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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.:

Since the amendment to the Norwegian copyright act in 2005, the making available right has been considered to form a part of the author's exclusive right of "public performance" in § 2 c) of the Copyright Act. In the proposal for a new Norwegian copyright act, which is currently subject to public opinion, the Ministry has proposed to separate "communication to the public" as a new category, separate from the right of "public performance" – in order to bring Norwegian law closer to the Copyright Directive.

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:

This is uncertain – under the 2005 ruling from the Norwegian Supreme Court in the so called Napster.no case, the Court chose not to issue an opinion on this, however the rationale behind the ruling seems to suggest that the Supreme Court did not consider linking to material already available on-line as an act of "communication to the public". In the same ruling, the Supreme Court stated that no distinction should be made between different forms of linking, i.e. in the sense of copyright law, "deep linking", "framing" and "embedding" should be treated in the same manner.

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

yes

Please explain:

If the act is considered as an act of communication, we would assume that the act is also considered as a communication "to the public", this is however uncertain.

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:

The group is inclined to think that linking to materials made available with consent from the rights holder would not be considered as a copyright infringement. Professor Rognstad of the University of Oslo has argued that the copyright holder, by agreeing to his work being made available "on line", has also agreed to linking ("implied license"), this view is however subject to discussion.

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)?

See above.

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:

We assume that, under Norwegian copyright law, deep linking and hypertext linking would be treated in the same manner. However, in a case where for example a company uses deep linking to a copyright work belonging to one of its competitors, to its own benefit in connection with business activities, and perhaps in such a manner that the consumers cannot see that the work is in fact hosted on the competitor's web site, this could contribute to the act being considered as a violation of the Norwegian Marketing Act and its provisions on unfair competition.

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:

We assume that, under Norwegian copyright law, framing and hypertext linking would be treated in the

same manner. However, in a case where for example a company uses a framing of a copyright work belonging to one of its competitors, to its own benefit in connection with business activities, and perhaps in such a manner that the consumers cannot see that the work is in fact hosted on the competitor's web site, this could contribute to the act being considered as a violation of the Norwegian Marketing Act and its provisions on unfair competition.

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:

We assume that, under Norwegian copyright law, embedding and hypertext linking would be treated in the same manner. However, in a case where for example a company uses an embedding of a copyright work belonging to one of its competitors, to its own benefit in connection with business activities, and perhaps in such a manner that the consumers cannot see that the work is in fact hosted on the competitor's web site, this could contribute to the act being considered as a violation of the Norwegian Marketing Act and its provisions on unfair competition.

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:

This is also uncertain – if linking relies on an "implied consent", it is logical that such consent could also be withdrawn, however it is not a widespread practice to include such statements on web sites in Norway. If linking is not considered as an act of "communication", then such statements would be without legal significance.

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, in this respect, we assume that linking in such a manner that the user would be able to circumvent a payment wall would be considered as a copyright infringement. This would apply whether the decision is based on the "new public" criterion in the Svensson case, or on the "indispensable contribution" in the Attorney General's statement in the Sanoma case.

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:

This is uncertain under Norwegian law. If the consideration is based on the "new public" criterion, we would think that the answers could be different, as the copyright holder did not provide his consent to the uploading, the copyright holder could not have considered the "Internet community" which would therefore be considered as a "new public". However, if linking is not to be considered as

"communication", linking to illegal materials would not be considered as a copyright infringement.

- 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, under Norwegian law, works made available on-line without restrictions are considered as published works. This is stated in the preparatory works of the 2005 amendment to the Copyright Act.

- 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?

N/A

- 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:

Yes, the circumstances could be relevant in supporting indirect or secondary infringement. This would however need to be decided on a case by case basis.

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

In the Norwegian Supreme Court's decision in the Napster.no case, linking to copyright materials posted on-line without the consent of the copyright holder was considered as an illegal contribution to the copyright infringement made by the uploader, i.e. a secondary copyright infringement. Under Norwegian law, one would consider whether the act of contribution is "unlawful" - not all contributions would be considered as "unlawful", i.e. contributions by Internet Service Providers in the course of their daily business, although they contribute to the act, would not be considered as unlawful unless special circumstances are present.

## 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 described, there is some uncertainty in Norwegian law in regards to whether linking to copyrighted works constitutes a copyright infringement. As a main rule linking to copyrighted works will not constitute an infringement. There are however certain exceptions in regards to linking to copyrighted material which has been made available online without the consent of the copyright holder.

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 current Norwegian copyright act should seek to clarify the legal situation in regards to linking. In the draft for a new Norwegian Copyright act which was recently published, the Ministry of Culture has explicitly refrained from taking a position on the issue, due to the uncertain status within the EU and the cases pending before the CJEU.

### III. Proposals for harmonisation

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

yes

Please explain:

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?

no

Please explain:

The act of linking should in itself not constitute a communication to the public. One may however consider to make certain exceptions in regards to linking/embedding, possibly under the rules of unfair competition.

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

yes

Please explain:

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?

no

Please explain:

The act of linking to copyrighted material which has been made available online with the consent of the copyright holder should not be considered an 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:

See above

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:

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:

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:

If linking is considered to be a communication to the public, and if access to the copyrighted material is limited the material has not been made freely available to the public, then linking to this material should not be permitted.

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 linking is considered to be a communication to the public, and if the copyrighted material has been uploaded without the consent of the copyright holder linking to the material will be a communication to the public and should thus not be permitted.

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, a "new public" should be defined as a public which has not previously had access to the copyrighted 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.

No additional issues the group wishes to comment upon at this time.

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

IP advisers views.

#### Summary

The "making available" right is generally recognized under Norwegian law. The issue of whether Internet linking falls within the scope of the author's "making available" right, is however uncertain under Norwegian law. In a Norwegian supreme court ruling from 2005 in the Napster.no case, which concerned linking to music files which had been uploaded without the consent of the right holders, the Supreme Court chose not to issue an opinion on this, but rather saw the linking as a contributory act to the copyright infringement carried out by the uploader. In relation to copyright, the Supreme Court did not distinguish between different types of linking. In the draft new Norwegian Copyright Act which was recently published by the Ministry of Culture, the Ministry also did not take a stand on the linking issue, but stated that they will await the outcome of the cases currently pending before the CJEU. In our opinion, linking should not be considered as a breach of the author's "making available" right, but should rather be considered under the rules on secondary or contributory infringement, and/or under the rules of unfair competition, which should possibly be harmonized within the EU/EEA.