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2016 – Study Question (Copyright)

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Linking and making available on the Internet

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I. Current law and practice

1) Does your Group's current law have any statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT?

yes

Please explain.:

The *Copyright Act 1968* (Cth) provides that the rights comprised in copyright include the exclusive right to communicate the work or other copyright subject matter to the public. "Communicate" is defined to mean:

"make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act."

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?

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?

no

Please explain:

The act of providing a hyperlink to publicly accessible material does not amount to “communicating” as defined because it does not “make available online” any copyright material, nor does it “electronically transmit” the material. Rather, it simply triggers a communication or transmission from the host web site to the end user. In Australia, this has been held not to amount to a direct copyright infringement (*Universal Music Australia v. Cooper* (2005) 150 FCR 1).

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

5) If yes, does that constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply?

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 the answer to Question 3.

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:

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:

Probably not. The issue has not been determined by an Australian court but, on the analysis set out in response to question 3, the framed material is made available online by the host web site and is electronically transmitted directly from the host web site to the end user – it is not made available online or electronically transmitted by the provider of the frame link. It is unclear whether an Australian Court would take the alternate view that framing is a new making available online because of the appearance of the framed site to the end user.

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:

Probably not. Again, the embedded material is made available online by the host web site and is electronically transmitted directly from the host web site to the end user – it is not communicated or transmitted by the provider of the embedded link. . It is unclear whether an Australian Court would take the alternate view that embedding is a new making available online because of the appearance of the embedded site to the end user.

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would

the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

No. The non-infringing conduct described above is non-infringing because linking does not “communicate” the copyright material within the meaning of the legislation. This does not depend upon the consent or otherwise of copyright owner.

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:

Under this arrangement, the linked material would presumably still require a subscription before access is provided. It seems unlikely in a properly configured system that providing a link would have the effect of bypassing access restrictions, but if so, on the analysis outlined above, this would still not amount to a communication to the public because the provider of the link does not communicate or transmit the material – the host site does.

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?

no

Please explain:

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:

Probably. The issue has not been determined under Australian law. The legislation does not define the relevant “public”. However, the Explanatory Memorandum in support of the Bill introducing the provisions identifies that it is intended to capture the act of making copyright material available online. Accordingly, copyright material made available on a site outside Australia is likely to be taken to constitute a communication to the public in Australia, and vice versa.

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?

N/A

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:

Yes, in respect of material uploaded to the host web site without the authorisation of the copyright owner. Providing a hyperlink (or otherwise linking) to this copyright infringing material may constitute authorisation of copyright infringement. This will depend on the factual circumstances and be determined by reference to legislated factors that must be taken into account in determining whether a person has authorised copyright infringement, namely:

- the extent of the person’s power to prevent the infringing act;
- the nature of the relationship between the person and the primary infringer;
- whether the person took reasonable steps to prevent or avoid the infringement, including whether the person complied with any relevant industry code of practice. Providing hyperlinks to copyright infringing sound recordings from a site at the domain name mp3s4free.net was held by an Australian court to constitute authorisation of copyright infringement (*Cooper v. Universal Music Australia* [2006] FCAFC 187).

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

see above

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 balance is largely struck by a consideration of a range of factors relevant to whether there has been an “authorisation” of copyright infringement. This has been demonstrated through case law as permitting a nuanced consideration of the particular fact circumstances of the case, having regard to the factors identified as relevant to be considered, namely:

- the extent of the person’s power to prevent the infringing act;
- the nature of the relationship between the person and the primary infringer;
- whether the person took reasonable steps to prevent or avoid the infringement, including whether the person complied with any relevant industry code of practice. In addition, web site terms and conditions restricting “scraping” or otherwise embedding content are likely to be enforceable in Australia, subject to those terms and conditions being brought to the attention of the target party. There is no case law in Australia determining whether a “browse-wrap” agreement is enforceable but any uncertainty could be remedied by giving the target actual notice of the terms and conditions upon which copyright material is made available at a web site.

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?

no

Please explain:

Australian law appears to strike a suitable balance between the interests of copyright owners and policy considerations as to the nature of the world wide web.

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:

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?

yes

Please explain:

All forms of linking should be treated equally since, putting the appearance to the user to one side, the underlying technical mechanism implemented by each form of linking is the same – the content is transmitted directly from the original host site to the end user.

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?

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:

No. Prohibitions on linking should be enforceable not by way of copyright infringement but, rather, through contractual enforcement of web site terms and conditions.

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:

No. In any event, a copyright owner is able to restrict access to material by correct configuration of its web site if it wishes to ensure access only by subscribers.

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:

Not insofar as primary infringement is concerned. However, if the source copyright material is infringing, linking to it may be regarded as an indirect infringement.

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:

No. The right of communication to the public is not a right that can be exercised only once. Every new method by which a copyright work is communicated to the public at large should itself constitute an exercise of the making available right. For instance, if a work is made available to the public at large on web site A, it can still be made available (again) by making it available to a sub-set of the public on web site B.

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:

No industry sector views were included.

Summary

In Australia, hyperlinking and deep linking do not constitute a communication to the public because "communicate" is defined in legislation to mean "make available online" or "electronically transmit". The relevant communication occurs from the host web site, not the provider of the hyperlink. Framing and embedding would probably not be regarded as a communication for the same reason, though there is no Australian case law on the point. However, providing a link to infringing material may be regarded as authorisation of an infringing communication. Authorisation liability will be determined on the facts of each case, taking into account a number of legislated factors such as the power to prevent

infringement or compliance with industry codes.

The Australian group does not consider that copyright is a suitable vehicle to protect against unauthorised linking to non-infringing copyright material. Enforcement of web site terms & conditions restricting linking to online content should be preferred.