



Summary Report

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2016 – Study Question (Copyright)

Linking and making available on the Internet

This Study Question primarily examines national laws relating to the act of linking to a copyrighted work on the Internet, and issues that arise in relation to a making available right of an author.

In the Internet context, copyrighted works are typically made publicly accessible by being uploaded onto websites. A copyrighted work may also be accessible to members of the public by "linking" to a copyrighted work that has already been uploaded to a website. This Study Question focuses on whether and under what circumstances such an act of linking constitutes infringement of the making available right of the copyrighted work. In addition, this Study Question examines the national and regional acceptance of the current provisions and potential avenues for international harmonisation.

This Study Question covers four methods of linking: (a) hyperlinking to the starting page; (b) hyperlinking in the form of deep linking; (c) framing; and (d) embedding.

For the purpose of this Study Question, the making available right means the right provided in Article 8 of the WIPO Copyright Treaty (**WCT**), which states:

(A)uthors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them. (emphasis added)

To the extent that a making available right is part of a neighbouring right granted to other parties, such neighbouring rights are outside the scope of this Study Question.

The Reporter General has received Reports from the following Groups and Independent Members (in alphabetical order): Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Malta (Independent Member), Bosnia/Herzegovina (Independent Member), Cyprus (Independent Member), Italy, Japan, Latvia, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom (**UK**), United States of America (**US**), Uruguay and Venezuela.

41 Reports were received in total. The Reporter General thanks all contributors for these helpful and informative Reports.

The Reports provide a comprehensive overview of national and regional laws and policies relating to the act of linking and the making available right. This Summary Report cannot attempt to reproduce the detailed responses given by each Group and Independent Member. If any question arises as to the exact position in a particular jurisdiction, or for a detailed account of any particular answer, reference should be made to the original Reports. See http://aippi.org/committee/?committee_type=11&status=Active.

In this Summary Report:

- references to Reports or responses by one or more "Groups" may include references to Independent Members;
- where percentages of responses are given, they are to the nearest 5%; and
- in Part IV below, some conclusions have been drawn in order to provide guidance to the Study Committee for this Question.

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?

Around 85% of the Groups reported that their current law has a statutory provision that provides for protection of an author's making available right in line with Article 8 of the WCT.

Among the Groups that answered YES to this question, 5 Groups reported that their statutory provisions do not contain the exact text of "*making available to the public of their 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*" or similar thereto. Rather, they have a more comprehensive right that covers the making available right. For example:

- The French Group explained that the right to "make available to the public" is not explicitly mentioned in the French Intellectual Property Code, but it is nevertheless accepted in French law that the right of performance provided in the Code covers all methods of communication of a work to an audience, including the making available of the work.
- The Mexican group explained that the Mexican Federal Copyright Law comprises a statutory provision regarding "public access by means of telecommunications", which could be interpreted as a making available right.

Around 15% of the Groups (7) reported that their law does not have a statutory provision that provides for protection of an author's making available right in line with 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?

Among the 7 Groups that answered NO to question 1) above, 6 Groups reported that they have analogous rights that essentially protect the making available right. For example:

- 4 Groups (Argentina, Pakistan, US and Venezuela) reported that the making available right is protected by a combination of more traditional modes of copyright protection such as the right of reproduction, the right of distribution and the right of public display.
- 2 Groups (Brazil and New Zealand) reported that the making available right is covered by the right to communicate a work to the public.

The Independent Member from Cyprus answered NO to this question.

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?**

The Groups were nearly equally split on this question.

Around 45% of the Groups reported that such an act of hyperlinking is considered a "communication" of the copyrighted work. For example:

- The Czech Group explained that such an act will be a communication of the copyrighted work, because the linking entity provides new technical access (direction) to the artwork being published originally in another place.

8 Groups (Bulgaria, Estonia, Finland, France, Hungary, the Netherlands, Slovenia and Spain), which represents around 45% of the Groups that answered YES to this question, reported that their answers are bound by the CJEU's *Svensson* decision.

Around 45% of the Groups reported that such an act is not considered a "communication" of the copyrighted work. For example:

- The German Group referred to the *Svensson* decision but also pointed out that *Svensson* involved deep linking that provided direct access to the work; and under the German and EU law, it is likely that setting of a surface link would not constitute an act of communication of the copyrighted work. The Italian and the UK Groups expressed similar views.
- The Australian Group explained that providing a hyperlink simply triggers a communication or transmission from the host web site to the end user, which does not amount to direct copyright infringement under Australian law.
- The Canadian Group explained that hyperlinks represent electronic addresses, and that the person that merely supplies the link that must be activated does not communicate the work or authorize the communication of the work by the act of hyperlinking alone.

