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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.:

Even though the right to "*make available to the public*" is not explicitly mentioned in the French Intellectual Property Code ("IPC"), it is nevertheless accepted in French law that the right of performance ("*droit de représentation*") provided in Article L. 122-2 of this code covers all methods of communication of a work to an audience, in particular the making available of the work in the terms of Article 3(1) of Directive 2001/29 of 22 May 2001 (transposed into French law by Law no.°2006-961 of 1 August 2006), which refers to the "*right of communication to the public*" and is directly inspired by Article 8 of the WIPO Copyright Treaty of 20 December 1996 which itself envisages communication "*by wire or wireless means, including the making available to the public*" of the works "*in such a way that members of the public may access these works from a place and at a time individually chosen by them*".

Specifically, under Article L. 122-2 of the IPC:

"Performance shall consist in the communication of the work to the public by any process whatsoever, particularly:

1° By public recitation, lyrical performance, dramatic performance, public presentation, public

projection and transmission in a public place of a broadcast work;

2° By broadcasting.

Broadcasting shall mean distribution by any telecommunication process of sounds, images, documents, data and messages of any kind.

Transmission of a work towards a satellite is regarded as being a presentation” (Underlining added)

The violation of this right constitutes an infringement pursuant to Article L. 335-3 of the IPC, according to which:

“Any reproduction, performance or dissemination of a work of the mind, by any means whatsoever, in violation of copyrights as defined and regulated by law shall also constitute an infringement.

The violation of any of the rights of an author of software as defined in Article L. 122-6 shall also constitute an infringement.

Any total or partial capture of a cinematographic or audiovisual work in a cinema theatre shall also constitute an infringement.”

French law therefore provides protection for the author in the event of his work being made available in a manner such that members of the public may have access to it at a place and time of their choice.

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?

yes

Please explain:

This question is rendered redundant by the positive response given to question 1, except for the consideration that, given that the Intellectual Property Code does not explicitly mention the author's right to make his work available to the public, it is considered that this right is nevertheless recognized on account of the interpretation which must be made of Article L. 122-2 of the IPC in the light of Directive 2001/29 of 22 May 2001.

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:

The decisions issued on this subject by the French courts are very few in number and none of them has made a clear pronouncement on the question of whether or not a hyperlink to the starting page of a website to which a freely accessible work has been uploaded constitutes a communication of this work to the public.

There has been no case-law which has held that a link to the starting page of a website where a work is freely accessible represents the communication of such a work to the public.

At the most, the Regional Court (*Tribunal de Grande Instance*) of Nanterre considered, in a judgment of 25 March 2010, that the “*making available of a hyperlink allowing the downloading of an item of software cannot constitute an act of infringement in respect of this software*”, taking care to note that “*there is no legal obligation to offer only hyperlinks which direct the Internet user to the starting page*” of a website, which appears to imply that such links would not constitute an act of communication of the works.

Nevertheless, this principle has never been clearly postulated either.

However, it appears that our substantive law has now been fixed by the *Svensson* judgment of the Court of Justice of the European Union (CJEU) of 13 February 2014 (Case C-466/12), insofar as “*the existence of an act of communication must be construed broadly*” (paragraph 17) and the provision, on a website, of clickable links to protected works published without any access restrictions on another site, must be classified as “*making available*” and, consequently, as an “*act of communication*” within the meaning of Article 3(1) of Directive 2001/29 (paragraphs 18 to 20).

Although this *Svensson* judgment does not explicitly refer to links to the starting page of a website, but only to those which allow protected works to be accessed directly, it may be considered that it also applies, by extension, to such links.

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

yes

Please explain:

If one adheres to the interpretation which may be made of French law on the basis of the few examples provided by the case-law prior to the *Svensson* judgment, the answer to question 3) is no, which would render this question 4) inapplicable.

If, however, it were considered that the *Svensson* judgment applies to links to the starting page of a website, it then constitutes our substantive law, with the consequence that question 4) must be answered in the affirmative in application of paragraphs 22 and 23 of the said judgment, according to which an act of communication such as that effected by means of clickable links is aimed at all of the potential users of the site, that is to say “*an indeterminate and fairly large number of recipients*”, i.e. at 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?

no

Please explain:

The question is inapplicable if one adheres to the case-law prior to the *Svensson* judgment, which gives rise to a negative answer to question 4).

