



Congress Milan 2016

2016 – Report on Resolution

Linking and making available on the Internet

On 20 September 2016 AIPPI approved a Resolution entitled "Linking and making available on the internet". The Resolution concerns the issue of whether and under what circumstances the act of linking to a copyrighted work on the Internet should constitute infringement of the making available right of the copyrighted work.

This question is of topical interest around the world. In the week preceding the Congress the Court of Justice for the European Union (CJEU) rendered an important judgment on this subject in the *GS Media / Sanoma* case. The lively debates at the Congress made clear that the approach of the CJEU in this and earlier cases is not considered self-evident across the world.

This Resolution makes a distinction between user activated links (hyperlinks or deep links) and automatic links (framing links or embedded links).

AIPPI confirmed its earlier Resolution on Q216B – "Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors" (Hyderabad, 2011) to the effect that providing a hyperlink to a copyrighted work that has already been made available to the public on the Internet with the authorization of the relevant rights holder should not, by itself, constitute a further act of making such a work available to the public. To this, the additional element of "or otherwise lawful circumstances" was added throughout the Resolution. AIPPI further confirmed that providing a hyperlink to a copyrighted work that has already been made available to the public on the Internet lawfully should not, by itself, constitute a communication of such work to the public.

Following considerable debate, AIPPI resolved that the act of placing a framed link or an embedded link should constitute a communication to the public, at least when the manner in which the work has been framed or embedded misleads the public into believing that the party engaging in the framing or linking is the source of the work. The point of debate was that several Groups considered that from a technical point of view, there is no difference between hyperlinks and deep links on the one hand and framing or embedded links on the other hand. This is because, in both cases, no transmission takes place. The requirement that the fragment or embedded link should mislead was added to preclude free speech issues.

AIPPI resolved that if a copyrighted work is made available lawfully on a webpage without any access restrictions, such work should be considered as having been made available to all members of the public that have access to the Internet.

It was also resolved that placing a hyperlink or deep link to a copyrighted work may attract liability where the linker knows or ought to have known that the copyrighted work has been uploaded

without the consent of the rights holder, or where the linker provides an inducement or authorization to copy, display or communicate the unauthorized work to the public, or contributes to the copying or communication to the public or display of such work.

Finally, the Resolution provides that linking to a copyrighted work which circumvents a technological restriction should attract liability under copyright law and/or other laws. It was however uncontroversial that a mere statement on a second website that prohibits linking should not, by itself, make placing a link on the first website to the second website an infringement of copyright by the linker.

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