Other Groups reported that the position in their law is uncertain.

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

9 Groups, which represents around 50% of the Groups that answered YES to question 3) above, reported that such an act is considered as a communication "to the public." For example:

- The Mexican Group explained that an act of providing several hyperlinks in a website, thereby redirecting users of the website to other websites in which the users could access and download copyrighted works, is considered a communication to the public through the making available of the works.

Among the Groups that answered YES to this question, 3 Groups (the Czech Republic, France and Spain) distinguished the issue of whether such an act is a communication "to the public" from the issue of whether such an act is a communication to a "new" public, and addressed the issue of "new public" in response to question 5) below. For example:

- The Spanish Group explains that an act of communication made by the manager of a website by means of clickable links, which is aimed at all potential users of the site (i.e., an indeterminate and large number of recipients) is considered as an act of communication "to the public." However, in relation to question 5) below, the Spanish Group reported that there is no direct infringement because the communication is not directed to a "new public."

7 Groups (Bulgaria, Estonia, Finland, Hungary, the Netherlands, Slovenia and Sweden) reported that such an act is not considered as a communication "to the public." For example:

- The Bulgarian Group explained that the work is already accessible by every Internet user, and thus the act of linking to the work does not broaden the circle of the public who may access the work.

These 7 Groups reported that their answers are bound by the CJEU's *Svensson* decision.

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?

Among the 9 Groups that answered YES to question 4) above, one Group (Mexico) reported that such an act constitutes direct infringement of the making available right. The Mexican Group explained that such an act is direct infringement, construing the law according to the substantive right established in Article 8 of the WCT, and also an administrative infringement as set forth in the Mexican Copyright Law.

8 Groups reported that it does not constitute direct infringement of the making available right. For example:

- The Danish, French and Spanish Groups above) answered NO to this question on the basis that the communication of the copyrighted work is not directed to the "new public" as decided in the *Svensson* decision.
- The Czech Group explained that if the original source is publicly available and there is no restriction that would be circumvented, such an act is not considered as infringement.

- The Philippines Group answered NO to this question, but subject to the condition that the copyrighted work referred to by the hyperlink is not made by means of a film, slide, television image or otherwise on screen by means of any other device or process. In that case, the act of hyperlinking to such a content falls under the exception provided in the Philippines Copyright Act.

On the whole, around 95% of the Groups (excluding the Groups reporting that the position under their law is uncertain in response to question 3) above) reported that hyperlinking to a starting page is not a direct infringement under their law.

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)?

Many of the Groups had already, to some extent, answered this question in response to question 5) above.

For example:

- The Danish and Spanish Groups explained that there is no communication to the "new public," as explained in response to question 5) above.
- The Czech group referred to exhaustion of rights, explaining that if the new link communicates the work to the same public as the original publication, that is considered for exhaustion of rights.
- The French Group explained that 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.
- The Paraguayan and Turkish Groups referred to implied licenses. The Paraguayan Group explained that the moment authors upload their work to the Internet with no restrictions whatsoever and no limitations as to the linking of such work, they implicitly authorize the retransmission or broadcasting of such work. Similarly, the Turkish Group explained that as long as the material is "freely accessible" on another website, it is deemed to be made available to the public within the implicit consent of the copyright holder.
- The Philippines Group referred to the exception provided in its Copyright Act, as explained in response to question 5) 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?

Around 90% of the Groups (including the Mexican Group, which is the only Group that answered YES to question 5) above) reported that their answers to questions 3) to 6) would not be different if the relevant act is deep linking. For example:

- The Czech Group explained that if the original deep link is publicly available, then publication of that deep link on a third party website does not make the work available to a new public; although it might make access to the work easier, it does not make the work available to a different public.
- The Mexican Group explained that hyperlinking and deep links are equally forms of giving access to the public to works.

8 Groups (Austria, Denmark, Estonia, Finland, France, Latvia, Slovenia and Spain) referred to the CJEU's *Svensson* decision and reported that they are bound by the decision.

Around 10% of the Groups reported that their answers would be different if the relevant act is deep linking. For example:

- The New Zealand Group reported that its answers to questions 3) to 6) above would be different if the relevant act is deep linking. However, the New Zealand Group's answer seems to be premised on an understanding that deep linking is a link that circumvents a paywall. (However, the actual intent of this question was to focus on situations in which the copyrighted work is publicly accessible without access restrictions.)
- The German and the UK Groups reported that their answers to questions 3) to 6) above would be different if the relevant act is deep linking, in the sense that an act of deep linking would be considered a "communication." (It is relevant to note that these Groups take the position in response to question 3) that the act of hyperlinking to a starting page is not a "communication.") However, these Groups also report that the act of deep linking is not a communication "to a new public."

