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2016 – Study Question (Copyright)

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Linking and making available on the Internet

Responsible Reporter: Yusuke INUI

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|-------------------------|------------------------------------|
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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.:

The Copyright and Related Rights Act, hereinafter: "Act", provides for the making available to the public right, which is in line with Article 8 of the WCT.

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:

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?

no

Please explain:

There is no sufficient guidance from jurisprudence, in particular, no Supreme Court judgment. There are two publically available judgments that concern the assessment of providing linking under copyright law.

The Appeal Court in Warsaw in a judgment of 7.5.2014 (case file I Aca 1663/13 available at www.orzeczenia.ms.gov.pl[<http://www.orzeczenia.ms.gov.pl/>]) reasons that providing a hyperlink does not, in itself, constitute “communication”. It involves no use of a copyright protected work, specifically, does not make the work perceptible. Using (clicking) a hyperlink merely transfers the user to another website, while “communication” requires perception of the protected work. Therefore, “communication” occurs only where using (clicking) a link makes a protected work directly perceivable. At the same time the Court stated that providing linking does not constitute a copyright infringement, but may be considered as indirect infringement. The position of the Appeal Court in Warsaw seems to contravene the interpretation of Article 3(1) of the 2001/29/EC Directive in the *Svensson* and *Best Water* judgments. Therefore, it is unlikely that this position would be followed in further jurisprudence, as it may breach the *acte éclairée* rule.

The Appeal Court in Cracow in an earlier judgment of 20.7.2004 (case file I ACa 564/04 available at www.orzeczenia.ms.gov.pl[<http://www.orzeczenia.ms.gov.pl/>]) suggests that providing a hyperlink is “communication” (despite the express reference to deep linking only). The Court refers to the definition of a “disseminated work” in the Act (a disseminated work is a work which with the authorization of the right holder has been made available (communicated) in any manner to the public). Dissemination (“communication”) occurs because a deep link broadens the circle of potential viewers of the protected work. The Court also notes that a deep link allows “immediate and direct” access to the protected work, as opposed to the transfer to the home page of the linked web site.

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

no

Please explain:

N/a

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:

N/a

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)?

N/a

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:

There is no clear guidance from jurisprudence, in particular, no Supreme Court judgment.

The Appeal Court in Warsaw in the judgment referred to in the answer to Question 3 states that there should be no such differentiation. In contrast, the Appeal Court in Cracow in the judgment referred to in the answer to Question 3 suggests that deep linking may be treated differently, because using (clicking) the deep link allows for “immediate and direct” access to the protected work, as opposed to the transfer to the home page.

The assessment is likely to be different where deep linking circumvents restrictive measures (Question 11 below).

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:

There is no clear guidance from jurisprudence, however, the judgments referred to in the answer to Question 3 suggest that framing requires a different assessment.

The Appeal Court in Warsaw differentiates between the mere transfer to the copyright protected work and making the protected work directly perceivable as the result of using (clicking) a link. The Appeal Court in Cracow refers to “immediate and direct” perception to the protected work upon using (clicking) a link.

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:

Please refer to the answer to Question 8 above.

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:

There is no indication in the jurisprudence.

When accepting that providing linking is communication to the public, then, the statement may be understood as the limitation of the authorization to communicate to the public, i.e., it is limited to the presentation of the protected work in the specific context and to a specific section of the public.

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:

Access to the protected work is possible as a result of the circumvention of restrictive measures on access and, therefore, it is unauthorized access.

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:

Providing linking may constitute indirect 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?

no

Please explain:

The judgment of the Appeal Court in Warsaw referred to in the answer to Question 3 indicates that it does not mean that the protected work has been made available to all members of the public (please refer to the answer to Question 14)

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 Appeal Court in Warsaw (judgment referred to in the answer to Question 3) suggests that a case-by-case assessment is required, because a website may be addressed to a specific circle of the public, e.g., depending on whether a website is in Italian or Polish, such website would be visited by different people.

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:

Providing linking may be considered indirect infringement where: the link transfers to an unauthorized copy, the authorization is withdrawn, access is possible as a result of the circumvention of restrictions on access, or despite the right holder's statement that linking is not authorized.

Indirect infringement is a general civil-law tort. In the case of linking, it may consist in assisting Internet users with obtaining the transmission of a protected work.

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

Indirect infringement requires the fault of the person operating a website with links, including negligence.

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?

The Act provides for the private use exemption and transitory or incidental reproduction exemption. The E-commerce Act provides exemptions in relation to other relevant parties, in particular, the hosting provider.

