



Submission date: 4th May 2016

2016 – Study Question (Copyright)

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Linking and making available on the Internet

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Date	03-05-2016

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 Mexican Federal Copyright Law ("FCL") comprises a statutory provision which could be interpreted as a making available right. However, it is not clear whether it is fully in line with article 8 of the WIPO Copyright Treaty (WCT). The provision states as follows:

Art. 27. The owners of economic rights may authorize or prohibit:

(II) the communication of the work to the public in any of the following ways:

(a) representation, recitation and public performance of literary and artistic works;

(b) public exhibition by any means or procedure regarding literary and artistic works;

(c) public access by means of telecommunications;

From the foregoing, it can be deduced that under article 27) II c) of the Mexican Copyright Law, the

making available of- or “public access” to - a work is tied to a specific medium, namely “telecommunications”. There is no definition in the statute for the term “telecommunications”. Public communication of (and public access to) a work can take place by other means that are not related to “telecommunications”.

The Mexican Federal Copyright Law lacks a provision related to the making available right in connection with neighbouring rights. Therefore, the rights comprised in WPPT regarding performers, sound recording producers, book publishers or video recording producers have not been incorporated into the statute.

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:

The current Mexican legal system protects the making available right by directly resorting to Article 8 of WCT, following the latest Mexican Supreme Court of Justice (MSCJ) interpretation on the applicability of international treaties, and the 2011 amendment to the Constitution.

Article 133 of the Mexican Federal Constitution establishes that the Constitution, the laws derived from Congress, and all international treaties that are in accordance to the Constitution, executed by the President and approved by the Senate, will be the Supreme Law of the Union. During many decades, this provision was construed as entailing a normative hierarchy with the Constitution at the top, while domestic law and international treaties were placed in a second tier, without establishing a clear prevalence of international treaties over federal laws.

In *Sindicato Nacional de Controladores de Tránsito Aéreo* (amparo proceeding No. 1475/98), the Supreme Court of Justice ruled in 1998 that international treaties are hierarchically superior to federal laws.

In July 2011, the Supreme Court issued a decision entitled “*Varios 912/2010*”. In short, this case was a *sui generis* ruling in which the Supreme Court had to determine how to comply with a condemnatory resolution from the International Court of Justice regarding the forced disappearance of Rosendo Radilla Pacheco -a musician and revolutionary social actor that was disappeared by the Military in 1974. Since the International Court of Justice condemned the Mexican State to adjust its internal legislation in conformity with the provisions of the American Convention on Human Rights, the Supreme Court had to decide whether international treaties such as the American Convention should prevail over domestic law. The result of the 2011 ruling was, among other constitutional aspects concerning the interpretation and application of the law, that all jurisdictional authorities (even those authorities who have material jurisdictional functions, even if they are not formally called “judges”), from all levels, have an *ex officio* obligation to ensure that international treaties are observed, and to guarantee that any laws that comprise provisions contrary to what is mandated in such treaties are pre-empted by the relevant treaty.

In addition to this shift in the constitutional interpretation and the hierarchy of international law, in June 10th, 2011 the Executive power published in the Federal Official Gazette a fundamental amendment to the Mexican Constitutional system. This amendment is known as the Human Rights Amendment of 2011, because it modified Article 1 of the Mexican Constitution, now ordering that all authorities, from all levels and branches, have to protect, respect, promote, and warrant the human rights set forth in the Constitution and in international treaties subscribed by Mexico. Additionally, the *pro personae* canon of interpretation was introduced in a constitutional level as an obligation for the authorities, when applying the law.

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- 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:

Initially yes, based on the definition of communication to the public of the Mexican Federal Copyright Law, and based on article 8 of the WCT. The definition of communication to the public set forth in Art. 16-III of the Mexican Copyright Law is as follows:

(III) communication to the public: the act by which the work becomes generally accessible by any means or process of dissemination that does not consist in the distribution of copies...

For the law, communication to the public means utilizing works intangibly, which makes it possible for them to be performed, rendered or sent, remotely for the public reading, viewing or listening *i.e.* accessing them. Providing a hyperlink to give access to a work by the public is part of the process of communicating it to the public. Hyperlinking should be a valid form of giving access to the public of the work if this can be found in the website connected by the link. The foregoing, regardless of the fact that the hyperlink takes the public to the home page or to the exact page where the work resides.

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

yes

Please explain:

Yes, it should be regarded an act of communication to the public as found in the Ba-K case, in which IMPI declared copyright infringement because the owner of the site gave access to the public to several hyperlinks, redirecting the users of the website to other websites in which they could access and download copyrighted works. This was considered as a communication to the public through the making available of the works.

- 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?

yes

Please explain:

Yes, it is a direct infringement, construing the law according to the substantive right established in Art. 8 of WCT, along with the administrative infringement set forth in Art. 231-I of the Mexican Copyright Law^[1].

Footnotes

1. [^](#) Art. 231. *The following practices constitute trade-related infringements when they are engaged in for direct or indirect profit-making purposes: (l) communication to the public or public use of a protected work by any means and in any form without the express prior authorization of the author, his lawful heirs or the owner of the author's economic rights...*

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)?