On the whole, around 85% of the Groups reported that deep linking is not a direct infringement, while around 5% of the Groups report that deep linking constitutes direct infringement. The remaining Groups reported that the position in their law is uncertain.

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?

Around 80% of the Groups (including the Mexican Group, the only Group that answered YES to question 5) above) reported that their answers to questions 3) to 6) above would not be different if the relevant act is framing. For example:

- The Czech Group explained that the exact technical method of hypertext linking of the third party context is not important.

9 Groups (Denmark, Estonia, Finland, Germany, Italy, the Netherlands, Slovenia, Spain and the UK) refer to the CJEU's *Bestwater* decision and reported that they are bound by the decision.

Among the Groups reporting that their answers to questions 3) to 6) would not be different, the Canadian and the German Group's answers seem to be premised on an understanding that framing requires clicking by the user. (However, the act of framing as described assumes that framing does not require clicking by the user; once the user access the page in which the frames exist, the copyrighted work will automatically appear inside the frame.)

Around 15% of the Groups reported that their answers would be different if the relevant act is framing. For example:

- The UK Group takes the same approach as it does in question 7) above; namely, that the act of framing is communication but is not communication "to a new public."

Among the Groups reporting that the act of hyperlinking to a starting page or deep linking does not constitute direct infringement, 4 Groups seem to take a position that the act of framing would constitute direct infringement. For example:

- The Chilean Group explained that in case of framing, the destination website would appear in the context of another website, which is a means of communication not approved by the author.
- The Philippines Group explained that framing by its nature allows the third party to display the copyrighted material in its own website, and to aggregate the same with other content.

On the whole, around 70% of the Groups reported that framing is not direct infringement, while around 15% of the Groups reported that framing constitutes direct infringement. The remaining Groups reported and that the position in their law is uncertain.

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?

Around 70% of the Groups (including the Mexican Group, the only Group that answered YES to question 5) above) report that their answers to questions 3) to 6) above would not be different if the relevant act is embedding. For example:

- The Australian Group explained that the embedded material is made available online by the host website and is electronically transmitted directly from the host website to the user; it is not communicated or transmitted by the provider of the embedded link.

10 Groups (Denmark, Estonia, France, Germany, Italy, Latvia, the Netherlands, Slovenia, Spain and Sweden) refer to the CJEU's *Bestwater* decision and reported that they are bound by the decision.

Around 25% of the Groups reported that their answers would be different if the relevant act is embedding. For example:

- The UK Group takes the same approach as it does in response to question 7) above; namely, that the act of embedding is communication but is not communication "to a new public."

Among the Groups reporting that the act of hyperlinking to a starting page or deep linking does not constitute direct infringement, 8 Groups seem to take a position that the act of embedding would constitute direct infringement. For example:

- The Brazilian Group explained that the act of embedding should be considered as a "communication" of the copyrighted work, since the work is visually available and displayed on the agent's website.
- The Canadian Group stated that if a link is embedded such that the work appears automatically without requiring any act on the part of the user, then the website host authorizes the communication or reproduction of the work, which may amount to copyright infringement.

On the whole, around 65% of the Groups reported that embedding is not a direct infringement, while around 20% of the Groups reported that embedding constitutes direct infringement. The remaining Groups reported that the position in their law is uncertain.

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?

Around 75% of the Groups reported that their answers to questions 3) to 9) above would not be different if the website displays a statement that prohibits the relevant act of linking or linking generally.

Among the Groups reporting that their answers to questions 3) to 9) would not be different, many explained that such a statement does not amount to the access restriction mentioned in the *Svensson* decision. For example:

- The Dutch Group stated that such a statement does not constitute technical measure restricting access to the work.
- The Slovenian Group explained that 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.

Some of the Groups reporting that their answers to questions 3) to 9) above would not be different, nevertheless refer to the possibility that the act of linking could constitute a breach of contract. For example:

- The Finnish Group stated that the meaning of such statements are likely to be evaluated from a contract law perspective.

Around 20% of the Groups reported that their answers would be different. For example:

- The Bulgarian Group explained that in such a case the act of linking will specifically contradict the intent of the copyright holder to "communicate" the work only to the users of a specific website.
- The Philippines Group explained that such a notice may create a presumption that any hyperlink or deep linking will conflict with and will prejudice the economic rights of the copyright holder.

On the whole, around 65% of the Groups reported that linking does not constitute direct infringement even if there is such a statement on the original website, while around 25% of the Groups reported that there is a possibility that such an act would be considered direct infringement. The remaining Groups reported that the position in their law is uncertain.

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?

