



Submission date: 20th May 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	United Kingdom
Contributors name(s)	Jonathan MOSS, James SEADON, Daniel LIM, Nick BOYDELL, Kirsty O'CONNOR, Alice STAGG, Jane MUTIMEAR and Justin WATTS
e-Mail contact	secretary@aippi.org.uk
Date	17-05-2016

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. The Copyright, Design and Patents Act 1988 (the "**CDPA**") provides for protection of an author's making available right, in line with Article 8 of the WCT:

s.16 provides the exclusive right of communication to copyright owners.

s.20(2)(b) provides that the exclusive right of communication applies to literary and artistic works and that communication to the public includes the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

"Electronic transmission" incorporates communication "by wire or wireless means" by virtue of the definition of electronic: see s.178.

S.20(2)(b) of the CDPA implements Article 3 of the InfoSoc Directive.

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to

the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) *for performers, of fixations of their performances;*
- (b) *for phonogram producers, of their phonograms;*
- (c) *for the producers of the first fixations of films, of the original and copies of their films;*
- (d) *for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.*

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Nonetheless, we note that there has been some discussion as to whether implementations of Art. 3 adhere to Art. 8 of the WCT in light of the EU interpretation of "communication to the public" though as international treaties do not directly enter into English law it is unclear what impact this would have domestically when addressed by the courts.

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:

Not applicable.

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:

This precise scenario has not been considered in relation to s.16 and s.20 CDPA in the English courts or indeed in the CJEU.

While *Svensson*^[1] offers some guidance its focus was on deep linking rather linking to the index page of a website – though we note that the AG Opinion in *GS Media* given on 7 April 2016 suggests that the guidance in *Svensson* may have been wrong on this very point. We assume here that the question requires the copyright work to be present on a page within the website that is other than its index page. Our preferred analysis here is that while linking to that index page would be a communication of the index page, it cannot be a communication of a copyright work located elsewhere within the website.

This is consistent with the view of Arnold J in *Paramount and others v B Sky B and others*:^[2]

[37] In the present case the Claimants contend that there is a communication to the public by UK users of the Websites who supply links to the Websites. For the reasons explained above, I am not sure that the mere provision of a hyperlink amounts to a communication to the public. It is clear from the evidence in this case, however, that many, if not most, of the users in question do not merely provide a

link to the host site, they also upload the content to the host site. In my judgment, the combined effect of these acts does amount to communication to the public even assuming that the mere provision of a hyperlink does not."

Footnotes

1. [^](#) *Svensson and others v Retriever Sverige AB (Case C-466 12) [2014] Bus LR*
2. [^](#) *Paramount Home Entertainment International Ltd, Sony Pictures Home Entertainment Ltd, Twentieth Century Fox Film Company Ltd, Universal Pictures (UK) Ltd, Warner Bros. Entertainment UK Ltd, Disney Enterprises, Inc v British Sky Broadcasting Ltd, British Telecommunications Plc, Everything Everywhere Ltd, Talktalk Telecom Ltd, Telefónica UK Ltd, Virgin Media Ltd [2013] EWHC 3479 (Ch)*

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

no

Please explain:

Not applicable.

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:

Not applicable.

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)?

Not applicable.

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:

Yes for the following reasons.

In relation to question 3:

Although there is no definition of "communication" in the CDPA, nor in the *InfoSoc Directive*, the term has been given a broad meaning by case law both at EU and national level, and has generally been interpreted in line with the objectives of the *InfoSoc Directive*, and in particular recital 23:

"This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts." [emphasis added]

Per *Svensson* the above scenario amounts to a "communication" because it affords the recipients of the user-activated hyperlink (i.e. users of the website where the link is provided) direct access to the work. It matters not whether the opportunity to access the work is acted upon; the important factor is that it has been made available in such a way that it may be accessed by persons other than the copyright holder.^[1]

Svensson draws upon the CJEU's earlier analysis of the scope of Art 3(1) of the InfoSoc Directive in *SGAE* (notwithstanding that the earlier case concerned broadcast transmissions).^[2]

"43...for there to be a communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive...that customers who have not switched on the television have not actually had access to the works." ^[3]