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:

Application of the “new public” requirement seems to limit the copyright protection in cases concerning “communication” other than linking. That requirement needs to be applied to other acts of the communication to the public. This results from the law provisions, which define the exclusivity granted for the copyright holder. That exclusivity concerns the use of the protected work throughout fields of exploitation. One of those fields is “dissemination that is not related to an original or a copy” of the protected work. Article 50 (3) of the Act provides acts, which constitute that dissemination and it lists, among others, making available to the public and retransmission. Therefore, if the “new public” requirement is applied, it must be applied to all the acts of that dissemination. If so, then, copyrights protection would be limited. (In addition, it may contravene the 93/83/EC Directive.) Therefore, it is not clear how to differentiate between making available to the public and other acts of dissemination in Article 50 (3) of the Act. (Moreover, there is no “new public” requirement for exclusive exploitation under the Act.)

In consequence, it seems that only indirect infringement may be established. There is no clear and consistent jurisprudence on indirect infringement. It is unclear what is the scope of that liability, in particular, in respect to establishing fault on the part of the provider of a link, and available remedies.

III. Proposals for harmonisation

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

yes

Please explain:

- Introducing harmonized provisions on the liability of providers of linking and the limitations of that liability similar to that of hosting providers under the E-commerce Directive.
- A harmonised interpretation of “public” in cases concerning linking and some other acts of communication to the public, such as simulcasting.

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 providing linking, in itself, does not involve any use of a protected work and, therefore, does

not fall into the scope of copyrights exclusivity.

Considering linking as “communication” results in the need to apply further criteria, in particular, “new public”, “technical means”, or a purpose of linking. Those criteria do not seem to be properly based in copyright law. Specifically, where linking is considered to be “communication”, then, any linking should be treated as copyrights infringement, irrespective of whether the work on the linked website is authorized or not. Moreover, the application of those criteria may lead to rather unclear results, e.g., assessment of linking where a copyright holder withdraws an authorization for presentation of a protected work on the linked web site after the linking is applied, specifically, does it mean that the provider of linking must monitor the authorization during the whole time of linking (which seems unacceptable).

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

no

Please explain:

N/a

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:

N/a

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?

no

Please explain:

Although framing/embedding makes a protected work perceptible within a given website, it seem that there is no good reason to apply a different treatment under copyright law. Such differentiation does not seem to fit copyrights law itself. Any reference to Internet users' perception of a website on which the protected work is accessible does not fit copyrights law. Under copyright law the actual exploitation of a protected work, which is covered by the scope of copyrights exclusivity, is relevant. Even in the case of framing/embedding there is no such exploitation (no use of the protected work).

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:

Providing linking may be considered indirect infringement at least in cases where: the link transfers to an unauthorized copy, the authorization is withdrawn, access is possible as a result of the circumvention of restrictions on access, or despite the right holder's statement that linking is not authorized.

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:

Please refer to the answer to Question 10.

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:

Please refer to the answer to Question 11.

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:

Please refer to the answer to Question 12.

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:

N/a

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:

N/a

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

- Whether the criterion of "new public" should be applicable to other acts of communication of protected works to the public, in particular, non-cable retransmission and especially simulcast directed to the same audience as the original one.

- Does liability of a provider of linking requires, at least, negligence (where linking is to unauthorized copy of a protected work)? If so, in what circumstances the liability is excluded? Is a withdrawal of an authorization after linking is provided relevant and, if so, does it mean that the authorization must be monitored at the time linking is provided?

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

N/a

Summary

Polish law provides for the “making available” right, which is in line with Article 8 of the WCT and Article 3 (1) Directive 2001/29/EC.

The jurisprudence does not provide any sufficient guidance on the assessment of linking under copyright law. The recent (one of the only two publicly available judgments) seems to contravene the European Court interpretation of Article 3(1) of Directive 2001/29/EC in *Svensson* and *Best Water* and it is unlikely to be followed by further jurisprudence as it seems to breach the *acte éclairée* rule.

It seems impossible to apply Polish copyrights law in line with the interpretation of Article 3(1) 2001/29/EC Directive presented by the European Court (*Svensson and Best Water*):

- Polish law provides that a copyright holder enjoys an exclusive right to the use the protected work within “exploitation fields”. Linking, in itself, does not involve any use of the protected work.
- One of the “exploitation fields” is dissemination, which is not related to an original/copy of the protected work. The acts covered by such dissemination are defined in one law provision and include, among others, making available to the public and retransmission. Therefore, the “new public” requirement must be applied to all acts of such dissemination, which would limit copyright protection.
- The reference to whether the copy on the linked web site is authorized does not fit the objective liability for copyrights infringement. The effect envisaged by the European Court when interpreting Article 3(1) 2001/29/EC Directive can be reached by the following application of the Polish law - providing linking does not constitute communication to the public (no copyright infringement), but may constitute an indirect infringement (in particular, linking to an unauthorized copy or circumvention of the restrictive measures).