If it is considered that the *Svensson* judgment applies to hyperlinks to the starting page of a website to which a freely accessible work has been uploaded, this should not constitute direct infringement either, since the public targeted by the person who puts in place the link is not a new one in comparison with the public which was targeted when the authors authorized the initial communication of the work (paragraphs 24 and 25).

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)?

Infringement is denied on the sole basis that putting in place the link is not deemed to be entering into the scope of the right of communication to the public.

Although the Commercial Court (*Tribunal de Commerce*) of Paris considered, in a decision of 18 December 2000, that “*the establishment of simple hyperlinks is deemed to have been implicitly authorized by any website operator*”, in contrast to “*deep*” links “*which directly connect to the secondary pages of a target website, without passing via the starting page*”, this does not however correspond to the recognition of the theory of an implied licence, which does not exist in French law.

It can simply be inferred from this that simple links which connect to the starting page of a website are considered not to be covered by the author’s monopoly.

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:

A deep link is a link which leads directly to a specific page of a website, other than the starting page, which displays the protected work.

The Regional Court of Paris has ruled on the lawfulness of a website which indexed and made available to the public the programmes offered by around a hundred video-on-demand websites, in particular by way of deep links which linked to the catch-up viewing window for the programmes of certain French television channels (Regional Court of Paris, 18 June 2010, M6 Web/SBDS)

The court considered that such a process did not constitute a breach of the copyrights relating to these programmes since there was no communication to the public, with the act of performance being effected by the television channels’ website:

“pursuant to the provisions of Article L. 122-2 of the Intellectual Property Code, performance consists in the communication of the work to the public by any process whatsoever. In making the programmes of M6 Replay and W9 Replay available to the public, the company SBDS is in no way itself communicating the works to the public, but rather is merely helping it by indicating to it a link making it possible to view then directly on the websites m6replay.fr and w9replay.fr, which websites then perform the act of performance within the meaning of this legislation.” (underlining added)

Likewise, the Regional Court of Nanterre considered that deep links leading to a specific page of another website that allowed an item of software to be downloaded did not constitute making the software available (Regional Court of Nanterre, 25 March 2010, Ordinateur Express/CBS Interactive):

“It is established that the defendants neither hosted nor stored the software on their website; the disputed file relating to the PcTap software in fact contained a hyperlink the address of which is <http://www.pctap.com/cload/tapi>[<http://www.pctap.com/cload/tapi>] ..., which enabled the software to be downloaded from the publisher’s website.

Accordingly, there is no act of infringement by placing on the market of the software, whether for consideration or free of charge, within the meaning of Article L. 122-6-3° of the Intellectual Property Code.

In addition, as far as acts of infringement are concerned, it matters little that this link does not direct the Internet user to the starting page of the website of the publisher or that the information in this regard is not complete: providing information does not equate to making available.” (underlining added)

In its *Svensson* judgment of 13 February 2014 (C-466/12), the CJEU ruled on the situation where any

person other than the holder of the copyright to a work provides a clickable link to this work on his or her website.

For its part, the CJEU holds that such a link constitutes a “making available” and a “communication to the public”, but considers that the link does not create a new public: “where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication”.

Under these circumstances, it considers that there cannot be an infringement:

“Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.

[...] Article 3(1) of Directive 2001/29 must be interpreted as meaning 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, as referred to in that provision”.

No recent decision has been issued on this question in the French case law, following the *Svensson* decision of the CJEU.

However, in a judgment of 2 February 2016 on the basis of related rights and not copyright, the Court of Appeal (*Cour d’appel*) of Paris held that a website including deep links to the catch-up viewing window of the programmes of certain French television channels was unlawful. Since it was giving judgment after the *Svensson* and *BestWater* decisions of the CJEU, the Court of Appeal of Paris justified this position by stating that the decisions of the CJEU do not apply to the related rights of audiovisual communications companies.