The English court applied *SGAE* in *Newzbin*, finding that "communication" should be construed broadly.^[4]

More recently, Arnold J in the English Court applied the *Svensson* approach (and endorsed Henderson J's approach in *Paramount*) in *1967 Ltd*.^[5]

In relation to question 4:

As with "communication", the CDPA and InfoSoc Directive offer no definition of "public". One must start with a very basic definition, settled by the CJEU as "*an indeterminate number of potential recipients*" and "*a fairly large number of persons involved*".^[6]

The CJEU in *Svensson* observed that an act of communication by means of clickable links is aimed at all potential users of such a site, i.e. an indeterminate and fairly large number of recipients.^[7] It went on, however, to endorse in this context a restricted meaning of public:

"Where there is a communication which does not use a different technical means to that of the original communication, it is necessary to show that the communication is to a new public, that is to say, a public which was not considered by the authors concerned when they authorised the original communication: *SGAE* at [40], *Organismos* at [38], *FAPL* at [197], *Airfield* at [72], [76], *ITV* at [38]."^[8]

This was applied in the English Court in *1967 Ltd*:^[9]

"In *Svensson* the CJEU ruled that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public within art 3(1) of the Information Society Directive. It held at 17 – 20 that there was an act of communication, but it held at 21 – 31 that the communication was not to the public since it was not to a new public, that is to say, a public which had not been taken into account by the copyright owners when they authorised the initial communication to the public. The reason for this was that all internet users could freely access the works on the other website to which the works had been communicated with the authorisation of the copyright owners: see 25 – 28."

In relation to question 5:

Not applicable.

In relation to question 6:

The CJEU did not expressly apply the theory of an implied licence in its reasoning in *Svensson*. The specific facts of the case provided the basis for the finding of non-infringement. In other words, while it is arguable that there is an implied licence, a licence is not necessary since without a communication to the public there is no restricted act requiring a licence.

Footnotes

1. [^](#) *Paras 19-20, Svensson and others v Retriever Sverige AB (Case C-466 12) [2014] Bus LR*
2. [^](#) *Case C-306/05 Sociedad General de Autores v Editores de Espana (SGAE) v Rafeal Hoteles SA [2006] ECR I-11519*
3. [^](#) *Ibid. Para 43*
4. [^](#) *Twentieth Century Fox Film Corp (and others) v Newzbin Limited [2010] EWHC 608 (Ch) at 119.*
5. [^](#) *1967 Ltd and others v British Sky Broadcasting Ltd and others [2014] EWHC 3444 (Ch) at 16.*
6. [^](#) *Case C-89/04 Mediakabel [2005] ECR I-4891 at 30 and 38 respectively. Further affirmed in SGAE at 37 and 38 and Case C-607/11 ITV Broadcasting (and others) v TV Catch Up Ltd [2013] ECR 32TV Catch-Up at 32.*
7. [^](#) *Svensson at 22 and 23.*
8. [^](#) *Svensson at 12.*
9. [^](#) *1967 Ltd at 16.*

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, as at 7 above. *BestWater* extends the *Svensson* analysis to framing.^[1]

Footnotes

1. [^](#) *CJEU, Case C-348/13 - BestWater International GmbH v Michael Mebes, Stefan Potsch*

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, as at 7 above. *BestWater* extends the *Svensson* analysis to embedding.^[1]

Footnotes

1. [^](#) *CJEU, Case C-348/13 - BestWater International GmbH v Michael Mebes, Stefan Potsch*

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. This seems unlikely to affect the question of whether a link (etc) elsewhere will be a communication to a new public. It may give rise to a cause of action in breach of contract but

establishing that the party linking to a website had agreed to any particular term would be difficult to say the least.

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:

This has not been directly addressed by the UK courts, but we believe that by restricting access there would be a communication to a 'new public' were restricted works made accessible. However, we also believe that this could be fact sensitive as there are an increasing number of business models which allow access freely but then cut it off after a given condition – such as number of views of pages (or articles) or time (as was the case in *Svensson*).

