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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?

no

Please explain:

As noted in the Study Question's preface, the U.S. does not have a statutory provision that expressly provides for protection of a making available right *in haec verba*. In effect, however, Section 106 of the US Copyright Act provides for protection of an author's making available right. Even though Section 106 does not use the express language of Article 8, the making available right is subsumed by the exclusive rights set forth in Section 106. See also the answer to no. 2 below, which provides a more thorough explanation.

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:

Yes. Section 106 of the Copyright Act, 17 U.S.C. § 106(4)-(6), establishes the exclusive rights of a copyright owner to perform or display a work publicly. Section 101 of the Copyright Act provides the definition that to perform or display a work "publicly" includes "to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." This analogous right provides authors the exclusive right to communicate a performance or display a work by making the performance or display available to the public through means of any device or process, including the Internet. Section

106(3) of the Copyright Act may protect the author's exclusive right of making available of the copyrighted work through copies by establishing the exclusive right of the copyright owner to distribute copies of the copyrighted work to the public. Depending on the facts, the reproduction right may also be implicated.

It is important to note that protection under the Copyright Act requires the work to be fixed in either a copy or a phono record. A copy is the material object by which the work can be embodied, meaning that a copyrighted work stored on a computer's server is the "copy" for purposes of U.S. copyright law. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

- 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:

Since under the U.S. Copyright Act the §106 exclusive rights of the copyright owner are not couched in terms of "communication to the public," we find it difficult and inaccurate to answer this question using this phraseology. Under U.S. law, one would look to see whether one of the exclusive rights under §106 were implicated by the linking. Whether one of the §106 rights is implicated by the linking in the situation described above depends on all the facts. For example, a link that results in a display or a stream may implicate the public display or public performance right. A link that permits a user to download a copy may implicate the distribution and reproduction rights. Whether such implicated rights are infringed, whether the infringement would be direct or indirect (contributory, vicarious or induced), and whether there would be a defense, an applicable limitation or exception (including fair use), or a limitation on liability (such as under the Digital Millennium Copyright Act ("DMCA") safe harbors), would depend on the facts.

That said, we are aware of no U.S. holding that the mere provision of a hyperlink to copyrighted content that had been uploaded to the public Internet with the authorization of the copyright owner, such as by a search engine, infringes the exclusive rights of the copyright owner, nor are we aware that any court has considered the question. *Cf., A.P. v. Meltwater*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (distinguishing a "true" search engine from a news aggregator who copied content in news digest linking to stories owned by plaintiff). Whereas such linking could be considered a "communication to the public" within the plain meaning of those words, and within the definition of "publicly" in §101, it is not determinative of whether a right has been implicated or infringed. In addition, any linking or other use of content protected under § 106 is subject to U.S. Copyright Act's "fair use" provisions, 17 U.S.C. § 107.

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

no

Please explain:

See above

- 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:

See above

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)?

See above

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:

We are aware of no distinction between hyperlinking and deep linking under U.S. law for purposes of these analyses. In a non-binding, unpublished district court opinion in 2003, one court explained: “A URL is simply an address, open to the public, like the street address of a building, which, if known, can enable the user to reach the original to make the URL a copyrightable item, especially, the way it is used . . . . There appear to be no cases holding the URLs to be subject to copyright. On principle they should not. *“Ticketmaster Corp. Tickets.Com, Inc*, 2003 U.S. Dist. LEXIS 6483 (citations omitted). We are unaware of any courts that have challenged this analysis.

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:

The act of framing (otherwise known as “in-line linking”) has been held by one appellate court to not constitute an act of direct infringement of the display right (The HTML instructions direct the user to the copyrighted work which is not the equivalent of communicating a copy. *Id.* at 1161)., but that it could be an act of contributory infringement if the defendant had sufficient knowledge and failed to take steps to minimize the damage in the context of a search engine. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1160–61 (on remand finding that Google was protected from liability under the DMCA safe harbors.). However, U.S. courts have not addressed the issue of framing outside the search engine context.

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:

We are aware of no distinction between framing and embedding under U.S. law for purposes of these analyses.