Around 80% of the Groups reported that their answers to questions 3) to 9) above would be different if the access to the work has been restricted. For example:

- The Estonian Group explained that, if the link circumvents restrictions placed on the work (e.g. paywalls), that would constitute as making the copyrighted work

available to a different "new public", compared to what was originally intended by the copyright holder.

- The Chinese Group stated that hyperlinking to a starting page still does not constitute direct infringement because such an act does not avoid the restriction measures adopted by the initial website, whereas deep linking, framing and embedding constitutes copyright infringement.

10 Groups (Austria, Denmark, Estonia, Finland, Germany, Hungary, Italy, Slovenia, Spain and Sweden) made reference to the *Svensson* decision and reported that they are bound by the decision.

Around 20% of the Groups reported that their answers would not be different. For example:

- The Australian Group explained that even in such cases, the provider of the link does not communicate or transmit the material; the host site does.
- The Japanese Group explained that access to the copyrighted work will not be obtained merely by providing a link.

On the whole, around 80% of the Groups reported that linking to a work with access restriction amounts to direct infringement, while around 20% of the Groups reported that it does not.

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?

Around 50% of the Groups reported that their answers to questions 3) to 9) above would be different if the copyrighted work has been uploaded on the website without the authorization of the copyright holder. For example:

- The Danish Group explained that if the copyright holder has not authorized the initial communication to the public, the copyright holder did not take any public into consideration when the work was uploaded; therefore, any subsequent act of communication of the infringing work to any public makes the work available to a "new public".
- The Canadian Group explained that the act of mere user-activated hyperlinking to such a work would not appear to constitute a communication of the work and thus would not be direct infringement, whereas in case of an embedded link, the party providing the link may be authorizing an infringing communication.
- The Argentinian Group stated that its answer is applicable only if the provider is duly notified that the link they are providing leads to an infringer's site.

3 Groups (Hungary, Italy and Poland), which represent around 15% of the Groups that state that their answers would be different, reported that such an act could constitute indirect or contributory infringement.

Around 30% of the Groups reported that their answers to questions 3) to 9) above would not change, even if the copyrighted work has been uploaded on the website without the authorization of the copyright holder. For example:

- The Korean Group explained that even if the hyperlink was connected to an infringing work, the act of hyperlinking itself cannot be regarded as copyright infringement or abetting copyright infringement.

11 Groups (taking either position) referred to the *GS Media* case that is currently pending before the CJEU with the expectation that the CJEU will give a clear guidance on this issue.

On the whole, around 45% of the Groups take the view that linking to an unauthorized work amounts to direct infringement, while around 30% of the Groups take the view that it does not.

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?

Around 80% of the Groups reported that a copyrighted work made available on a webpage without any access restriction would be considered as having been made available to all members of the public that have access to the Internet. For example:

- The Norwegian Group explained that works made available online without restrictions are considered as published works.

13 Groups, which represent around 40% of the Groups that answered YES to this question, point to the *Svensson* decision in support of their position.

Around 5% of the Groups reported that such a work is not necessarily made available to all members of the public. More details are provided in response to question 14) below.

Other Groups reported that the position in their law is uncertain.

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?

Among the Groups that answered NO to question 13) above, for example:

- The Polish Group explained that a case-by-case assessment is required, because a website may be addressed to a specific circle of the public; for example, depending on whether a website is in Italian or Polish, such a website would be visited by different people.
- The Swiss Group explained that the perceptible intent of the copyright owner to address a limited group of people would be decisive; and according to this opinion, the work would be deemed made available to a restrict group of people, even though it is in a technical sense freely accessible for all members of the public.

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?

Around 50% of the Groups reported that those are circumstances that would support a finding of indirect or secondary copyright infringement. More details are provided in response to question 16) below.

Around 45% of the Groups reported that those circumstances would not support either finding.

Among the Groups that answered NO to this question, 4 Groups reported that their law does not recognize indirect or secondary copyright infringement.

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

The Groups' answers to this question varied greatly, which is likely to be due to the fact that different countries have different indirect/secondary copyright infringement laws. For example:

- 5 Groups reported that in circumstances where the original copyrighted work was uploaded illegally (i.e. without authorization of the copyright holder), and the person who set the link to the work knew that the work was uploaded illegally, such an act of linking could constitute copyright infringement.
- 3 Groups reported that if the person who is linking to the website with the illegally uploaded work, knows or should have known that the copyright work was uploaded illegally, such an act of linking could constitute indirect/contributory infringement.
- The Australian Group reported that providing a link to a copyrighted material which was uploaded without the authorization of the right holder could constitute authorization of copyright infringement, depending on other factual circumstances, namely: (a) the extent of the person's power to prevent the infringing act; (b) the nature of the relationship between the person and the primary infringer; and (c) whether the person took reasonable steps to prevent or avoid the infringement.
- The Brazilian Group reported that its law requires a "for profit" or "for gain" qualification.
- The Polish Group reported that indirect infringement requires the fault of the person operating a website with the links, including negligence.

