (hereinafter the "secondary communicator"), without a click on any link which is posted on the secondary communicator's website. Therefore, it looks as if the work were copied to the secondary communicator's website, which is viewed as the infringement of the original communicator's right to control "in what manner his/her works are displayed."

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:

As described in our answers to Questions 20) to 22), the making available right should be interpreted as including "a right of the copyright holder to control in what manner his/her works are displayed." Therefore, "hyperlinking to the starting page and deep linking" should be treated differently from "framing and embedding" in determining infringement of making available 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?

yes

Please explain:

Firstly, since hyperlinking to the starting page and deep linking would not constitute infringement as described in our answers to Questions 22) and 23), it does not matter whether infringement should be direct or indirect. However, if a copyrighted work has been uploaded to the original communicator's website without authorization, there should be a possibility that hyperlinking to the starting page and deep linking to the work may constitute indirect infringement, that is, an act that is contributory to illegal uploading.

Secondly, in the cases of framing and embedding, the work the original communicator tries to communicate is accessed by the member of the public without a click on any link on the secondary communicator's website, as described in our answer to Question 22). In this case, the communication to the public should be judged to be done by the secondary communicator (that corresponds to "the person who set up the website on which the link is provided" in our answer to Question 20) above).

Consequently, in the cases of framing and embedding, the secondary communicator should be found to directly infringe the making available right.

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:

As described in our answer to Question 22) above, the making available right should be interpreted as including a right to control "in what manner his/her works are displayed." Hyperlinking to the starting page or deep linking will not affect the manner in which the works are displayed, regardless of whether the website displays a statement that expressly prohibits such linking.

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:

In the context of the Internet, especially in the World Wide Web, the making available right should be interpreted as including a right of the copyright holder to control "in what manner his/her works are displayed" as described in our answer to Question 22) above. If a work is displayed in a certain manner on a website and is communicated by the act of providing a link to the website, the manner how the work is displayed on the website will not be affected by the fact that the public's access to the work uploaded on the website is limited in any way.

If someone provides a link that can circumvent an access restriction to make a copyrighted work available to those who are not eligible for the access, such an act should be controlled as circumvention of technological protection measures (unauthorized access) or an act of tort, so that the interests of copyright holders may not be impaired unfairly.

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:

If a copyrighted work has been uploaded to the original communicator's website without authorization of the copyright holder, the manner in which the work is displayed is not under control of the copyright holder. Therefore, any act of providing a link to the work on the original communicator's website would infringe the copyright holder's making available right, or a right to control "in what manner his/her works are displayed."

This opinion may attract criticism that, when providing a link to a copyrighted work, it is not easy to check whether the work has been uploaded with the copyright holder's authorization, and if a finding of copyright infringement is dependent on whether the authorization was given, there may be a discouraging effect even on the legitimate act of providing links, which may enhance the convenience of the Internet.

However, even if someone happens to provide a link to a copyrighted work that has been uploaded



without authorization from its copyright holder, it will not be hard at all for him/her to face a successful injunction against his/her act of linking. Moreover, awarding of damages requires intention or negligence on the part of the person who provided the link. Therefore, unfair results will not be brought to this person.

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:

The reason for this answer is the same as that in 26) above.

Additionally, since it is difficult to establish a clear-cut definition of "new public," such a definition could blur the boundaries of copyright infringing acts and bring about a discouraging effect even on the legitimate act of linking. Moreover, we doubt if it is reasonable to decide that a copyright is infringed merely due to the fact that someone provided a link in order to communicate a copyrighted work to other than the members of the public covered by an existing authorized communication.

For example, if a work is available without any access restrictions on a Japanese website, "certain members of the public" are thought to be Japanese people who understand the Japanese language. However, if someone provides a link on a German website for the purpose of presenting this work, it will be difficult to regard this act as an act of copyright infringement, because this link only shows a legitimate way to access the work that has already been accessible.

Another example of the same reasoning is: if a webpage provides a list of traditional (physical) literature and research papers related to copyright law, and this list includes information on an unpublished paper written by a student, which it is usually almost impossible for researchers to find, it will be difficult to judge that this list infringes the copyright to the said paper.

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:

There can be such circumstances. For example, it is possible that said webpage may not be found at all, even by entering every keyword relating to the work on a search engine. Also, the work can be considered as not having been made available to members of the public who do not understand the language used in the website where the work is available. However, if a copyrighted work that used to be inaccessible to certain members of the public becomes available to them by providing a link to the work, this act should not be found to be infringing the copyright based only on that fact, as mentioned in our answer to Question 28).

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

In Article 23(1) of the Japanese Copyright Act that provides for protection of the public transmission right, "making available" is included in the concept of "automatic public transmission", and thus it is considered that protection of author's making available right is provided in line with Article 8 of the WCT.

Under the Japanese laws and practice, it is generally believed that there is no copyright infringement in cases of all the following three methods of linking: (a) hyperlinking (including deep linking); (b) framing; and (c) embedding. While under the Japanese Copyright Act, "making available" is defined as the act of enabling information to be automatically transmitted to the public by recording or entering the information in a server connected to the network, any types of linking do not involve the act of "making available," i.e. recording or entering information in a server.

In this connection, it is probably necessary to prohibit, to certain extent, so-called “reach sites” which collect many links to unauthorized contents, and the Japanese Government just started to consider enactment of such prohibition.

The Japanese Group of AIPPI Japan believes that in the context of the Internet, which is connected mainly through especially in the World Wide Web, the making available right should be defined as including “a right of the copyright holder to control in what manner his/her works are displayed.” The finding of infringement of the making available right should be based on whether such a right of the copyright holder is infringed.

Based on this test, the acts of hyperlinking and deep linking would not constitute infringement; with a click on the link in these cases, a member of the public is transited to the website on which the work is originally posted by a person (hereafter the "original communicator"). In this case, the communication to the member of the public is viewed to be still done by the original communicator. Therefore, the original communicator's making available right is considered not to be infringed.

On the other hand, in the cases of framing and embedding, a member of the public views the work which the original communicator tries to communicate on a website of another person (hereinafter the “secondary communicator”), without a click on any link which is posted on the secondary communicator's website. Therefore, it looks as if the work were copied to the secondary communicator's website, which can be viewed as the infringement of the original communicator's right to control "in what manner his/her works are displayed."