



Submission date: 19th April 2016

2016 – Study Question (Copyright)

Sarah MATHESON, Reporter General
John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General
Yusuke INUI, Ari LAAKKONEN and Ralph NACK, Assistants to the Reporter General
Linking and making available on the Internet

Responsible Reporter: Yusuke INUI

National/Regional Group	Portugal
Contributors name(s)	Ricardo HENRIQUES, Ana SILVA, Ana RITA PAINHO, Gonçalo PAIVA E SOUSA and Lourenço SAMPAIO
e-Mail contact	ricardo.henriques@pbbr.pt
Date	19-04-2016

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. Pursuant to indent j) of paragraph 2 of article 68 of the Portuguese Author's Right and Neighboring Rights Code (Decree-Law 63/85 of 14 March 1985, as subsequently amended):

"The author has the exclusive right to, amongst others, make or authorize, by himself/herself or his/her representatives:

(...)

j) the making available of the work to the public, by wire or without wire, in order to make it accessible to anyone from the place and at the time chosen by such person"

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?

no

Please explain:

No, considering the fact that the work has been previously communicated to the public.

Please note that, to the best of our knowledge and available public records, there are no Portuguese court decisions on this matter. However, when interpreting Portuguese law, Portuguese courts will always decide based on the ECJ interpretation of the EU Directive to which they are bound.

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

no

Please explain:

N/A

It should be noted, however, that some Portuguese legal authors consider there is no communication to the public only to the extent there is no economic advantage being taken from the communication.

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?

no

Please explain:

No. They would not be different.

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. They would not be different.

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:

No. They would not be different.

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:

No. They would not be different.

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.

11.3) They would be different to the extent there would be a communication to a new public to which there would have been no previous communication;

11.4) Yes, such an act would be considered as communication "to the public";

11.5) Yes, it would constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply;

11.6) N/A;

11.7) No;

11.8) No;

11.9) No.

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:

No. The answers to questions 3) to 9) would not be different.

- 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. There is no relevant distinction in the law in this regard.

- 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?

no

Please explain:

No. Portuguese law does not support a finding of indirect or secondary copyright infringement.

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

N/A

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?

We find that the balance struck by Portuguese law favors freedom of and right of access to information over the author's right owner's control of his/her work.

- 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?

no

Please explain:

No. We do not consider that there should be any strengthening or reducing of the Author's right owner's control over linking.

III. Proposals for harmonisation

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

yes

Please explain:

Yes. We consider that harmonization is important considering the globalized economy and especially the European Union single market strategy.

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:

No, as it is a mere reference to an existing communication.

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:

They should be treated equally, as there is no communication.

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:

N/A

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:

No, as the author does not have the right to prohibit the linking (reference).

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. It should depend on limitation to public's access such as registration, subscription, payment or other similar requirements.

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.

no

Please explain:

No.

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. The new public should be comprised of all people that were not meant to have free access in the first communication.

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:

No.

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

We consider that the two other topics should be considered: a) moral rights, i.e. an author's right not to be associated with content that it does not want to (including the right to be forgotten / let alone, i.e. no longer have his/her work referred); and b) the economic advantage taken by the person/entity linking to the original work should be taken into consideration when assessing the existence of a communication to the public, as it can change the nature of the communication and its relevant public.

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

Summary

The relevance of linking to the protection of author's rights should depend on the consideration of existence of a communication to a new public and the advantage taken by the person/entity linking to the original work, as said factor can change the nature of the communication and its relevant public. Moreover, the protection of an author's moral rights, i.e. an author's right not to be associated with certain content should also be considered.