Not Apply

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, hyperlinking and deep linking are equally forms of giving access to the public to works, pursuant to Mexican legislation.

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:

Framing should not be considered a different form of giving access to the public to works as hyperlinking has been considered. Strictly adhering to the definition contained in Art. 8 WCT, framing would also constitute the conduct of making available to the public of 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. Therefore. Framing was not addressed in Ba-k.com case.

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:

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, they should not be treated differently. For the commission of an infringement, or for defensive purposes, statements are not required as a condition or limitation to the right of communication to the public. Statements were not an issue discussed in Ba-k case.

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:

No, the answer is the same. As a matter of fact, TPMs, DRMs or any other technology used by copyright holders to restrict access to the public, can only be viewed as a form of applying the right of communication to the public. Circumventing technological protection measures can lead to infringement of the right of communication to the public, as well as to the right to authorize or prohibit public access by means of telecommunications.

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:

No. In cases like this infringement, there would be two rights involved: the right of reproduction -given that in order to be able to upload and maintain works hosted in websites, an act of reproduction is required; and the right of communication to the public -since the uploader then makes available to the public the works that had been reproduced without authorization.

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. Interpreting the Mexican Copyright Law, jointly with the international treaties on the subject, we would need to conclude that making available a copyrighted work on a webpage, without any restrictions, is an act of communication to the public, to all of its members connected to Internet. Mexican legislation does not have any provisions or special rules concerning members of the public, or how to consider public communication to have occurred it in a partial or global way. Thus, Mexican authorities would have to follow the canon of interpretation that states that where the legislator did not distinguish, judges should not distinguish either.

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 reason of the above assumption is that under the Mexican Federal Copyright Law there is nothing restricting the scope of, or defining, what is public. The law provides a criterion of public, to differentiate public from private in terms of using works, in particular in terms of their communication to the public. However, the Law does not establish any distinction as to how the term “public” can be defined. And since the Law does not restrict or detail the concept of “public” in respect to the medium by which works are used (for example, by recognizing a particular public for Internet), the notion of public can only be seen broadly.

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:

Not Apply

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?

This question has not been raised so far in terms of the interests of an alleged infringer. It has been raised, though, in connection with the interests of ISPs, users and copyright holders. The issue has been raised by an ISP in a recent case brought by RIAA against a website operator named mymusic.com[<http://mymusic.com/>] . RIAA moved for *certiorari* and the Supreme Court has taken the matter for study.

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 Copyright Law should be improved to fully recognize the making available rights, equally for authors, performers and sound recording producers.

A first step towards a better legal framework of copyrights protection would be the full implementation of the WIPO treaties (WCT/WPPT) into the Mexican legal system, as well as the modernization of some of its antique provisions that do not respond to nowadays necessities.

III. Proposals for harmonisation

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

yes

Please explain:

Yes, the US should adopt the WCT system as well as the Berne Convention for the Protection of Literary and Artistic Works, and avoid taking alternative forms of protecting the making available right.

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:

Yes. It cannot be other way, in line with Berne, Rome and WCT/WPPT.

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

yes

Please explain:

Yes. It cannot be other way, in line with Berne, Rome and WCT/WPPT.

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:

Yes. It cannot be other way, in line with Berne, Rome and WCT/WPPT.

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:

Equally, because all of them are similar in the way that users can reach the works that are uploaded at their time and place of choice, and because said upload was not permitted or, if permitted, it was not intended to be communicated to the public. Hyperlinking, framing, and embedding are different from a technical stand point, but WCT and national legislation do not distinguish among those technicalities in order to establish the commission of a copyright infringement.

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:

Direct infringement, because the user of the work is the person directly giving access to the work by means of hyperlinking, framing or embedding. That is actually the purpose of a right of communication to the public. The right is most useful since it avoids that copyright actions are taken against indirect users of the works. Without the right -as it happens in the US- actions need to be addressed indirectly, and hence, with more complications. Likewise, many countries like Mexico do not recognize actions for indirect infringement at all.

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:

No. The concept of new public is inconsistent with treaties and the laws of many countries, including Mexico.

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:

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:

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:

No. The right of access is a subcategory of the right of communication to the public, but is independent in as much as it can be infringed without the need or requirement that the work is then transmitted or copied. Copyrights can be infringed separately and independently if a work is uploaded without consent; access is given to the public of a work uploaded with or without consent; if the work is then transmitted by streaming; or members of the public download the work.

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

no

Please explain:

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

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

Internet

Cinematographic

Music

Entertainment

Television

Summary

Mexico provides for a making available right, but not clearly from the statute, but from directly invoking WCT and WPPT. The making available right is part of the broader notion communication to the public –and never of the notion of distribution-. Furthermore, hyperlinking has been viewed as making available in administrative and judicial cases. However framing and embedding can also be regarded forms of making available of works. Making works available in the Internet is considered copyright infringement by itself, without the need of communication to the public. The notion of public is broad under the law and the concept of new public is not accepted.