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

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Please explain:

We are aware of no case in which a U.S. court has considered whether a statement that prohibits linking to a publicly available website is an 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?

yes

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Please explain:

A fact of this nature would likely affect the infringement analysis because it suggests that the linking party may have circumvented technological protection measures imposed by the copyright owner and is thereby engaging in an unauthorized display, performance or distribution of copies or may have violated the Digital Millennium Copyright Act by circumventing access controls. Even if the linking party was not responsible for the circumvention, it might still be liable depending on its level of participation, knowledge and culpability, whether any defenses, limitations or exceptions apply, and whether safe harbors apply.

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

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Please explain:

A fact of this nature may affect the infringement analysis since if the copyrighted work has been uploaded without the authorization of the copyright holder this means a violation of the reproduction right has occurred. If the linking party is also the uploading party then that party may be directly liable for the reproduction as well as any display, performance or distribution of copies that is implicated by the linking, again subject to the defenses and limitations described above. Even if the linking party is not responsible for the uploading, the linking party could be indirectly liable for the reproduction under theories of contributory or vicarious liability or inducement, again, subject to the defenses and limitations. described above.

DMCA take-down notices and safe harbor protection is often used in this context (but can also be used when the copyrighted material was uploaded lawfully). Section 512 of the U.S. Copyright Act provides limitations on monetary liability relating to online material for qualifying parties who employ repeat infringer termination policies and where the service provider does:

1. Not have actual knowledge of the material or activity is infringing;
2. Not receive a financial benefit directly attributable to the infringing activity; and
3. Upon notification of the claimed infringement, expeditiously removes or disables access to the alleged infringing material.

17 U.S.C. § 512(d).

- 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:

Under the Copyright Act, to perform or display publically means to perform or display at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered. No U.S. law limits the access of a webpage having no access restrictions to members of the public including the global public. A webpage without any access restrictions would be considered as having been made available to all members of the public that have access to the Internet.

- 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?

yes

Please explain:

Secondary liability for copyright infringement may be found against the website containing hyperlinks, deep links, framing and embedding if it is established that the website facilitates or otherwise contributes to direct copyright infringement by a third party. Secondary copyright infringement is limited by the safe harbor exclusions set forth in Section 512 of the Copyright Act as well as all other applicable defenses and limitations and exceptions under the Copyright Act.

Additionally, section 1201 of the Copyright Act, Circumvention of Copyright Protection Systems, provides that no person shall circumvent a technological measure that effectively controls access to work protected under the Copyright Act. A website may be in violation of the copyright owners anti-circumvention right found in 17 U.S.C. 1201 when circumventing a measure that was created to prevent access to copyrighted material.

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

There are three types of secondary liability for copyright infringement: contributory, vicarious and inducement. Contributory liability requires knowledge and a material contribution by the defendant. Vicarious liability requires that the defendant have the right and ability to control the infringement and enjoys a direct financial benefit from it. Inducement liability is found where the defendant has actively encouraged the infringement. Secondary or indirect copyright infringement is limited by the safe harbor exclusions set forth in Section 512 of the Copyright Act, as well as all other applicable defenses and limitations and exceptions under the Copyright Act.

## 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 "Fair Use" provisions of the U.S. Copyright Act, 17 U.S.C. § 107 coupled with the free speech protections of the First Amendment to the U.S. Constitution seek to strike a balance between the incentive given to rights holders to create protected content and the public's interest in dissemination of ideas, information and discoveries.

- 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?

### III. Proposals for harmonisation

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

yes

Please explain:

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:

The act of linking, in and of itself, cannot categorically be considered an act of communication of the copyrighted work, but rather is driven by the facts of each situation.

- 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?

no

Please explain:

The inquiry should focus on the particular facts of any alleged acts and appropriation instead of the particular technology employed to reach the goal

- 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:

The determination should be based on the specific facts of any such alleged infringement, including knowledge and intent of the “linker.”

25) Do your answers to any of questions 20) to 24) depend on whether the website expressly displays a statement that prohibits the relevant act of linking or linking generally? If yes (in any case), please explain.

no

Please explain:

26) Do your answers to any of questions 20) to 24) depend on whether the public's access to the work uploaded on the website is limited in any way? If yes (in any case), please explain, including limitations that should be relevant.

no

Please explain:

See answers above

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:

To the extent that such linking knowingly causes a violation of the rights as discussed in paragraph 24, a linker could be subject to either direct or secondary liability.

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:

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.

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

Summary