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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 32 of local Law on Copyright and Related Rights contains identical wording as Article 8 of the WCT.

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:

Law on Copyright and Related Rights protects the making available right.

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:

There has never been a similar case in Bosnia but the local courts and administrative bodies closely follow the practice of CJEU and, most definitely, they would also apply the “new audience” doctrine.

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)?

There has never been a similar case in Bosnia but the local courts and administrative bodies closely follow the practice of CJEU and, most definitely, they would also apply the “new audience” doctrine.

7) If the relevant act is deep linking as described in paragraph 11) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

8) If the relevant act is framing as described in paragraph 12) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

9) If the relevant act is embedding as described in paragraph 13) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

Constitution of Bosnia and Herzegovina grants the right of expression and linking, in its nature, is mere reference to something. The Group's opinion is that prohibiting linking is limiting the freedom of expression.

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:

The situation would be different in the case if linking somehow enabled the users to circumvent the

subscription. In this case, the notion of the "new audience" would be fulfilled, as the court could easily assume that the targeted audience of the first communication would be the subscribers only. However, if the linking worked in a manner that still required the users to subscribe, the situation would remain the same.

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:

It would constitute a copyright infringement.

13) Under your Group's current law, if a copyrighted work is made available on a webpage without any access restrictions, would that work be considered as having been made available to all members of the public (i.e. globally) that have access to the Internet?

yes

Please explain:

14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

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?

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

## II. Policy considerations and proposals for improvements of the current law

17) How does your Group's current law strike a balance between a copyright owner's ability (or inability) to control the act of linking by others to their copyrighted work and the interests of the copyright owner, the public and other relevant parties?

The Law takes a more liberal approach and protects against copyright infringements.

18) Are there any aspects of your Group's current law that can be improved? For example, by strengthening or reducing the copyright owner's control over linking?

yes

Please explain:

As the revenues from online advertising have grown to become one of the main sources of financing of online publishers, the group hopes that the practice and legislation will shift towards stronger regulation of the linking matter. Current situation seems to leave a gap for unlawful profiting and accumulating additional website traffic.

### III. Proposals for harmonisation

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

yes

Please explain:

Yes, in certain extent. Internet is a global vessel for dissemination and more uniform regulation is necessary. Migrations of the piracy websites (peer-to-peer networks, streaming sites, etc.) have shown that the legal framework is at least a step behind and different regulations leave open door for constant “resurrections” of the mechanisms to disseminate materials that infringe on copyright.

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

20) Should an act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) to a website containing a copyrighted work be considered a "communication" of the copyrighted work?

no

Please explain:

No, to the extent that it clearly indicates that the actual content is hosted on a different location and on a different site.

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

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?

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?

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:

No. Such limitations hinder the freedom of expression to certain extent.

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. Specific groups, such as members of a website, closed groups, intranet users, etc. should not be considered public (and according to Law on Copyright and Related Rights they aren't). Linking to contents communicated to such groups and, especially, bypassing some obstacles (subscription, DRM tools, etc.) should not be allowed.

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:

Of course. Unauthorized communication is an 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."

yes

Please explain:

New definition would be: Members of the public who do not have access to the means of the communication used for the first dissemination of the 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?

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

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

Summary