Accordingly, the Court held that, by virtue of “Article L. 216-1 of the Intellectual Property Code, interpreted in light of Article 3(2) of Directive 2001/29/EC, SA France Télévisions, in its capacity as an audiovisual communications company, benefits from the exclusive right to authorize its programmes being made available to the public online and on-demand, including by way of the use of deep links by means of the transclusion technique”, with the consequence that “by allowing access on its website *playtv.fr*, from 20 November 2014 onwards, to the programmes broadcast by SA France Télévisions from its own website *pluzz.francetv.fr* by virtue of deep links and the technique of transclusion, without the authorization of that company, SAS Playmédia committed, subsequent to 20 November 2014, acts of infringement of the related rights of audiovisual communications companies that were owned by SA France Télévisions” (Court of Appeal of Paris, 2 February 2016, 13/01249).

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:

Framing consists in dividing a webpage (first webpage) into a number of frames which allow an item of content to be displayed independently. A frame displays the content of another webpage (second webpage) which contains the protected work. The content of the second webpage is transmitted directly from the server which stores this page to the web browser of the reader who is reading the first webpage.

By a judgment of 25 June 2009, the Regional Court of Paris considered that for a travel website to show the website of a competitor by means of the technique of framing constituted an act of infringement

(Regional Court of Paris, 25 June 2009, Générale de services aériens/Easyvoyage):

“On the basis of this report of findings, it also appears that, when voyagenet.com is clicked on, a window is displayed which is based on a set of two frames – one frame known as the top frame which is the page from the website pressvoyages.com on which advertisements for other travel companies appear, and one frame called “site2view”, which is the starting page of the website voyagenet.com.

[...] Consequently, as no challenge has been raised with regard to the protection of the voyagenet.com website by the provisions governing copyright law, it should be stated that presenting the website voyagenet.com on the website pressvoyages.com without the authorization of the company GSA, the owner of the copyrights, constitutes infringement in the light of the aforementioned pieces of legislation”.

However, a decision of the Regional Court of Nancy held, on 6 December 2010, that the technique of framing (incorrectly referred to as “deep linking” in that decision) is in principle not prohibited and does not *per se* constitute an act of infringement (Regional Court of Nancy, 6 December 2010, 10/04160), thus anticipating the solution of the *Svensson* judgment.

No recent decision, in particular one subsequent to the *Svensson* and *BestWater* decisions of the CJEU, has been issued on this question in the French case-law.

However, in the decision referred to in question 7, the Court of Appeal of Paris did also rule on the techniques of framing, and held, on the basis of associated rights, that they were unlawful:

“by allowing access on its website playtv.fr, from 20 November 2014 onwards, to the programmes broadcast by SA France Télévisions from its own website pluzz.francetv.fr by virtue of deep links and the technique of transclusion, without the authorization of that company, SAS Playmédia committed, subsequent to 20 November 2014, acts of infringement of the related rights of audiovisual communications companies that were owned by SA France Télévisions” (Court of Appeal of Paris, 2 February 2016, 13/01249).

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:

Embedding (or inline linking or hotlinking) consists in creating a reference to an item of data, with the reference itself making it possible to display the content of the item of data (an “embedded link”). The link, which is present on the first webpage, displays the content of the second webpage containing the protected work as if it were part of the first webpage. As in the case of framing, the content of the second webpage is transmitted directly from the server which stores this page to the web browser of the reader who is reading the first webpage.

In concrete terms, embedding makes it possible to display on a webpage a specific element (image, text, video etc.) which originates from another. This element is clickable and constitutes a link to the webpage from which this element originates.

In a decision of 26 May 2011, the Regional Court of Paris held that the communication on the Google Images website of images originating from another website and constituting a link to the latter does not constitute an act of infringement.

However, the Regional Court emphasizes the website’s status as a search engine and bases its decision specifically on the right to information and Google’s status:

“Thus, the fact of indexing images and displaying them in the form of thumbnails on the results page is

necessary for the purposes of providing information to Internet users and constitutes an essential means of accessing the data stored on the Internet.

These actions, which are necessary so that the effective right to information can be exercised, do not render the company Google Inc. liable since they constitute technical services which operate automatically and passively by way of the application of an algorithm, with the defendant having neither knowledge nor control of the information transmitted or stored.

Moreover, the Google Images website does not itself reproduce the disputed photograph, but merely provides the link which makes it possible to access the file where the indexed photograph is located.