We note that in *Svensson* the works posted on the source website were only openly accessible to the public for three weeks. After that time a personal code was needed to access the articles, i.e. access to the work was restricted in some way, and Retriever's links circumvented this restricted access which suggests that from this time communication was "to the [new] public". This is perhaps the reason why the case settled outside of the Swedish court.^[1]

Footnotes

1. ¹ See <http://ipkitten.blogspot.co.uk/2014/12/what-happened-to-svensson-and-his.html>

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:

We await confirmation^[1] of this from *GS Media BV v Sanoma Media Netherlands BV and Others Case 160/15* in which the following relevant questions have been referred to the CJEU:

"1(a) If anyone other than the copyright holder refers by means of a hyperlink on a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29?"

1(b) Does it make any difference if the work was also not previously communicated, with the rightholder's consent, to the public in some other way?"^[2]

Following the logic of *Svensson*, however, we can apply the subjective test as to who a copyright holder has in mind at the point of initial communication to assess whether such an act will amount to a "communication to the [new] public" and, consequentially, whether an infringement of the making available right will be established.

In assessing the existence of a 'new public' *Svensson* affirms earlier CJEU case law^[3] that it is the copyright holder's idea of 'the public' which is the relevant assessment.

If a copyright holder does not carry out or authorise the first communication it arguably cannot be said that he or she took any public into account. It follows that any subsequent act of communication of the

work would be a communication the public because, in this instance the public, as a whole, would amount to a 'new public'.

Footnotes

1. [^](#) *The Court of Justice diary indicates that the case was heard 3 February 2016 .*
2. [^](#) See <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164772&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=810168>
3. [^](#) See <http://ipkitten.blogspot.co.uk/2014/02/post-svensson-stress-disorder-1-does-it.html>

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:

We assume that this question concerns an initial making available of the copyright work on the internet by the rightsholder, as discussed in *Svensson*. On that basis, then for the purposes of the specific question regarding linking to a copyright work, yes.

In *Svensson vs Retriever Sverige*, C-466/12 the CJEU said (at [26]):

"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."

The CJEU made no distinction between likely visitors to the website or those to which the website was particularly directed, the threshold was merely "potential" visitors.

The corollary to the above is that copyrighted work will not be considered to have been made available to all members of the public that have access to the Internet if access to the work were subject to "restrictive measures".

In *Svensson*, the CJEU expanded upon this as follows (at [31]):

"... where a clickable link makes it possible...to circumvent restrictions put in place...in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication..."

It is not clear from *Svensson* whether "restrictions" is intended to apply only to technical restrictions (such as paywalls or geoblocking) or whether it also extends to contractual restrictions.

The court in *Svensson* did not specifically address the situation where the work was previously made available without access restrictions but was restrictions were subsequently imposed by the copyright holder; please see the response to question 11.

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?

See 13 above, in relation to the specific question regarding linking to a copyright work. A separate body of EU and national caselaw has addressed the territoriality of communication to the public and the need for there to be targeting in order to infringe a national communication to the public right. However that is a different question from the public contemplated by the copyright holder when it made its own work available on the internet, which is the question addressed by *Svensson*.

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:

It is unlikely – see below.

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

Secondary liability could in theory be established if the act of providing a hyperlink to a freely available copyright work, uploaded with the consent of the rights holder:

(i) is part of a wider common design to infringe copyright such that the principle of joint tortfeasorship (or common design) applies;

(ii) authorises another to do an act of primary copyright infringement^[1]; and

(iii) otherwise deals in infringing copies with knowledge^[2].

It is also important to note that 'secondary infringement' has a specific meaning under UK law (the third of the above categories above) but we have covered other actions which create 'secondary liability' as well. It is difficult to envisage circumstances in which this would apply to linking where the rightsholder has itself made the copyright work freely available on the internet. The English Courts have shown willingness to apply these grounds flexibly in the context of online infringement where there may not be a clear primary infringement by the defendant. However the case law to date has related to content which was uploaded to websites without the consent of a copyright holder and where there was no suggestion that the rightsholder had itself made the works freely available on the internet so as to trigger the *Svensson* condition (see 13 above).

For example, the case of *Twentieth Century Fox Film Corporation v Sky UK Ltd* [2015] EWHC 1082 concerned an App called "Popcorn Time" through which films and television programmes hosted on other websites could be viewed (without authorisation from the rights holders). The Claimants sought site blocking injunctions against: (i) websites from which Popcorn Time could be downloaded; and (ii) websites which provided the source of the infringing content.