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?

Around 20% of the Groups reported that the balance is struck by the framework adopted by the CJEU; namely, that copyright owners are able to use technical measures to restrict access to their works, in which case linking to the works would constitute copyright

infringement; but if the copyright owners do not use such access restriction measures, others are free to create links to the works.

The Chinese and the Japanese Groups, while not EU countries, also referred to the copyright owner's power to impose access restrictions and the third parties' right to create links to unrestricted works.

Around 10% of the Groups reported that the balance is struck by applying the exceptions to copyright protection, such as private use and fair use.

Examples of other answers are as follows:

- The Australian Group explained that the balance is struck by considering a range of factors relevant to whether there has been an "authorization" of copyright infringement, namely (a) the extent of the person's power to prevent the infringing act; (b) the nature of the relationship between the person and the primary infringer; and (c) whether the person took reasonable steps to prevent or avoid the infringement. (The Australian Group also referred to these factors in the context of indirect/secondary infringement in question 16) above.)
- The Canadian Group explained that its law considers whether the link is automatic or user-activated; in the former case, the link is considered to "authorize" the communication of the copyrighted work, while in the latter case the link itself is not a communication of the work.

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?

Around 30% of the Groups reported that their laws require more clarification, with 5 Groups stating that it should be clarified whether or not the act of linking to illegally uploaded works constitutes copyright infringement.

Examples of other answers are as follows:

- 3 Groups reported that their laws should be updated in order to cover the Internet and other developments in technology.
- 2 Groups reported that the making available right should be introduced into their laws.
- The Hungarian Group considered that all types of linking should be regarded as communication to the public, and that licensing should only take place via mandatory collective management.

2 Groups (Australia and Portugal) state that their laws do not require any improvement.

III. Proposals for harmonisation

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

Around 90% of the Groups are of the view that harmonisation in this area is desirable. Many Groups taking this view point to the fact that issues relating to the Internet extends beyond national boundaries.

Around 10% of the Groups are of the view that harmonisation is not necessary.

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?

Around 40% of the Groups are of the view that linking should be considered a "communication" of the copyrighted work.

Around 25% of the Groups are of the view that linking should not be considered a "communication" of the work.

Around 25% of the Groups take a middle ground, for example:

- 4 Groups take the view that hyperlinking to the starting page should not constitute "communication," while deep linking, framing and embedding should.
- 2 Groups take the view that hyperlinking to the starting page and deep linking should not constitute "communication," while framing and embedding should. For example, the French Group explains that in the former case the hyperlinks are merely indications for the purpose of accessing the work, while in the latter case the work appears on the Internet user's screen.
- The Brazilian Group is of the view that embedding should constitute "communication," but hyperlinking to the starting page, deep linking and framing should not.
- 3 Groups express the view that whether the act of linking constitutes "communication" should depend on other factors. For example, the Independent Member from Bosnia/Herzegovina stated that linking should not be considered "communication" to the extent that it clearly indicates that the actual content is hosted on a different location and on a different site. The US Group stated that the act of linking in and of itself cannot categorically be considered an act of communication, 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"?

Among the Groups that answered YES or take a middle ground in response to question 20) above, around 55% of those Groups are of the view that such an act of linking should be considered as a communication "to the public" in some cases, but not in all cases. For example:

- 12 Groups are of the view that it must be a communication to "the new public"; if the work is already available to public access, linking to such a work should not be considered as a communication "to the public"; however, if access to the work is restricted, linking to such a work should be considered as a communication to the "new public."
- The French Group is of the view that framing and embedding should be considered as a communication "to the public," while hyperlinking to the starting page and deep linking should not.

- The Brazilian Group is of the view that hyperlinking to the starting page, deep linking and framing should not be considered as a communication "to the public," since they are only referring to content of other website; however, the embedding should be considered as a communication "to the public."

Around 35% of such Groups (the Groups that answered YES or take a middle ground in response to question 20) above) are of the view that such an act of linking should always be considered a communication "to the public." For example:

- The Japanese Group considers it is not necessary to use the concept of the "new 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?