Thus, the mere operations of indexing, temporary storage and displaying thumbnails on the results pages of the search engine cannot cause Google Inc. to be found liable on the basis of infringement, or on the basis of civil liability under generally applicable law” (Underlining added, Regional Court of Paris, 26 May 2011, 11/3433).

However, in several rulings of 12 July 2012, the Court of Cassation (*Cour de cassation*) found Google liable in that it allowed, via Google Video, videos stored and made available by other websites to be read on its website by means of the technique of embedding:

“the judgment states that the Google companies offer the Internet user the possibility, by way of links to the other websites, of viewing the film on their own website Google Video France, and infers from this that they perform an active function which allows them to capture the content stored on third-party websites in order to present them directly on their pages intended for their own clients; whereas, for these reasons, the Court of Appeal, which has found that the said companies were thus reproducing the film on their website Google Vidéo France without the authorization of the owners of the rights to this film, this constituting an infringement, and that they thus went beyond the use of a mere technical functionality, justified its decision on legal grounds without having to undertake a search incapable of ruling out the imputation to the Google companies of the unlawful acts of presentation.” (underlining added, Court of Cassation, 12 July 2012, 11-13.666, 11-13.669).

Conversely, at the EU level, the *BestWater* decision of the CJEU of 21 October 2014, which was a ruling on the technique of embedding, adopts the same reasoning as the *Svensson* decision which applied to classical hyperlinks.

Accordingly, the CJEU finds that this technique does not constitute a communication to a new public since the work was already freely available to all Internet users on another website with the authorization of the copyright holders.

The CJEU also confirms that this principle is not called into question when the protected work appears while giving the impression that it is displayed from the website on which the link is situated.

The Court further states that this circumstance characterizes the technique of embedding, which makes possible the display of an element originating from another website in order to conceal the original environment to which this element belongs from the users of the website containing the link.

Thus, the Court concludes that *“the mere fact that a protected work, which is freely available on a website, is inserted onto another website by means of a link using the technique of transclusion (“framing”), such as that used in the main proceedings, cannot be classed as a “communication to the public”. [...], since the work in question is neither transmitted to a new public nor communicated by way of a specific technical means which is different from that of the original communication” (underlining added, CJEU, 21 October 2014, *BestWater*, C-348/13).*

NB: Even though the French translation of the CJEU’s *BestWater* decision uses the term “framing”, it appears, on the facts of the case, that it is in fact the technique of embedding which was used.

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:

It should first of all be stated that the insertion of a link may be prohibited, irrespective of any statement on the website, if this link itself constitutes a breach of a pre-existing contractual obligation. For example, a record producer was on the basis of the contractual liability because he had, on the website dedicated to a musical group whose records he produced, inserted links to the websites of other artists (Court of Appeal of Paris, 9 October 2015, 14/18769).

This having been said, if the statement is able to be classified in legal terms as a unilateral act, it cannot have any effect on the rights which the third parties may hold, including in relation to links, by application of the law.

If, on the other hand, the statement can be classified as a contractual act, which would accordingly be enforceable against a person who chooses to access the website in order to discover its contents and then to create a link to this website, it could have an effect on the ability of the third parties to establish links.

The Court of Cassation appears to consider that the mere act of accessing a website which contains general terms and conditions does not, however, automatically result in an obligation “of a contractual nature” (Court of Cassation, Civil Chamber 1, 31 October 2012, 11-20480). Accordingly, it dismissed an appeal against a judgment of the Court of Appeal of Paris which had held that “simply placing online in a semi-concealed manner the general terms and conditions of use does not suffice to impose on the users of the service obligations of a contractual nature which they are not even encouraged to acquaint themselves with” (Court of Appeal of Paris, 27 April 2011, 10/15910).

The Regional Court of Paris has also held that the general terms and conditions of a company's website which prohibit “another website from selling its flights” are applicable only to persons who make orders on the website for their own account (and, in particular, not to a mere “intermediary”, who thus remains a third party to the contract”), thereby greatly restricting their enforceability.

It is therefore improbable, against the background of the decisions which have been able to be analysed, that a mere statement on the website is capable of standing in the way of the rights which may be conferred on Internet users, in particular by the Court of Justice of the European Union, in relation to links. Moreover, this type of statement would be of such a nature as indirectly to call into question the solutions identified by the Court of Justice on this question.