The Court held that neither website communicated the works to the public because it was Popcorn Time which made the content available at a time and place of the user's choosing, (not the websites). Nonetheless the owners of the websites knew and intended that Popcorn Time caused infringing communications to occur and therefore there was a common design to infringe copyright and the application was granted.

Footnotes

1. [^ S16\(2\) CDPA](#) – *Technically authorisation of a primary infringement is a primary infringement in itself.*
2. [^ S22-26 CSPA](#) – *this covers uses such as importing, possessing or dealing and where there is knowledge that copy in question is infringing.*

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 UK law strikes a balance by ensuring that the norms of the internet age are not stopped by the operation of copyright law. The UK Group believes that the law as it stands favours the public or other relevant parties who are involved in the dissemination of information or who are content providers. The UK Group also believes that there may be a favouring of allowing linking where the copyrighted material being linked to acts as a source of information as opposed to merely providing content which has the primary purpose of providing entertainment.

- 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:

The UK Group believes that the current law can be improved by ensuring that a copyright owners rights are not rendered useless when the initial release of their work to the public is in of itself an infringement of copyright – over which they will most likely not have had an control.

III. Proposals for harmonisation

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

yes

Please explain:

Yes, the UK Group does consider that harmonisation in the area of copyright and linking and making available on the Internet is desirable. The Internet is a global phenomenon by its nature and acts an essential resource/repository for information and medium for communication/expression for people the world over. Access to the internet is arguably a relevant component of quality of life and is certainly an indicator used to assess the development status of nations. The internet and the way it functions is driven by content, the bulk of which will inevitably constitute copyrighted works of one form or another. Linking, embedding, framing and otherwise “making available” content on the internet are fundamental to the way the Internet functions in the modern era, as is the relationship and interaction between content generators (i.e. copyright owners) and content consumers (i.e. potential infringers). The line between the two has become increasingly blurred and challenged by the emergence of new online business models and the new reality of the post-social media online world, in particular the economic value created by individual content creators/sharers and by sites such as news aggregators.

In this regard, the UK group acknowledges and largely agrees with the concerns and observations outlined in section 4 of the European Commission Communication “Towards a modern, more European

copyright framework” (the **Communication**).

The UK Group considers that achieving harmonisation of the approach of copyright to such activity is highly desirable, to give copyright owners/content generators as well as content consumers greater certainty about their rights and the limits to those rights, and uniformity in the way those rights are policed irrespective of quirks of location. Without global minimum levels of copyright protection and a certain degree of consistency of copyright enforcement there is the risk of the emergence of copyright “havens” to which infringers will flock. The existence of such relatively unpoliced jurisdictions would undermine the protection of copyright globally, and likely give rise to a host of difficult choice of law questions as infringers find ever more inventive ways of introducing a nexus with such jurisdictions into their infringing activities. Two overarching paradigm shifts in the way content is generated and shared online should be noted, as they throw the ostensible tension between the two interest groups into sharp relief.

The first is that already touched upon – the increasing importance and value of content aggregators. This value is evident by the simple fact that there is such a growing market for these aggregation services, the fact that such new business models are viable and the sheer popularity and visibility of linking sites/aggregators in the public consciousness. In the context of a world where the rate at which content is created continues to increase at an exponential rate, the ability to effectively filter and curate content which is useful and relevant to an individual or a business will only become more and more valuable.

The second key shift is the rise of individual use generated content. Traditionally the bulk of valuable content (and thus copyright works) was owned by companies or collecting societies, with the resources, experience and purpose to create and control content and enforce their rights in them. In the present post-social media world, user generated content makes up an increasingly large and important proportion of online content. In this connection, the inequality of bargaining power noted in the Communication should be noted – individual content creators will typically lack the experience and resources to proactively assert their intellectual property rights, and rely on adequate protection from a clearly drafted and carefully conceived position in law.

In light of the above, it is clear that a fair balance must be struck. In this regard it should be noted that many forms of linking and content aggregation provide direct benefit to copyright owners, by boosting exposure, increasing page views and giving rise to the attendant benefits thereof (e.g. higher search result rankings). Such synergy/symbiosis between content creators and aggregators leads to greater economic and practical value for all stakeholders and should be encouraged. It is only when there is an unfair balance and one group does not receive adequate value for their contribution that a problem arises.

