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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:

The Korean Copyright Act does not provide “making available right”. If we were to consider whether the “public transmission right” and the “interactive transmission right” under the Korean Copyright Act protect the rights related to linking, the said rights do not protect the rights related to linking.

The term “public transmission” means transmitting works, stage performances, music records, broadcasting or database (hereinafter referred to as “works, etc.”) by means of wireless communication or wire communication so that the public may receive them or have access to them (Copyright Act Art. 2(7)), and the owner of copyright shall have the right to transmit his/her work in public (Copyright Act Art. 18).

Further, the term “interactive transmission” means to provide works, etc. for use so that the members of the public may have access at the time and place of their own choice among the public transmission, including transmission to be done accordingly (Copyright Act Art. 2(10)), and the owner of neighboring copyright shall have the right to transmit (Copyright Act Art. 74 & 81). Please note that interactive transmission is regarded as part of public transmission.

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:

- 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:

Korean courts have held that although act of providing hyperlink can be seen as "preparatory action to instruct or request transmitting of a work," it does not constitute "act of transmitting or providing for use." Further, the courts held that such act does not even constitute an act of reproducing, which is defined under the Copyright Act as "fixing on a tangible object temporarily or permanently or a remaking into a tangible object." (Copyright Act Art. 2(22)).

- 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 order to constitute a copyright infringement, an infringing act against the rights of the author as set forth under the Copyright Act must occur. However, an act of placing a hyperlink merely facilitates the users' access to the webpage that they wish to access by signposting with text embedded with URL. In other words, hyperlink itself does not reproduce any work in the hyperlinked website, but merely directs the users to find the webpage where they can access the subject information/work. Hence, Korean Supreme Court held that such act does not constitute "reproduction", "public transmission", or "interactive transmission" as defined under the Copyright Act (Supreme Court decision 2008Da77405 dated Nov. 26, 2009). Thus, copyright infringement is not found in the act of placing a hyperlink.

- 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:

Because Korean courts view deep linking same as direct linking.

- 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:

It is not clear since there is no court precedent that directly ruled on whether framing constitutes a copyright infringement. However, in light of the case below, our answers would not change. The Seoul Central District Court held in a case regarding the frame of a map search service that “as in the copyright infringement act, such framing leads to unjust enrichment by disturbing good social order and infringing on profit that is proper for another person,” and yet it did not directly deal with whether framing constitutes a copyright infringement (Seoul Central District Court decision 2000GaHap54067 dated Dec. 7, 2001). Thus, the majority view of legal scholars is that framing itself does not constitute copyright infringement.

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:

It is not clear. Although it is not a case directly related to embedding, the Supreme Court held in a case where a thumbnail image (small-sized version of an original image) was provided on a search engine site, which allowed the users who click on the thumbnail image to view enlarged version of the original image by hyperlinking thumbnail image to the website where original image can be found, that “since neither the original image nor the minimized image were not saved on the server or other tangible medium that was under the alleged infringer’s direct control,” the alleged infringement could not be substantiated (Supreme Court decision 2009Da4343 dated March 11, 2010). In light of the above, even embedding would not constitute an “interactive transmitting” activity, and unless the subject content is deemed to have been “reproduced”, it is likely to be not found of copyright infringement.

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:

The answer stays the same. Even if there is such a statement, unless it is an infringement under the Copyright Act, then the answer would not differ.

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:

For the same reason stated in the answer to question 9, the answers would not change. However, in case a work that was uploaded on a restricted website has been hyperlinked through hacking, it is likely that such may found in violation of public exhibition right.

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:

As per the recent Supreme Court case, even if the hyperlink was connected to an infringing work, the act of hyperlinking itself cannot be regarded as copyright infringement nor abetting copyright infringement (Supreme Court decision 2012Do13748 dated March 11, 2010).

- 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:

Unless there is a special restriction, it is regarded as having been made available for the public's usage and view. However, regardless of such restriction, reproducing, transmitting or other similar activities regarding the work without permission from the copyright holder are prohibited.

- 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:

Secondary infringement has not considered by the courts. As for the indirect infringement, since the act of hyperlinking to a webpage that infringes on the copyright holder's right to reproduce or right of public transmission "cannot be said to have facilitated the copyright infringement act itself, and thus, such act of hyperlinking itself does not constitute act of aiding and abetting IP right infringement" (Supreme Court decision 2012Do13748 dated March 12, 2015).