However, in its *Ryanair* judgment of 15 January 2015 (CJEU, 15 January 2015, C-30/14), the Court of Justice considered that Directive 96/9/EC of 11 March 1996 on the legal protection of databases has to be interpreted as not preventing the creator of a database which is not protected by either copyright or the *sui generis* right from laying down “contractual limitations on its use by third parties”. Therefore, it maybe cannot be entirely ruled out that in future statements clearly posted on websites intended for “third parties” (or, more specifically, “third parties” who have then become “contractual partners”) may be considers as “contractual limitations” in relation to links.

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:

Disregard for the restrictive measure put in place by the author constitutes a contravention of the means of dissemination desired by the author; accordingly, the dissemination is undertaken without the consent of the author and will therefore be considered to be prohibited.

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:

Any accessing of a piece of protected content placed on line without the consent of the author is prohibited, whatever the means of accessing (hyperlink, framing or embedding).

However, in his Opinion of 7 April 2016, the Advocate-General of the CJEU, Melchior Wathelet, considered, in the case of GS Media BV (C-160/15), that “Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the posting on a website of a hyperlink to another website on which works protected by copyright are freely accessible to the public without the authorisation of the copyright holder does not constitute an act of communication to the public, as referred to in that provision” (on the grounds that a link per se was not an act of communication of the work, in contrast to the solution adopted by the *Svensson* judgment).

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:

a) The absence of a distinction between publics within the public that has Internet access under French law

In light of both French and Community legislation and case-law, the French courts would consider that when a work is made available to the public on a website without any restriction of access, it is made available to all of the public which has access to the Internet.

The French law of copyright does not provide for a right of communication to the public that is distinct from the right of performance, which is one of the two economic prerogatives conferred by French copyright law. Article L. 122-2 of the IPC provides that “*performance shall consist in the communication of the work to the public by any process whatsoever*”. The only limitation to the communication to the public of a work is that of Article L. 122-5 of the IPC, which permits “*private and gratuitous performances carried out exclusively within the family circle*”.

However, Article 1 of Law no. 2004-575 for confidence in the digital economy specifies the following:

“*Communication to the public by electronic means shall be understood to mean any making available to the public, or to categories of the public, by an electronic communication method, of signs, signals, writings, images, sounds or messages of any nature which does not have the character of private correspondence*”.

Thus, in French law one finds no distinction in terms of the scope of the public to which a work has been made available, but only a limitation in terms of what constitutes the public, which is characterized by the private or non-private character of correspondence. In other words, if the making available does not have a private character, it is considered as having been communicated to the

public. For example, if a work is sent to a single recipient as an attachment to an email, this communication would be considered to be private. The situation would be different if it were transmitted to a plurality of recipients outside the circle of the family.

For the French courts, the mere presence of a work on a web page is sufficient for them to consider that it has actually been communicated to all of the public which has access to the Internet. One of the first decisions along these lines was issued in 14 August 1996 by the Regional Court of Paris, ruling in interlocutory proceedings, and stated as follows:

“Whereas, however, by permitting third parties connected to the INTERNET network to visit their private pages and potentially to take copies of them, and even though the object of the INTERNET might be to ensure such transparency and such conviviality, Francois-Xavier BERGOT and Guillaume VAMBENEPE are encouraging the collective use of their reproductions”.

The French courts do not distinguish publics within the public that has access to the Internet.

It is even considered in the scholarship that the concept of public includes all *“individuals because each person is a part of a public”* (Christophe Caron, *Droits d’auteur et droits voisins* (Copyrights and related rights)) on the Internet. Now, according to the scholarship, *“the fact of a person digitizing a work and placing it on his website which is open to the public must be regarded as being equivalent to a transmission to the public. This is because there is communication to the public as soon as the work is capable of being captured by an indeterminate number of persons”* (A. Françon, *La notion de public selon le droit français* (The concept of “public” in French law)).

Thus, if a work protected by copyright is made available on a website without any restriction, this work will be considered to have been made available to all of the members of the public who have access to the Internet.

