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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.:

The Copyright and Related Rights Act (hereafter: the "**Copyright Act**") stipulates in Article 32.a as follows:

The right of making available is the exclusive right that a work, by wire or wireless means, is made available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

This definition has until recently encompassed also making work available in such a way that a work is transmitted to a member of the public based on an offer, intended for the public. However, by the latest amendment of the law which entered into force on 30 July 2015, this last part has been deleted with the explanation being that neither the Directive 2001/96/EC nor the WIPO Copyright Treaty contain such wording in their definitions of right of making available. The aim of the amendment was therefore harmonization of the definition with the wording of the European directive.

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:

See our answer to question 1.

- 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:

Yes. There is no relevant national case-law on the subject. However, the courts in Slovenia would follow the case law of the Court of Justice of the European Union (hereafter: the "**CJEU**"), i.e. the *Svensson* judgment (13 February 2014, C-466/12). The act described above would thus be considered as "communication" of the copyrighted work for reasons set out in the *Svensson* judgment (paragraphs 17-23 of the judgment).

However, considering a somewhat different view in the recent Opinion of AG Wathelet in *GS Media* (c-160-15) dated 7 April 2016, pursuant to which the described hyperlinking would not constitute "communication", we will need to wait what position the CJEU adopts in this case.

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

no

Please explain:

For the same reasons as in our answer to question 3), we refer to the *Svensson* judgment to answer the question. Pursuant to the CJEU position in *Svensson* case, to establish existence of communication to the public two cumulative requirements need to be met, i.e. (i) act of communication of the work and (ii) the communication reaches a new public.

Taking into account *Svensson* test, because the initial website on which the work was published is freely accessible (i.e. to all internet users), hyperlinking in question does not communicate the work to a new public i.e. a public that was not taken into account by the copyright holder when he/she authorized the initial 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?

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)?

As follows from our answers to questions 3) and 4) the described act would not be considered as communication to the new public which would require authorization of the copyright holder and therefore can not constitute an infringement under Slovenian law.

- 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:

The CJEU has made clear in the *Svensson* judgment that even when Internet users click on the link at issue and the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site, such act constitutes communication, but not to a new public, which means that authorization of the copyright holder is not required in case of deep linking either.

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:

As Slovenian law lacks statutory regulation as well as case law on this matter, this question is also answered by reference to the case law of CJEU.

The court decided on the issue of framing in its *BestWater* decision (court order, 21 October 2014, C-348/13), whereby it was established that the act of framing in itself does not constitute communication to the public insofar as the copyrighted work is neither directed to a new public nor communicated by using specific technical means that differ from those used for the initial (authorized) communication.

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:

Also in the case of embedding, the court order of the CJEU issued in *BestWater* (court order, 21 October 2014, C-348/13) applies.

Namely, the same as with framing, the technique of embedding does not make the work available to a new public, if the work is freely available on the site from which the embedded link was transmitted.

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, because a mere statement prohibiting linking does not restrict access to copyrighted work.

The rationale of the CJEU *Svensson* judgment set out in paragraph 26 thereof¹⁰¹ still applies. Regardless of the prohibitive statement, all the Internet users could access the work at the original webpage and should thus be deemed potential recipients of the initial communication which means that they cannot constitute a new public and no authorization of the copyright holder is required.

¹⁰¹ "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."

- 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 CJEU has explicitly stated in the *Svensson* judgment that in case when the linking constitutes an intervention without which its users would not be able to access the works, all these users must be deemed a new public, which was not taken into account by the copyright holders when they authorized the initial communication. Accordingly the holders' authorization is required for such a communication to the public. Without obtaining authorization, such act would constitute a copyright infringement.

- 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:

There is no case law on this point in Slovenia. Also, the case law of CJEU is also not clear on this point.

