



## 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 Copyrights Act, 1957 and as amended from time to time, provides for protection of an author's making available right, in line with Article 8 of the WIPO Copyright Treaty (WCT):

Article 8 of the WCT, which provides for the making available right, states: Authors 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.

Under the Indian Copyright Act:

Sec 2 (ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. Explanation.- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

- (a) in the case of a literary, dramatic or musical work, not being a computer programme, -
- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
  - (ii) to issue copies of the work to the public not being copies already in circulation;
  - (iii) to perform the work in public, or communicate it to the public;

- (iv) to make any cinematograph film or sound recording in respect of the work;
  - (v) to make any translation of the work;
  - (vi) to make any adaptation of the work;
  - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) in the case of a computer programme, -
- (i) to do any of the acts specified in clause (a);
  - (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:  
Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental."
- (c) in the case of an artistic work, -
- (i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
  - (ii) to communicate the work to the public;
  - (iii) to issue copies of the work to the public not being copies already in circulation;
  - (iv) to include the work in any cinematograph film;
  - (v) to make any adaptation of the work;
  - (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
- (d) In the case of cinematograph film, -
- (i) to make a copy of the film, including a photograph of any image forming part thereof;
  - (ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
  - (iii) to communicate the film to the public;
- (e) In the case of sound recording, -
- (i) to make any other sound recording embodying it;
  - (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;
  - (iii) to communicate the sound recording to the public.

Explanation : For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

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?

No.

Please explain:

Not applicable

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:

Hyperlinking would be considered communication.

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

Yes.

Please explain:

Section 2(ff) of the Indian Copyright Act, 1957 defines the term "communication to public" in the following words:

"Communication to public means making any words available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member actually sees, hears or otherwise enjoys the work so made available."

The explanation to this section further provides to include any communication through satellite or cable. Therefore, this definition covers the contents of a web site on internet by virtue of expression "by any means of display". Therefore, linking comes within the ambit of Indian copyright law. If any linking is done to the detriment of any site, its owner can take recourse to legal remedy under Indian Copyright Act, 1957.

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)?

No.

Please explain:

Not Applicable

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?

Yes.

Please explain:

This right would cover transmission of a work to the public by wire or wireless means including broadcasting, webcasting and would cover other acts. Providing of a deep link may be considered as a communication of copyrighted work.

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?

Yes.

Please explain:

The communication would be automatic once the User clicks on the page containing the copyrighted work.

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:

The act of hyper linking to a page or deep linking may be held to constitute direct infringement as the link is embedded on another website is communicating to a User through web page and then a copyright page appears automatically but this is not provided by original website.

- 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:

Answer would not be different. In spite of a restricted statement on the website that prohibits the act of linking; the User would still access copyrighted work on the webpage and thus could be recipient of the communication from the website. It is a possibility that such act would be considered as an infringement and might involve contract law if the party has agreed to the "Terms of Use of the Website".

- 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?

No.

Please explain:

Linking a copyrighted work with an access and a kind of restriction would be a communication to a Subscriber by Contract or the Terms of the website. There could be restriction of the pages for the kind of access by the Subscriber.

- 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:

The copyright owner has not authorised the communication therefore the infringing copyrighted work which is communicated would be an infringement.

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

Yes.

- 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?

There is no territorial restriction on the communication to the public or any restricted right of access when a work is made available on the Internet.

- 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?

No.

Please explain:

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

A link to a copyrighted material which has been uploaded without the authorisation of the copyright owner could amount to copyright infringement and it would be viewed as such. Also copyright holder had not authorised that link and had no intention to do so. Thus there could be indirect infringement.

## 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 Indian law has looked to strike a balance for offering access on the Internet and protection of Copyright. Copyright owners are able to use technical measures to prevent infringement or may be create links to restrict access to the works. There is a strong reason to protect content which involves entertainment industry in India. The current law can be improved by including technical measures that would protect the copyrighted work when they are released over the Internet. The nature of the Internet and the wide access of the Internet need to ensure that adequate copyright protection is given to the copyright owners.

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

Yes.

Please explain:

The current law can be improved to ensure that the copyright owner's control over linking can be managed with some better Take Down provisions under the law.

## III. Proposals for harmonisation

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

Yes

Please explain:

The Indian Group does consider harmonisation.

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:

More so for a situation where there is framing and embedding there has to be a clearer understanding whether that would also amount to communication of a copyrighted work.

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

Yes

Please explain:

Framing and embedding also should be considered as 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:

If there is hyper linking and communication of a copyrighted work it should amount to copyright infringement. The issue remains whether copyright protection limitation would apply to embedding and framing and could also be covered by this limitation?

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:

Different tools and technology are used by various websites and there are restrictive access conditions imposed by website owners. Framing by a website is a form of presentation that is not necessarily from the original copyrighted work and will appear on the website of a third party where the framing or embedding has been formatted or created. Thus this form of communication to the public needs to be clearly differentiated and the interests of the copyright owners need to be protected.

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:

Direct infringement. The website owner has used a link to intentionally link to a third party website and access copyrighted material/ content. Technical formats such as framing and embedding should be considered infringement when they make the copyrighted work of the third party available to the public. This can be said to be some form of infringement.

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:

Such a situation should be regarded as a warning from the copyright holder and therefore can be an infringement of the copyright.

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:

If a content of the website is freely available to the public it should be considered as open freely to the public. If third parties provide deep linking, framing, linking with terms and conditions that violate the use /terms and copyright of the original website, the same should be limited and not amount bonafide communication to the 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.

No.

Please explain:

- 28) If there has already been an authorized communication of the copyrighted work directed to certain members of the public, should a finding of infringement of the making available right depend on a subsequent act of unauthorized communication of the said work to a "new public"? If yes, please propose a suitable definition for a "new public."

Yes.

Please explain:

"New Public" would mean, any persons for whom the communication was not intended or would have not, in normal course of internet access have access to that copyrighted work.

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

No.

Please explain:

If the work has restrictions by virtue of the technical access restrictions in a geographical area or by reason of a contractual restriction, it should be considered as the copyright holder's ability to restrict the same for universal access.

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

Not applicable.

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

Summary