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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:

There is no concept of making available right in Pakistan. However the law grants exclusive right to copyright holder in relation to reproduction, publication, performance and adaptation of copyrighted work.

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:

In the absence of any provision relating to making available right in the current law and any case law

decided by the Pakistani courts which we are aware of, we are unable to comment whether the act as described in this question would amount to communication of the copyrighted work.

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

no

Please explain:

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:

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)?

In the absence of necessary provision in law and lack of awareness of any case law in Pakistan we believe that uploading of copyrighted work under authorization of the copyright holder would amount to publication as provided for under the current law and any action of infringement is likely to be denied.

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:

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:

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?

yes

Please explain:

Since the current law provides exclusive right to the copyright holder to authorize publication, reproduction, performance and adaptation of copyrighted work so any statement on the website that prohibits the relevant act of linking or linking generally would ordinarily be assumed as a restriction imposed by the copyright holder and any violation thereof may constitute infringement under the law of contracts but in the absence of any legal provision or case law in relation to making available right and thereby linking one cannot say with certainty that it would amount to infringement as such.

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:

Please refer to answer to question 10) above.

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:

Please refer to answer to question 2) above.

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:

Such an act would fall under the publication of copyrighted work though there is no concept of making available in the local copyright 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?

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?

Under our system, there is no law that specifically addresses the issue raised in the question.

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 concept of making available rights as per Article 8 WCT be introduced in the current copyright law of Pakistan.

### III. Proposals for harmonisation

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

yes

Please explain:

In view of developments in field it is necessary that this aspect of copyright protection should be well defined in the current law.

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:

Our view is based on the laws in various other jurisdictions and case law developed in territories outside Pakistan. We therefore believe that the act of linking to a website containing a copyrighted work should not be considered "communication" of the copyrighted work because there is no "infringing copy" made by the linking person on which to base liability. The hyperlink itself is not copyright protected, even though the underlying pages may be protected under copyright laws.

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

no

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:

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:

For the reasons mentioned above, different forms of linking maybe treated equally where it concerns liability under the law, even though theoretically, each may be different from the each other. However, in the case of framing, possible argument of copyright infringement may be based on the fact that the process results in an unauthorized modification of the linked site. In several countries, this view has not been accepted on the basis that it is also considered as legitimate linking.

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:

In our view linking itself cannot be considered infringement unless, link is used to access copyrighted work and is subsequently used for infringing purpose, in such a situation, linking party may be taken as inducer of direct infringement, provided no exceptions apply.

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.

yes

Please explain:

The answers to questions 20) to 24) maybe different where the website expressly prohibits linking, as the liability would then be dealt with under law of contract or licensing, as under copyright law, no infringement of copyright holders rights takes place. However, it could also be contended that contractual restrictions may not in themselves suffice. The initial communication occurs before contractual restrictions come into play. So unless the website also contains technical restrictions, it will remain freely accessible website for the purposes of initial communication and so any contractual restrictions, while they might give rise to a breach of contract claim as between the website owner and the hyperlink provider, would likely not prevent a communication to the public using hyperlinks, since the communication is not restricted to "new public".

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:

The answers to questions 20) to 24) maybe different where there are limitations attached, such as notice requirement, or other technical restrictions, as the same be governed under different set of laws.

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:

Where copyrighted work has been uploaded on the website then the answers may differ on the basis that infringing copy has been made as opposed to linking, which is not protected under the copyright

law. Furthermore, the uploading of copyrighted work, without acknowledgement of the author included, may constitute direct infringement of copyright holder's rights as the content of copyright work itself has been reproduced.

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:

Unauthorized communication to the new public may constitute infringement as the copyright holder did not voluntarily make the work available to general public. A suggested definition for a 'new public' would be, "a public that was not taken into account by the copyright holder at the time the initial communication was authorized".

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:

None

## Summary

Copyright infringement occurs whenever copyrighted material is copied from or posted to a website without authorization from the copyright owner. This report discusses the potential for liability arising from providing a link of copyrighted content. Under our current law, there is no provision that specifically addresses making available right of copyrighted works by wire or wireless means. Linking or making available is not considered direct infringement of copyright, even though the underlying pages may be protected under copyright law. The copyright material is stored on copyright holder's server, rather than that of linking person. As such, there is no infringing copy made by the linking person on which to base liability. Linking can be divided into hyperlinks, embedding and framing. Each form of linking maybe treated equally where it concerns liability under the law, even though theoretically, each may be different from the other. However, on the other hand, If a copyrighted work itself has been uploaded on the website, then direct infringement may occur as in that case, infringing copy is made. Linking itself may not result in liability, direct or indirect, but if the copyrighted material is used for infringing purpose from linking person's website, then the linking person may be considered as "inducer" and secondary liability may arise. Harmonization in this area of law may not be necessary, as the copyright holder reserves the right to bring a legal action against infringers where unauthorized use of his work is made.