- 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?

In light of the foregoing court precedents, act of hyperlinking itself is not generally regarded as copyright infringement (including indirect infringement). Therefore, the courts are more interested in upholding the freedom of expression on the Internet, preventing any chilling effect that may come about by regulations on the hyperlinking activity, and thereby maximize the free exchange of information over the Internet than the opposite. Therefore, once the copyright holder posts its work on a website made available for the public or relevant parties' access and use, then the interest of the public/relevant parties is of greater importance than that of the copyright holder, at least with respect

to the act of hyperlinking.

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:

As the Internet develops, the use of works on Internet is becoming more and more diversified, and since the use on the Internet is much different to the offline use, there are difficulties in applying the existing Copyright Act to the online use. For example, an issue may arise regarding to what extent the first-sale doctrine under the current Copyright Act would be applicable in the event of trading software. Therefore, there is a view calling for sorting out of how work is used on the Internet, and providing special provisions to govern different uses of the work under the Copyright Act to better reflect the characteristics and the nature of the use on the Internet.

III. Proposals for harmonisation

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

yes

Please explain:

There exists a view calling for improvement.

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:

Act of linking is difficult to be seen as transmitting or providing the subject work for use. It is merely indicating where the subject work may be found, and thus, it would not constitute "reproduction", "public transmission", or "interactive transmission".

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?

no

Please explain:

There is no need to treat it differently. In particular, the fact that the link connects the user to other persons' website from the user's own computer is same in embedding link as in any other hyperlinks. Further, whether the work is accessed by the public is not decided by the person who places the link but by the person who initially uploaded and posted the work on the webpage, and thus, the act of mere linking is difficult to be seen as transmitting or using the work without permission or authorization of the person, e.g., copyright holder, who initially uploaded the work. If there is any unjust enrichment by the person who placed the link, such as depriving the advertisement fee owed to the copyright holder, then such can be prohibited and resolved through other laws such as the laws governing unfair competition.

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:

Despite the statement, non-infringing act cannot be considered as copyright infringement.

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 the access is restricted by any means, then using the work is not possible even though the link is placed on the work, and thus, merely placing a link to a restricted work cannot be regarded as copyright infringement.

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:

It is a matter of deciding whether the act of placing a link itself is an infringing act, and thus, whether the object of the link has been posted without its copyright holder's permission should be of no concern.

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:

Under the Korean Copyright Act, "public" includes "certain members of the public", and thus, as long as it has been transmitted to certain members of the public, it is regarded as having been transmitted to the public. Therefore, trying to fit in the concept of "new public" when deciding the issue of copyright infringement not only conflicts with the current Copyright Act but also is seen as being too restrictive of free exchange and use of information over the Internet as a matter of public policy.

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:

If the work has been made available on the webpage without any access restriction, then it is difficult to see that as not having been provided to the general public. However, it is of course prohibited to reproduce or transmit the work without the copyright holder's approval under the current Copyright Act.

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

In relation to linking, even if there is no infringement of right to reproduce or interactive transmission right, there still may be issues surrounding whether there is any infringement of paternity right (right to be identified as author) or regarding the relation between the link and fair use.

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

Summary

The Korean Copyright Act does not specifically protect the "making available right". If we were to consider whether the "public transmission right" and the "interactive transmission right" under the Korean Copyright Act protect the rights related to linking, the Korean Court held that the said rights do not protect the rights related to linking. Korean courts have held that although act of providing hyperlink can be seen as "preparatory action to instruct or request transmitting of a work," it does not constitute "act of transmitting or providing for use." Further, the courts held that such act does not even constitute an act of reproducing, which is defined under the Copyright Act as "fixing on a tangible object temporarily or permanently or a remaking into a tangible object." (Korean Copyright Act Art. 2(22)).

To conclude, linking is not protected under the Korean Copyright Act, whether the relevant act is embedding or framing. In this regard, we believe the Korean court's position regarding "linking" is reasonable. When there is any unjust enrichment by the person who placed the link, such as depriving the advertisement fee owed to the copyright holder, then such can be prohibited and resolved through

other laws such as the laws governing unfair competition even if there is no infringement of right to reproduce or interactive transmission right.