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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.:

Yes, Article 5, section v) of the Chilean Copyright Act sets forth a definition of communication to the public in the following terms:

*“communication to the public: any act, executed by any means or procedures that serve to disseminate signs, words, sounds or images, either known at present or to become known in the future, whereby a group of persons, who may or may not be together in the same place, may access the work without prior distribution of copies to each of them, including the making available of the work to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them”.*

This article is complemented by articles 17 and 18 of the Copyright Act, which give the author a general right to authorize all uses of a copyrighted work, including explicitly communication to the public in article 18.

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?

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. In our opinion, such user-activated hyperlink would be merely an act of informing others about the existence of a publicly accessible means through which the work is being communicated to the public, but not a communication in itself.

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

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?

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, unless (a) the deep link leads to a webpage that cannot be easily recognized as a distinct stand-alone webpage, so that it is not really relevant whether the user first accessed the starting page of the website or not; and/or (b) the deep link in any form circumvents a total or partial restriction to access the linked webpage on the destination website, such as a password-protected interface or the display of a window showing advertisements. Even though these matters are not expressly regulated by Chilean copyright law, they can be inferred from the above-cited articles and other provisions, since both cases mentioned here would constitute an alteration of the exact form of communication to the public chosen and authorized by the author.

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, since the content shown in the frame would be communicated to the public through the website of the person providing the link. Even if the destination website could be recognized in the frame, it would appear in the context of another website, i.e., a means of communication not approved by the author.

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, since the content shown in the frame would be communicated to the public through the website of the person providing the embedded link.

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. In our opinion, the existence of such statement does not change the nature of the acts in question. Accordingly, a hyperlink (excluding deep links, which must be analyzed on a case-by-case basis) should never be considered an act of communication, since it is merely informative. Nevertheless, the statement may come handy in case of infringement, in order to prove that the infringer knew or should have known that he/she was committing such infringement.

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:

Please refer to our answer to query number 7. Additionally, it must be noted that the Free Trade Agreement between Chile and the United States of America (“FTA”) includes a prohibition on the act of circumventing a technological measure that controls access to a copyrighted work, and a restriction on the manufacture and distribution of technologies and devices (“tools”) that can be used for circumvention. The FTA also includes a set of limited exceptions for some activities, and provisions that provide for civil penalties and criminal sanctions for certain violations of the circumvention provisions.

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:

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. Under the Chilean Copyright Act a copyright work that has been made available on a webpage, without any access restrictions, is considered available to all members of the public. According to the Chilean Law the concept of public communication is very broad. Consequently the issue contained in the question satisfied the same.

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?

Non applicable.

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:

Non applicable. Under the current Chilean Law the circumstances described above do not constitute direct infringement. We do not have provisions related to indirect or secondary copyright infringement.

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

Not 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?

It is to be noted that our Copyright Law has a system wherein the owner of a copyright work is entitled to protect the communication of the work through the ordinary Courts.

As was mentioned, the concept of public communication is very broad and for this reason there is a grey area where the copyright owners could have a real faculty to control the act of linking. In fact, there are no specific provisions applicable to the act law of linking.

The limitations and exceptions to copyright are related to altruist purposes such as educational, communication to disable people, lectures provided in schools, high schools and Universities.

Now, in the case of software, the limitations are very specific, as follows:

*The following activities relating to computer programs shall be permitted, without requiring the authorization of the author or copyright holder or any payment:*

*(a) the adaptation or copying of a computer program performed by its holder, provided that such adaptation or copying is essential for its use, or for purposes of archiving or backup, and does not serve other purposes.*

*Adaptations obtained in this way may under no circumstances be transferred, without the prior authorization of the holder of the respective copyright; likewise, copies obtained in this manner may under no circumstances be transferred, unless this is done together with the computer program that was used as a master.*

*(b) reverse engineering activities performed on a lawfully obtained copy of a computer program for the sole purpose of ensuring operational compatibility between computer programs or for research and*

*development purposes. The information obtained in this manner may not be used to produce or market a similar computer program in violation of the Law or for any other copyrightinfringing act.*

*(c) activities performed on a lawfully obtained copy of a computer program for the sole purpose of testing, researching or correcting its functioning or the security of this or other programs, of the network or computer, as the case may be. The information derived from these activities may only be used for the abovementioned purposes.*

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:

In our opinion there are different aspects that could be improved in order to strength the copyright owner's control over linking. For example, to modify the concept of public communication in order to include the different hypothesis of linking. Additionally, to improve the positive or economical faculties of the copyright owners, to protect the subsequent public communications of the copyright work.

### III. Proposals for harmonisation

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

yes

Please explain:

We agree with the harmonisation in this area, since Chile has already signed different international and cooperation treaties that include intellectual property matters.

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. Consistent with the criterion of the European Court of Justice, we are of the opinion that linking should be considered as a form of communication to the effects of intellectual property law. The most common and obvious meaning of the concept of "communication" implies the act of conveying something, as it occurs in the case of linking. However, the author's exclusive right should involve "communicating the work to the public", where the public element is essential to the concept.

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

no

Please explain:

No. If the copyrighted work is already available to the public access, then the mere act of communicating its existence should not be considered to infringe the copyright holder's exclusive right to communicate its work to the public, as such right was already exercised at the moment of uploading the copyrighted work to the Internet without restrictions of any kind.

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:

Please refer to our previous answer.

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:

We believe they should be treated equally. The difference between each form of linking relies only in the way the copyrighted work is presented to the user in its browser, but in all cases the copyrighted work is hosted on a server that is different from the server that hosts the website doing the act of linking.

Therefore, we believe that the copyright infringement discussion should be focused on whether the party that uploaded the content was authorized or not to do so, and not in the form of linking used by third parties

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:

We believe there is neither direct nor indirect infringement in the mere act of linking to a copyrighted work.

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:

A statement prohibiting linking should not change the analysis on whether or not the act of linking may be considered an act of unauthorized communication to the public. It seems that the act of communication to the public should be depleted by the author willingly uploading its work with no technical measures of protection. Considering the technical context of the Internet, we believe that the act of limiting the public to which a work is being communicated should be a technical action as well.

However, such an act of linking could amount to

- A statutory breach of rights management information regulation; or
- A breach of contract (different to a copyright infringement) should the party have actively accepted a website's terms and conditions prohibiting the act of linking

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. If the access to the work is limited in a technological manner, then we believe that the copyright holder has clearly and effectively exercised and, as a consequence, also limited its exclusive right of “communicating its work to the public” addressing it to a specific public. If the act of linking allows a different public to access the work, then the person who is doing the linking is breaching the author’s exclusive right, and therefore is infringing its copyright.

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. The lawfulness of the act of linking does not depend on whether or not the linked work was uploaded with or without authorization of the copyright holder.

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. Please refer to answer to question 26. “New public” should relate to any individual who was restricted from accessing the work under the technological and objective restrictions currently imposed by the copyright holder

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. Please refer to our answers to questions 25 and 26.

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

In general terms, we agree with the reasoning that upheld the European Court of Justice. Uploading content to the Internet without any access restriction should be considered itself as “communicating the work to the public”, and any reference to such content should not correspond to a new exercise of that right.

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

Summary