The French courts would also take account of the case-law of the Court of Justice of the European Union (CJEU) on the effects of a work being made available to the public on a website without any restriction of access.

b) The contribution of Community law: the concept of “new public”

Article 3-1 of Directive No 2001/29 of the European Parliament and of the Council of 22 May 2001 on the information society (OJEC, No L 167) enshrines a cross-cutting right of communication to the public: *“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”.*

Recital 23 of the Directive provides as follows: *“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”.*

This recital reflects a political desire to enshrine a broad right so as to cover all acts of communication to the public, even if the public is not located in a defined space. This definition enables the author to be granted an exclusive right over the acts of consultation of a work on networks, in particular on the Internet.

The Community case-law appears broadly to adopt this approach, which culminates in the *Svensson* judgment. One of the first significant decisions on the subject (CJEU 7 December 2006, SGAE, C-306/05) provided that:

“The concept of “communication to the public”, which has no exhaustive definition, must be interpreted broadly (...). For there to be an act of 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, without the question of whether or not they use that opportunity not being decisive”.

Moreover, the Community courts have sought to define more precisely the concept of “public”, considering that it relates to “*an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons*” (CJEU, *ITV Broadcasting Ltd v TV Catch Up Ltd* 7 March 2013).

Paragraph 26 of the *ITV* judgment states that “*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*”.

In other words, when a website is not subject to any access restriction, the initial communication of the work by the author is considered to be aimed at all Internet users, i.e. all members of the public.

With regard to communication by satellite, the *Airfield* decision of the CJEU dated 13 October 2011 states in paragraph 72 that an “*authorisation is necessary when the protected works become accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works when they gave their authorisation*”. Thus, if the authors did not take into account a certain public when they communicated their work (for example by placing it online on a website with restricted access), a new authorization will be required for the purposes of communicating it to a website accessible to all of the Internet community or to another website with restricted access.

Finally, the *Svensson* decision of the CJEU of 13 February 2014 adds that, when no access restriction has been put in place, there is only one public on the Internet. It specifies 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’, as referred to in Article 3(1) of Directive No 2001/29/EC*”. In other words, the public which has access to a work placed online on the Internet is still considered to be all of the potential visitors to the site concerned, namely all Internet users who could freely have access to it. The creation of clickable links to works that are freely available on another website therefore does not constitute a communication to the public because, according to the CJEU, there would be no communication to a new public.

Consequently, both in French law and in Community law, if a work is made available on a freely accessible website, this work would be considered to have been made available to the entirety of the public which has access to the Internet. However, the French courts appear to wish to show a certain degree of resistance to the concept of communication to a “*new public*” as interpreted by the CJEU. Specifically, a recent decision of the Court of Appeal of Paris of 2 February 2016, which was issued in relation to related rights, states that “*the concept of “communication to a new public” by way of deep links such as those defined by the Nils Svensson judgment and the BestWater International GmbH order does not apply to the protection of the related rights of audiovisual communications companies*”.

- 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?

Since question 13 was answered in the affirmative, question 14 does not require a specific response.

- 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?

yes

Please explain:

It is possible to find examples in the French case-law, exclusively in criminal cases, in which the fact of placing hyperlinks on one's website has been found to be a case of complicity to infringement within the meaning of Article L. 121-7 of the French Criminal Code. This article provides that "*The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission*".

In a judgment issued by the Court of Appeal of Aix en Provence on 10 March 2004, a person who offered on his website links to sites permitting the downloading of works placed online without the authorization of their author (in that particular case video games), which it did in full awareness of the facts, was held to be an accomplice to infringement by way of the provision of means (cf., however, Regional Court of Epinal, Ch. Correc., 24 October 2000, which, in a similar case, found that there was direct infringement on the basis of making available without authorization).

On the other hand, when the links lead directly to the incriminated work and not to the storage website, the Regional Court of Paris found that there was direct infringement in respect of a dissemination and making available of the work without the authorization of its author, which are misdemeanours laid down in and prohibited by Articles L. 335-3 and L. 335-4 of the Intellectual Property Code (Regional Court of Paris, Ch. Correct. 2 April 2015).

It is important to note that, for complicity to exist, it is necessary in particular to establish a principal act which is punishable under criminal law (in the present case infringement). It is therefore only when the person has knowingly placed on his website a link leading to an illegal downloading website that complicity by the provision of means exists. On the other hand, when the link leads to a website on which the author has made his work available or has authorized it, complicity cannot be found to exist in the absence of any original offence.

