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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.:

Article 25 of Law no. 5846 on Intellectual and Artistic Works ("Copyright Act") is in line with Article 8 of WCT which grants authors the exclusive right to make their works available to the public.

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:

Although a copyright work has been uploaded to a website with the authorization of the copyright owner and made publicly accessible; act of providing a user activated link can be considered as "communication" in Turkish laws. Act of communication refers to any transmission of the protected works, irrespective of the technical means or process used to transmit them, thereby an act of communication can occur when a work is made available and accessible through a link.

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

yes

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)?

Linking does not infringe copyright as long as the material is "freely accessible" on another website as it is deemed to be made available to the public within the implicit consent of the copyright holder.

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?

no

Please explain:

Unless the website also contains restrictive measure (i.e. technical restrictions etc.), such a disclaimer would not make any difference on the ground that the copyright holder has already communicated the content to the public as a whole.

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:

Such a restriction would mean that the copyright holder has addressed the copyrighted content to a restricted group of people instead of the public as a whole.

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:

If the copyrighted work has been uploaded on the website without the authorization of the copyright holder, the initial communication itself would be an infringing act. Copyright holders have the exclusive right to authorize or prohibit any communication to the public of their works. The copyright work must be published with the consent of the copyright holder.

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?

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:

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?

Copyright Act acknowledges the 'fair use' doctrine with several provisions including Article 38 titled 'Personal Use'. According to the Article, reproducing all intellectual and artistic works for personal use without the purpose of promulgation or profit is permitted; nevertheless, such reproduction may not damage the legitimate interests of the copyright owner without valid reason or conflict with the average exploitation of the 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?

yes

Please explain:

Copyright Act does not include any provisions regarding linking, hyperlinking, deep linking, or embedding. Since a regulation tied to a particular technology may require amendment rather quickly, any such provision regarding linking and such should be drafted in a technology neutral way. However, certain expression such as "new public" is required to be defined either by the Law or via court practices.

III. Proposals for harmonisation

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

yes

Please explain:

Technology is evolving tremendously fast and practically there are no boundaries on the Internet. Therefore legislation in this area must be harmonized worldwide.

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:

Yes. Any transmission of a copyrighted work, irrespective of the technical means or process used to transmit them should be construed as communication. So, act of linking to a website containing a copyrighted work should be considered a communication of the copyrighted work.

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

yes

Please explain:

Yes, however the concepts of the public and the new public shall be differentiated from each other accurately. Where copyrighted material is freely available, those linking to it could not be said to be providing that content to an audience different from the one rights holders allow to access their content. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them. So such an act of linking would communicate the copyrighted work to "the public" indeed but not a "new public."

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:

It should not constitute infringement in cases where the copyrighted work was communicated to the public with no restrictions. As stated in Svenson case and EU case law, in order for a copyrighted work to be considered as "communicated to the public", it must be made available to a 'new public'. That term means a different audience from the one that rights holders originally directed their material at when publishing their copyrighted content. The CJEU ruled that there is no 'new public' to target when copyrighted material is made freely available online which should be considered for harmonisation in other jurisdictions. The act of linking to it, therefore, should not be an "act of communication to the public" and therefore should not be deemed to be infringement of copyrights. However, where rights holders place restrictions on access to their copyrighted material, for instance through passwords, login screens website operators those who provide link to the material should be deemed to infringe copyrights.

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:

The all forms of linking mentioned above should be treated equally, considering technological developments and the nature of the Internet.

There may be objective criteria for examining infringement of making available right on the Internet, since the technique can be always changed. So, if we say those forms of linking should be treated differently, the answer would not be enough for the future developments. However, accepting the objective criterias or rules should cover the every possible techniques, as it not easy to foresee the future of the technology.

If the owner of the copyrighted work has somehow communicated the work to the public without any restrictions, there is no importance of which forms of linking applied. We should importantly underline here, if someone's acting of linking mentioned aboved causes unfair benefits from the copyrighted work and reputation of the owner, the said acts should be considered as an infringement action.

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:

According to above answer, we accept all kinds of linking should be treated equally and in relation to each such case the finding should be one of the direct infringement since making available right shall be harmonized as an exclusive right granted to the copyright owner in all jurisdictions.

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:

Once a copyrighted work is made available to the public on a website with no restrictive measures such as technical restrictions for the purposes of initial communication, rules of exhaustion would be applicable. From this point on, it is deemed that the public has free access to such content at all times. Therefore, a disclaimer prohibiting the relevant act of linking would be considered null and void within the scope of the making available right.

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 above answers would change if the work on the website is only made available to certain people via subscription or other methods. In this case linking-embedding-framing would constitute communication to public without the copyright owner's authorization which would infringe the making available right of copyright owner. When the copyright owner makes its work available through a subscription system, its aim is clear that only users who agree to the rules of subscription can view the work.

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:

According to Article 25 of Turkish Copyright Act, Article 11 of The Bern Convention, Article 8 of The WCT and Article 2 of the 2001/729/EC Directive, copyright holders have the exclusive right to authorize or prohibit any communication to the public of their works. The right of communication to the public of work is one of the patrimonial rights of the copyright holders. From this point of view, copyright holders have the prohibition right to convey of their works to the public. The copyrighted work must have been published with the consent of the copyright holder. If copyrighted work has been uploaded on the website without the authorization of the copyright holder, it would be infringement of the right of communication to the public.

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:

A public is new, if the subsequent linking introduces the copyrighted work to a new group of Internet users which were not taken into account by the copyright holder at the time of the initial 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:

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

Considering continuous technological developments, linking and making available right should be evaluated with a broader scope. Linking and making available of a copyrighted work is inevitable since the number of internet users increasing every second. Critical issue at this point is possible infringement of copyright owner's moral rights, especially on the authority to designate the name. In the case of linking without a clear implication or a statement of the owner's name, copyright owner's moral rights might be irreversibly damaged (especially in the cases of deep linking, embedding and framing as the internet user does not visit the main page of the website , thus may not perceive the main origin of the copyrighted work). Moreover, it may also give rise to a tortious act and/or unfair competition within the framework of the general provisions which should be examined in detail with different aspects.

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

IP SECTOR

Summary

Article 25 of Turkish Copyright Act regulates the exclusive right to make the copyrighted work available to the public in line with Article 8 of WCT and the act of providing a user activated link can be considered as "communication" in accordance with Turkish laws. Linking does not infringe copyright as long as the material is made "freely accessible" in a website initially by the copyright holder as the further communications shall be deemed as made within the implicit consent of the copyright holder regardless of the type of linking. However, in case the copyright holder has taken restrictive measures in this respect (i.e. technical restrictions, subscription etc.) and the further communication introduces the copyrighted work to a new public, linking may constitute an infringement in such a case. We are of the opinion that the legislation in this area shall be harmonized worldwide and the definition of new

public should be made accurate since the technology is evolving tremendously fast and there are no boundaries on the Internet.