Among the Groups that answered YES or take a middle ground in response to questions 20) and 21) above, around 85% of those Groups (representing around 50% of the entire number of Groups that responded to this question) are of the view that such an act of linking should constitute infringement of the making available right, at least in some cases. For example:

- 12 Groups are of the view that communication "to the new public" should constitute infringement of the making available right.
- 2 Groups are of the view that hyperlinking to the starting page and deep linking should not be considered as direct infringement, while framing and embedding should be. For example, the Japanese Group stated that the making available right should be interpreted as including "a right to control in what manner the work should be displayed," and that such a right is infringed in the case of framing and embedding, but not in the case of hyperlinking to the starting page and deep linking.
- The French Group is of the view that embedding should constitute infringement, while other forms of linking should not.
- The UK Group is of the view that the question of infringement of the making available right should be assessed on a case by case basis, with particular regard to the real economic impact of the linking activity on the copyright owner.
- The Mexican Group takes the view that infringement should always be found.

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?

Around 60% of the Groups are of the view that different forms of linking should be treated differently to some extent.

- 11 Groups are of the view that hyperlinking to the starting page and deep linking should be treated differently from framing and embedding. For example, the Belgian Group explained that a regular hyperlink will lead the visitor of the linking site away from the linking site to the target site, which is not the case in framing

and embedding; and that a hyperlink is less likely to affect the monetization opportunities of the linked-to work than a framed or embedded link.

- 4 Groups are of the view that embedding should be treated differently from other forms of linking. For example, the Italian Group explained that embedding takes out the copyrighted work out of its original context and inserts it into a different website, which therefore addresses users other than those originally intended by the owner of the linked website; however, such issues are much less frequent with framing, because the framed website nonetheless preserves its integrity even though it presented within the frame of another website, so that hosting and hosted websites essentially are distinct and recognizable.
- 3 Groups are of the view that hyperlinking to the starting page should be treated differently from other forms of linking. For example, the Slovenian Group explained that link to a starting page which does not itself contain the copyrighted work should not be regarded as communication of the public of the copyrighted work.

Around 35% of the Groups are of the view that all forms of linking should be treated equally. For example:

- The Australian Group explained that, putting the appearance to the user to one side, the underlying technical mechanism implemented by each form of linking is the same, in that sense that the content is transmitted directly from the original host site to the end user.

2 Groups take the view that a case-by-case analysis is necessary. For example:

- The US Group stated that 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?

Around 40% of the Groups are of the view that if an infringement is to be found, it should be direct infringement.

Around 20% of the Groups are of the view that there are cases in which direct infringement should be found and there are also cases in which indirect infringement should be found. For example:

- The Canadian Group considers that: (a) an automatic link to a copyrighted work unauthorized by the copyright owner should be considered as direct infringement; and (b) intentionally providing a link to a third party's website to aid others to download a copyrighted work, knowing that the work is not authorized, should be considered as an indirect infringement. The Chinese and Japanese Groups take a similar view.
- The Italian Group considers that: (a) framing and embedding should be treated as direct infringement if they make available the copyrighted work to a public that could not have directly accessed to it; and (b) linking, framing and embedding should be considered as indirect infringement if they provide access to works which were made available unlawfully on the linked website.

- The US Group takes a view that the determination should be based on the specific facts, including knowledge and intent of the linker.

Around 15% of the Groups are of the view that if an infringement is to be found, it should be indirect infringement. For example:

- The Polish Group takes the view that linking may be considered as indirect infringement where: the link transfers to an authorized copy; the authorization is withdrawn; access is possible as a result of the circumvention of restrictions on access; or despite the right holder's statement that linking is not authorized.

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.

Around 85% of the Groups are of the view that such a statement does not affect their answers to questions 20) to 24) above. For example:

- The French Group considers that it would ultimately render impossible the adoption of general and clear principles governing the lawfulness or unlawfulness of different types of links.
- The German Group considers that the use of the Internet and exchange of content needs general rules, and that specific rules in the discretion of the copyright owner after he or she has decided to upload the work in the Internet without access restrictions would hinder the use of the Internet.
- The Independent Member from Bosnia/Herzegovina stated that such limitations would hinder freedom of expression.

7 Groups, while answering NO to this question, referred the possibility of contractual enforcement of a prohibition statement. However, some Groups stated that acceptance of the website's terms and conditions would be necessary in order to contractually enforce such a prohibition, and that a unilateral statement does not create a contractual obligation.

Around 15% of the Groups are of the view that such a statement affects their answers to questions 20) to 24). For example:

- The Estonian Group explained that considering the copyright holder's right to make decisions regarding the use of its own work, such an explicit statement that prohibits the relevant act of linking or linking in general could be regarded as infringement of the making available right.

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.

