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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?

no

Please explain:

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:

Analogous protection is granted under section 16 of the Copyright Act 1994 (**Act**) through the protection of the right to communicate a work to the public.

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:

This has yet to be tested by New Zealand case law. While New Zealand courts are likely to follow the position of its relevant trading partners (e.g. Australia, UK, Singapore), the issue has yet to be

considered by the courts in these jurisdictions.

New Zealand may follow the European Court of Justice (CJEU) decision in *Svensson and Others v Retriever Sverige AB* (C-466/12) (**Svensson**) which held that "an act of communication" should be construed broadly and should include clickable links.

Under the Act "communicate" means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system. "Communication" has a corresponding meaning. This definition is sufficiently broad to encompass user-activated hyperlinks .

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

no

Please explain:

No, although this has not been addressed in New Zealand case law. As above, New Zealand courts may adopt the CJEU position established in *Svensson*. The CJEU in *Svensson* held that for the purposes of copyright infringement in order to be "communication to the public" it must be communication that is directed to a new public. The owner of a website may use hyperlinks to redirect Internet users to publically available protected works on other websites without the authorisation of the copyright holder of the linked website on the basis that the works are not being provided to a "new public". New Zealand Courts may adopt the same distinction between communication to the public as intended by the copyright owner and to a new 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)?

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?

yes

Please explain:

Yes. While this is yet to be tested by New Zealand case law, New Zealand courts may follow the European position. In *C More Entertainment v Sandberg* (Case C-279/13) the CJEU held that where linking circumvents a paywall – namely deep linking – there is publication to a "new public" such that copyright infringement occurs. Accordingly, the answer to 4) and 5) and 6) would likely be yes.

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, unless the framed content is being provided to a "new public". While this is yet to be tested by New Zealand case law, whether the answers will be different will likely depend on whether the framed works are being communicated to a "new public" or not. New Zealand courts may follow the CJEU decision in *Bestwater International GmbH vs Michael Mebes and Stefan Potsch* (C-348-13) where it was held that

the owner of a website may frame publically available protected works on other websites, on their own websites, without the authorisation of the copyright holder of the framed content on the basis that the works are not being provided to a "new public". In the instance that the content is being provided to a "new public", the answer to 4) and 5) and 6) would likely be yes.

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 position is likely to be same as that for framing (see answer for 8)). Again, this is yet to be tested by New Zealand case law. In the instance that the content is being provided to a "new public", the answer to 4) and 5) and 6) would likely be yes.

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:

Likely no, however, no New Zealand cases have addressed this. The use of a statement that prohibits linking may be an attempt to avoid a finding that content is "freely accessible", as discussed in *Svensson*, but in practice is unlikely to have any effect. Publishing material online (where that material is not subject to any access restrictions) manifests an intent to communicate to the world at large. Accordingly, despite the presence of a prohibitive statement, the content will still likely be deemed to be freely accessible (where that material is not subject to any access restrictions). Therefore there is unlikely to be communication to the public, as per the *Svensson* decision.

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:

Likely yes, however, there is currently no New Zealand case law addressing this. The fact that access has been restricted in some way indicates that the copyright holder intended for the work to be accessed by a limited public. By providing a link to circumvent the restriction, it is likely that the communication is made to a public broader than that which was initially envisaged by the copyright holder. Accordingly, communication is made to a "new public" and so direct infringement results meaning the answer to 4), 5) and 6) would be yes.

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 currently no New Zealand case law addressing this. Similarly, none of New Zealand's trading partners have considered it and the European position is undecided. The New Zealand courts may follow the CJEU *Sanoma* decision, once released.

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, but this is yet to be considered by New Zealand case law.

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?

Provided there are no access restrictions, the content will be considered as having been made available to all members of the public.

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:

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?

As there is no New Zealand case law on copyright protection in the context of linking, it is unclear how New Zealand's current law would strike such a balance.

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:

By improving the clarity around how and when New Zealand's copyright provisions are to apply in the context of linking. Guidance from the New Zealand courts would be beneficial.

III. Proposals for harmonisation

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

yes

Please explain:

Possibly.

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, subject to comments at 23.

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

yes

Please explain:

Yes if, as a result of an act of linking, the work is communicated to a "new public" then it should be considered communication "to the public" for the purposes of copyright infringement.

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:

If the act of linking results in communication of the work to a "new public" then it should constitute infringement.

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:

Different forms of linking should be treated differently. This is because some forms of linking, namely deep linking, are guaranteed to result in communication of a work to a "new public" and therefore should require authorisation of the copyright owner.

Framing and embedding may result in communication to a "new public" but because the court has taken the view that the internet is a medium for displaying works, rather than as a mode of transmitting works, copyright infringement may be more difficult to show.

Hyperlinking to the starting page (where the material is not subject to access restrictions) will not constitute communication to the public for the purposes of the Act and therefore no authorisation is required.

24) If yes in any case, in relation to each such case, should the finding be one of direct or indirect infringement? If yes (in either case), why?

yes

Please explain:

If the form of linking results in communication to a "new public" the finding should be one of direct infringement. Where the form of linking circumvents any form of access restriction, such as deep linking, there is a direct infringement by the linker of the copyright holder's right to limit the audience to whom he/she communicates the copyrighted work.

- 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:

Publishing material online (where the material is not subject to access restrictions), regardless of whether a website expressly displays a prohibitive statement, still manifests an intent to communicate to the world at large. Accordingly, the content should still be considered "freely accessible" and not communication "to the public" for the purposes of copyright infringement.

- 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:

Yes. If access is limited, then acts of hyperlinking to the restricted works which circumvent that limitation, will result in communication of the work "to the public" for the purposes of copyright infringement. Limitations such as paywalls, subscription systems, and any other restriction that is intended to restrict public access to the website content 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:

Possibly. Linking to a website that has published unauthorised content is unlikely to in itself constitute copyright infringement, but may do so if the person who placed the hyperlink should reasonably have known that the content infringed copyright.

- 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. "New public" being a public that was not taken into account by the copyright holder when they authorised the initial communication to the public.

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

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:

Only those views of the authors

Summary