In April 2016, AG Wathelet issued an Opinion in *GS Media* case (C-160/15). AG Wathelet expressed the view that the CJEU case law, more specifically, *Svensson* judgement and *BestWater* court order could be understood that absence of authorization of copyright holder for the upload of the work on the website is not relevant for the purpose of Article 3(1) of the InfoSoc Directive (i.e. Directive 2001/29/EC) and determining copyright infringement.

Furthermore, in AC Opinion in *GS Media* (C-160-15) it was stated that placing hyperlinks is not an act of communication within the meaning of the Directive 2001/29/EC and that the motivation and the fact that the person placing the hyperlink knew or should have known that the initial communication on other websites had not been authorized, are not relevant.

Should the CJEU follow the AG's Opinion, the answer to this question would be negative and the answers to questions 3) to 9) would not be different.

- 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:

Similarly as with regard to the previous answers, there is no statutory regulation nor case-law in Slovenia applicable to this question. As follows from the CJEU's *Svensson* judgment, if a website is not subject to any restrictive measures, then all Internet users can have free access and are thus potential visitors of that site.

In the opinion of our Group, however, a copyrighted work, once made available on a webpage without any access restrictions, should be considered as made available globally and not only to certain members of the public, even if the webpage was emanating from or directed to a certain country or was designed in one language only. Firstly, because various widely used search engines which enable

searches by keywords make it fairly easy to access copyrighted work even if it is uploaded on a foreign webpage, and secondly, because it may prove considerably difficult to delimitate the group of public members to which a certain webpage is directed.

- 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 answer to the previous question.

- 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:

Slovenian Copyright Act does not provide for secondary copyright infringement. However, depending on the particulars of each individual case, this may amount to liability for damages under general rules of damages liability.

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

N/A.

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

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

Given the important of hyperlinks for the functioning of the world wide web, we consider that in the current EU case law there is a reasonably stricken balance between 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.

- 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:

It remains open whether linking to unlicensed content which is freely accessible to the public on the website should always be outside the copyright protection. This question should be answered by the CJEU clearly, to provide guidance for local courts.

We believe that determination whether there is communication to the public should be made based on objective criteria. Nevertheless, the point to address is whether the act of knowingly and intentionally linking to unlicensed contact should always be outside the copyright protection (even in most severe

cases such as linking to websites who provide access to illegally obtained content as their core business activity).

III. Proposals for harmonisation

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

yes

Please explain:

Yes, see also our response to question 18.

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:

We consider that hyperlinking to a starting page of a website where protected work is published on a subsite should not be considered as a "communication" of the copyright work. However, linking, embedding, framing, to a website that contains copyright protected work should be considered as "communication" of the copyrighted work.

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

no

Please explain:

No, when the link provides access to a website that is freely accessible to all internet users.. However, when linking provides access to the new public, which would not have access to the content in absence of the act of linking, we consider such action should 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?

yes

Please explain:

Yes, when linking provides access to copyright protected work to a public that was not initially intended to have access to the work when the copyright holder granted authorization for publication (e.g. access to initial publication is limited by a paywall).

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:

These different forms should be treated equally, except, as already expressed, link to a starting page of a website which does not itself (i.e. the starting page) contain the copyright protected work, should not be regarded as communication to the public of copyright protected work.

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:

N/A.

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:

See our response to question 10. Mere statement is not a technical measure and all internet users may still access the work on the initial website.

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:

Answers are based on the assumption that the protected work was uploaded to a website which was freely accessible to all internet users. Should protected work be uploaded to a website with access restricted by technical measures (e.g. paywall), link to such content would be communication to a new 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.

yes

Please explain:

Yes. Answers were based on the assumption that authorization for initial upload was provided by the copyright holder.

Based on the AG Opinion of AG in GS Media when the work is uploaded to a website without the authorization of the copyright holder, the element of communication to the "new public" is not applicable.

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:

We consider the definition provided by CJEU in the *Svensson* judgement, par. 24 (C-466/12) is appropriate.

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

no

Please explain:

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

N/A.

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

Summary