Around 65% of the Groups are of the view that their answers to questions 20) to 24) above would be different, if the public's access to the work uploaded on the website is limited. For example:

- The Czech Group explained that, if the link communicates the referred content to broader group of persons, exhaustion of rights is not applicable in respect of persons who have no access to the original publication.
- The Chinese Group stated that access restriction is unrelated to deciding whether hyperlinking to the starting page constitutes infringement, since verification is still required after linking to the initial webpage; whereas deep linking, framing and embedding may constitute infringement where circumvention of technical measures is conducted.
- The Swedish Group recognizes that technological restrictions may have a varying degree of efficiency; and that where the work is accessible to anyone who enters the address in their internet browser, the work should be treated as having been made available to every potential visitor and therefore the act of linking to the work should not be treated as communication to the public.

Around 35% of the Groups are of the view that their answers to questions 20) to 24) would not be affected. For example:

- The Canadian Group explained that restricted access to a website does not affect the technical fact that a link is a reference to a location and not a communication.
- The Japanese Group stated that the manner in which the work is displayed on the website should not be affected by any limitation on the public's access to the work uploaded on the website. However, the Japanese Group also considers that if someone provides a link that can circumvent an access restriction to the work, such an act should constitute unauthorized access or tort.

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.

Around 65% of the Groups are of the view that their answers to questions 20) to 24) above would be affected to some degree if the copyrighted work has been uploaded on the website without the authorization of the copyright holder. For example:

- The Spanish Group explained that if the works have been uploaded without the copyright holder's consent, linking should constitute an infringement in any case regardless of any circumstances, because the original unlawful nature of the act vitiates any subsequent exploitation of the work.
- The French Group explained 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") to a work unlawfully uploaded onto the original website, because the author is and must remain the only person who has the right to determine the arrangements for the dissemination of their works.

Among the Groups indicating that their answers would be affected, 6 Groups are of the view that if the copyrighted work has been uploaded on the website without the authorization of the copyright holder, the finding should be that of indirect/secondary/contributory infringement. For example:

- The German Group stated that under the doctrine of secondary liability, the linking party should be liable for infringement when he knew about the infringement or upholds his link after he has knowledge of the infringement.

Around 35% of the Groups are of the view that their answers would not be affected. For example:

- The Estonian Group explained that if the legality of the act of linking should be dependent on the authorization of the copyright holder; otherwise, it would place an unjust burden on the person carrying out the link, as they would have to use extraordinary means to ascertain the legality of the copyrighted work before each act of linking; also, it would be almost impossible to determine the legality of the uploaded copyrighted works after an act of linking (as the copyright holder can rescind authorization at any point).

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."

Around 60% of the Groups are of the view that communication to a "new public" should be necessary for finding infringement of the making available right.

Proposals for a definition of "new public": include the following:

- 11 Groups proposed definitions that are identical or similar to the definition adopted by the CJEU in the *Svensson* decision, namely, *"a public that was not taken into account by the copyright holders when they authorised the initial communication to the public."*
- 7 Group proposed definitions focusing on the point that the said public did not previously have access to the original work. For example, the German Group would define new public as *"a unspecific higher number of unspecific individuals which has no access to the work as set up by the copyright holder."*

Around 40% of the Groups are of the view that the concept of "new public" should not be a criteria for finding infringement of the making available right. For example:

- The Hungarian Group stated that the "new public" concept is erroneous and violates the Berne Convention, TRIPS and the WCT. The Hungarian Group pointed to the example of unauthorized retransmission of a TV program - under the "new public" criteria, such an act would not be considered as copyright infringement.
- The Spanish Group stated that the "new public" concept introduces an exception or limitation on the making available right that is not provided for in the Berne Convention, the WCT or in the Information Society Directive.

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?

Around 85% of the Groups are of the view that in such a case, the work should be considered as having been made available to all members of the public that have access to the Internet. For example:

- The Brazilian Group stated that if a copyrighted work is made available on a webpage without any technical access restrictions, it should be considered that the work is made available to all members of the public who have access to the Internet. The Brazilian Group noted that although a contractual restriction is possible, to be effective there must be a restriction through the use of technical tools.

Around 15% of the Groups are of the view that there are 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. For example:

- The Canadian Group considers that where a work is placed on a website with a clear indication that it is directed to a single geographic area, and appropriate notices are in place concerning such restrictions, the work might be considered as not having been made available to all members of the public that have access to the Internet. However, the Canadian Group also points out that such notices or restrictions should not prevent linking.
- The Latvian Group considers that the work should be considered as not having been made available to all members of the public that have access to the Internet, but only if it could be established under the normal course of events such content could not have become available to all members of public.