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

Having regard to the current French case-law, for indirect infringement to be found to exist in the scenario of links under criminal law, it is necessary for three elements to be combined: a principal offence (the making available of works to the public on a website without the authorization of their author), a material element of complicity (the provision of a link leading to the aforementioned website) and a mental element (the fact of providing a link while having the relevant knowledge that the works have been made available to the public in an illegal manner).

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?

This balance is currently ensured by the fact that:

- a link set up to an unlawful source, that is to say a website on which a protected work has been placed without the agreement of the author, appears to be punishable under French law (this point is currently at the heart of the questions submitted to the CJEU in the *GS Media BV* case);
- linking, deep linking, framing and embedding to a website on which a protected work has been placed with the agreement of the author without any particular access restrictions are in principle lawful.

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 fact that a copyrighted work is visible on a third-party website without the person visiting the website realizing that the work is in fact disseminated, under conditions accepted by the author, on another website (embedding) should be able to be more circumscribed or even prohibited without the author's consent, since it is liable to cause serious damage to the value of its rights.

III. Proposals for harmonisation

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

yes

Please explain:

Yes, all the more so since the Internet is cross-border and there would therefore be a very particular benefit in adopting common rules.

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:

The French Group, while it is committed to authors' rights, considers that linking and deep linking do not constitute a "communication" of the work, but rather mere indications for the purposes of accessing it (like, to a certain extent, Advocate-General Wathelet).

On the other hand, framing and embedding appear to it to constitute a "communication" of the work, since the work appears on the Internet user's screen.

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

yes

Please explain:

Yes, for framing and embedding.

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:

The French Group considers that this should not constitute infringement except in the scenario of embedding, in which the Internet user is not aware that the work that he or she sees on the website of the third party is only to be found there on account of a technical contrivance, and not on the basis of

agreement by the author.

- 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 French Group considers that a third party which practises embedding without Internet users being aware that the work reproduced on its website originates from another website infringes an author's copyright since Internet users may be caused to believe that this third party itself has a specific authorization from the author to reproduce the work on what appears to be "its" website. If, for example, a photographer markets his photographs on his website, the fact that one of his photographs is "disseminated" by embedding on the website of a third party should not be freely authorized since that would deprive an author of the exercise of his rights over his works to too great an extent.

- 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:

In the case of embedding, the finding should be one of direct infringement because the work visually appears to have been disseminated on a particular website even if it is not physically reproduced.

- 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:

The French Group considers that a statement on a website should not have any effects in relation to linking since this would ultimately render impossible the adoption of general and clear principles governing the lawfulness or unlawfulness of different types of links.

- 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 French Group considers that if, on the website onto which a protected work was initially uploaded, a technical restriction (access by codes, free access to a limited version of the work or a version in low resolution, etc.) has been desired by the author, third parties should not be authorized to circumvent these restrictions by links other than simple links or deep links, which are not considered to be acts of "communication" of the work here.

- 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.

yes

Please explain:

The French Group considers that third parties should not be authorized to create links (other than simple links or deep links, which are not considered to be acts of “communication” of the work here) to a work unlawfully uploaded onto the original website since the author is and must remain the only person who has the right to determine the arrangements for the dissemination of his works.

The French Group considers that simple links or deep links to a work uploaded unlawfully onto the original website should be able to be dealt with and punished on the basis of mechanisms other than infringement.

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:

The French Group considers that the concept of a “new public” is not relevant because the public must be understood broadly as meaning Internet users by mass.

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, but the making available should be conceived as accessing the work under conditions which do not deny, by way of the technique of embedding, the initial context of the making available that received the author’s consent.

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

In relation to embedding, should the fact that the source is clearly disclosed change the answers to the questionnaire? The French Group considers that it should not.

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

Energy.

Summary

The CJEU, in its Svensson and Best Water rulings, gave the principles guidelines applicable to linking and making available on the Internet in Europe, by creating a difference between the cases where the

work is or not disseminated towards a new public.

The French Group considers that embedding should be treated as a particular case, since it may have serious adverse effects on IPR.