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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.:

Yes.

Article 177.7 of RA 8293, the Intellectual Property Code of the Philippines, provides that the copyright and economic rights shall consist of the exclusive right to carry out, authorize or prevent "communication to the public" of any work. Communication to the Public is defined under Article 171.3 as any *communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and includes the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them.*

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?

no

Please explain:

N/A

- 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:

Yes, as it makes such copyrighted material available to the public, by accessing the link in the website, from a place and time individually chosen by them.

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

yes

Please explain:

Yes, as it makes such copyrighted material available 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?

no

Please explain:

No, as a general rule. If the act of placing a hyperlink to work is not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process, it does not constitute direct infringement. It will fall under the exception in Section 184.1(j)^[1] of RA 8293.

For the exception to apply there are four (4) requisites: (a) the act of the non-copyright owner constitutes a public display of the work or a copy of the work; (b) the work has been published, or, that the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title; (c) it does not conflict with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interests; (d) That the work is not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process;

On the first requisite, the internet is a medium of communication and platform which is generally accessible to the public. Consequently, the posting of any copyrighted material, or reference by way of a hyperlink is a public display of such work.

Second, a hyperlink is used to reference content which is available on a location/address/website accessible on the internet. As such, any copyrighted work, to be accessible by a hyperlink, must have been previously placed/published or made available on the internet.

Third, a hyperlink only provides a reference or location where a copyrighted material may be found. It does not copy nor does it display such copyrighted work on the third party website. Thus, such a reference could not diminish or limit any economic rights or interest of the copyright owner.

Thus, provided that the content referred to by the hyperlink is not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process the exception under Section 184.1(j) is applicable.

Footnotes

1. [^] Under Section 184.1(j), the “Public display of the original or a copy of the work not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process: Provided, That either the work has been published, or, that the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title” does not constitute infringement of copyright. 184.2 The provisions of this section shall be interpreted in such a way as to allow the work to be used in a manner which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interests.

- 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)?

There is an exception to the rule as explained 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:

- 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?

yes

Please explain:

Yes. The use of frames to display copyrighted material on a website/application is direct infringement.

Unlike hyperlinking and deep linking, framing by its nature, allows the third party to display the copyrighted material in its own website, and to aggregate the same with other content which is owned or published by the third party or information from other sources.

The display of the copyrighted material in the third party website directly competes, at the least, with web site visitors of the copyright owner.

The publication of the copyrighted material in frames in a third party website will (a) compete with the copyright owner's website for web visitors, an element which is used as basis for monetization of websites; and (b) competes with the copyright owner in obtaining online advertisers, among others.

Thus unlike a hyperlink or deep linking such display conflicts with the normal exploitation of the work and will prejudice the right holder's legitimate interests.

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?

yes

Please explain:

Yes. For embedding, such act would constitute direct infringement. Same reason as 8.

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:

Yes, we are of the opinion that such a notice may serve to create a presumption that any hyperlink or deep linking will conflict with and will prejudice the economic rights of the copyright owner.

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. The linking with the knowledge that the copyrighted material was uploaded without the consent of the copyright owner may constitute indirect infringement if providing such link materially contributes to the infringing conduct of the uploader (i.e. it helps increase traffic, access, piracy of such material).

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:

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:

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?

NA

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.

NA

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?

By providing exceptions under Sec. 184.1(j) to the rights of a copyright owner under Section 177. At present, there is still no judicial decision relating to the linking, hyperlinking, embedding or framing of copyrighted material. As such we take a conservative view and advise against any such communication

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:

We believe that the law should be couched in broad terms in order to address future changes in technology. That said, we believe the implementing rules and regulations may be further clarified to account for its application to changes in technology including the interpretation of the Intellectual Property Office on these matters.

We believe that providing a hyperlink in general does not result in any prejudice, and may in fact benefit the copyright owner. Thus the act of providing a hyperlink should not result in direct infringement.

III. Proposals for harmonisation

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

yes

Please explain:

Yes. Considering that the internet is borderless, the provisions of law relating to communication to the public as it relates to the use of the internet as a medium for such communication should be harmonized to provide a consistent application of laws across jurisdictions

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:

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:

No, with respect to the act of providing a hyperlink to the website of the copyright owner.

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:

They should be treated differently. Deep linking, framing and embedding can prejudice the economic right and prerogative of the copyright owner to monetize the content published on the internet.

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:

NA

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:

No. Please refer to our answer to questions 20 to 24

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:

Yes. The linking with the knowledge that the copyrighted material was uploaded without the consent of the copyright owner may constitute indirect infringement if providing such link materially contributes to the infringing conduct of the uploader (i.e. it helps increase traffic, access, piracy of such material).

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 definition of "communication to the public" under the IP Code does not require that communication to the public be made to all members of 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.

We believe the study should also consider if notice (actual or constructive) should be made a requirement before the liability for direct infringement will attach.

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

Summary

The exclusive right of "communication to the public" of copyrighted work is found in Article 177.7 of RA 8293, the Intellectual Property Code of the Philippines. "Communication to the public" is couched in general terms as to include the exclusive right to make any copyrighted available on the internet, in whatever form, including the use of hyperlinks, deep-linking, embedding, and framing.

Philippine Copyright Law can be improved by having it couched in broad terms to address future changes in technology. Harmonization is of course desired. Considering that the internet is borderless, the provisions of law relating to communication to the public as it relates to the use of the internet as a

medium for communication should be harmonized to provide a consistent application of laws across jurisdictions. We propose that hyperlinks and deep-linking should not constitute infringement in that as the technology currently stands, the use by third parties of hyperlinks or deep-links to copyrighted material does not have a material impact on the economic rights of the copyright owner. Framing and embedding should however be treated differently as they prejudice the economic rights and prerogative of the copyright owner.