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

Various comments are provided, example of which are as follows:

- The Portuguese, Korean and Turkish Groups pointed to the issue of moral rights, namely, the possibility that moral rights could be damaged due to acts of linking.
- The Chinese Group commented that it might be feasible to adopt neighboring rights to protect the Internet disseminators, taking into consideration the rebroadcasting right among the rights of broadcasting organizations.
- In relation to embedding, the French Group raised the issue of whether the source is clearly disclosed. The French Group does not consider that changes the position.
- The Polish Group pointed to the issue of whether the "new public" criteria should be applicable to other acts of communication of protected works to the public, in particular non-cable transmission and especially simulcast directed to the same audiences as the original one.

- The Swiss Group commented that harmonisation with regard to act of linking is reasonable only if such harmonisation includes all exclusive rights of the copyright holder that are possibly affected by acts of linking (such as reproduction and retransmission rights), and only if limitation on these exclusive rights are harmonized as well.

Industry sector views included in these proposals for harmonization

The following consultation with industry was reported:

- Authors and copyright holders (New Zealand, Spain, Sweden)
- Entertainment, music, news and communications, retail and biotechnology (Argentina)
- Internet, cinematographic, music, entertainment and television (Mexico)
- Energy (France)

IV. Conclusions

Linking

Around 40% of the Groups are of the view that linking (hyperlinking to the starting page, deep linking, framing or embedding) to a copyrighted work should be considered a "communication" of the copyrighted work, while around 25% of the Groups are of the view that it should not be. Around 25% of the Groups are of the view that it should depend the form of linking.

Among the Groups taking the view that there are cases in which linking should be considered as a "communication," around 55% of those Groups are of the view that an act of linking should be considered as communication "to the public" in some but not all cases, while around 35% of the Groups are of the view that it should always be considered as such.

Among the Groups taking the view that an act of linking should be considered as a communication to the public in all or some cases, 85% of such Groups (which represents around 50% of the entire number of Groups who responded to this question) are of the view that such an act of linking should constitute infringement of the making available right, at least in some cases.

As to whether different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) should be treated differently, 60% of the Groups are of the view that they should be treated differently to some extent, while 35% of the Groups are of the view that all forms of linking should be treated equally.

As to the type of infringement, if any infringement is to be found, around 40% of the Groups are of the view that direct infringement should be found, while around 15% of the Groups are of the view that indirect infringement should be found. Around 20% of the Groups are of the view that either direct or indirect infringement should be found, depending on the case.

As to the significance of a statement that prohibits the relevant act of linking or linking generally, 85% of the Groups are of the view that such a statement does not affect their answers shown above, while 15% of the Group are of the view that it does.

As to the significance of restriction of access to the uploaded work, 65% of the Groups are of the view that such a restriction affects their answers shown above, while 35% of the Group are of the view that it does not.

As to the significance of the fact that the copyrighted work has been uploaded on the website without the authorization of the copyright holder, 65% of the Groups are of the view that such a lack of authorization affects their answers shown above, while 35% of the Group are of the view that it does not.

Making available right and "new public"

As to whether communication of a copyrighted work to a "new public" is necessary for finding infringement of a making available right, around 60% of the Groups are of the view that communication to a "new public" should be necessary for a finding infringement of the making available right, while around 40% of the Groups are of the view that it should not be.

As to a copyrighted work made available on a webpage without any access restrictions, around 85% of the Groups are of the view that the work should be considered as having been made available to all members of the public that have access to the Internet, while around 15% are of the view that there are 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.

Overall comments

As summarized above, the concept of the "new public" introduced by the CJEU's *Svensson* and *Bestwater* decisions has received support from around 60% of the Groups. Around 85% of the Groups agree that if a copyrighted work is uploaded on a webpage without any access restrictions, the work should be considered as made available to all members of the public that have access to the Internet. Also, around 65% of the Groups are of the view that restriction of access to the copyrighted works would affect (at least to some extent) their answers on whether the act of linking should be considered as infringement of the making available right. The significance of an access restriction is a point on which the Groups might be able to reach a consensus.

In the meantime, around 85% of the Groups are of the view that a mere statement that prohibits linking does not affect their answers on whether the act of linking should be considered as infringement of the making available right. This is also likely to be the point where the Groups might be able to reach a consensus.

On the other hand, as to "communication", the Groups are quite split on this issue. While around 65% of the Groups are of the view that there are circumstances under which an act of linking should be considered as "communication", around 65% of the Groups are also of the view that different forms of linking should be treated differently. It seems difficult to reach a consensus on where to draw the line.

At minimum, it could be said that a majority of the Groups are of the view that embedding should be considered as "communication." This might be a point where the Groups might be able to reach a consensus.

Finally, the fact that the copyrighted work has been uploaded on the website without the authorization of the copyright holder would affect the answers of around 65% of the Groups. This is also likely to be the point where the Groups might be able to reach a consensus.