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:

See response to question 23. The UK Group considers there is a relevant distinction between linking and deep linking on the one hand, and framing and embedding on the other hand. Hyperlinking to the starting page or deep linking should not be considered “communication” of the copyrighted work, whereas framing and embedding should be.

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

yes

Please explain:

Generally speaking, yes, although the UK Group acknowledges there could conceivably be particular circumstances in which the communication might not be “to the public” and that this should be assessed on a case by case basis. See comments in questions 12 and 13 in regards to the existence of different “paywall” models and the implications these have on the definition of the “public” or “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?

yes

Please explain:

See comments in question 19 regarding the need to balance the interests at play, and the response to question 23.

The UK Group considers that there is no question that where there has been a communication to the public of a copyrighted work, that that activity should constitute infringement of copyright. The more pertinent question is whether the various forms of linking should be considered communication to the public.

Generally speaking, the UK Group considers that linking activity that unfairly impinges upon the realisation of the economic value of the copyrighted work by the owner of the copyright should be prevented. Accordingly, the UK Group considers that the question of infringement of the making available right should be assessed on a case by case basis, with particular regard to the real economic impact of the linking activity on the copyright owner. The UK Group also notes that in respect of the non-economic interests of copyright owners (such as credit for their work), there are separate rights which exist for the purpose of protecting those interests, such as moral rights.

The UK Group notes with approval and interest that the Communication raises the question of whether the “communication to the public” and “making available” right is sufficient and sufficiently described to govern linking and other content aggregation activity. The UK Group agrees that greater clarity over the definition and boundaries of these rights is highly desirable and welcomes discussion of whether separate action is required to address the position of linking and content aggregation.

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:

The UK Group considers there is a relevant distinction to be made between linking and deep linking on the one hand, and framing and embedding on the other hand. In the former case, the copyrighted work is being viewed on the owner’s website, as the owner intended and in the way that the owner has themselves made that work available to the public. The relevant act of communication of the actual work to the public has still been done by the copyright owner – the act of the linker is essentially that of signposting/directing the content viewer to that work.

In those circumstances, the owner receives the credit for their work, both from a moral rights attribution perspective and in terms of page view numbers, with any attendant commercial benefit that ensues. Accordingly, from a policy perspective, their rights and interests in their copyrighted work are

preserved.

However, in the latter case, the copyrighted content will appear outside of its original context on the copyright owner's site, and will instead appear on the site of the framer/embedder, in whatever context the framer/embedder chooses. Accordingly, the owner of the copyright assumes an entirely passive role in any communication of that work to the public – the framer/embedder is the party who is presenting the work on their site, possibly (or ambiguously) as their own work, and is deriving commercial or reputational benefit from the work in place of the copyright owner. In those circumstances the rights and interests of the copyright owner are impinged upon.

Accordingly, the difference between linking and deep linking on the one hand, and framing and embedding on the other hand is not a mere technicality, but goes to the essence of the way the copyright work is communicated and the core interests of copyright owners/content generators in post-social media society.

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:

Direct infringement. The website operator has carried out the infringing act of communication to the public, even if it has done so via the technical means provided by a third party ISP.

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.

yes

Please explain:

Yes.

No act of linking to a work uploaded on a website which is freely available to the public on the Internet should be considered a communication to the public.

By contrast, deep-linking, framing and/or embedding (but not hyperlinking) to a work uploaded on a website which is not freely available to the public on the Internet, for example because it is behind a paywall or is subject to a click-through licence, should be considered a communication to the public.

Hyperlinking should in no circumstances constitute a communication to the public.

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:

- 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 public that is the target of the initial communication of the copyrighted work must be any person who has access to that copyrighted work. A "new public" will be any person who, but for the unauthorised communication, would ever not have had access to that copyrighted work.

- 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, provided the copyright holder has the ability to take down the copyrighted work and withdraw it from public access. The copyright holder should be able to retain control over access to the copyrighted work in the future.

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

Not applicable.

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

Summary