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2016 – Study Question (Copyright)

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Linking and making available on the Internet

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|-------------------------|---|
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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.:

By way of introduction, it is relevant to note that Denmark is a member of the European Union. Accordingly, Danish law and Danish case law must comply with European law and decisions from the Court of Justice of the European Union (hereinafter referred to as "CJEU"). Therefore, the following answers are mainly based on the European case law, especially the cases Svensson (C-466/12) and BestWater (C-348/13).

Additionally, it is relevant to note that the copyright owner will to some extent be able to use other legal regimes than the Danish Copyright Act against linking to a copyright protected work. The Danish Marketing Practices Act may be applied in relation to linking to copyright protected works depending on the specific type of linking and provided that certain further conditions are satisfied.

Referring to question 1 above: Yes, Danish law provides for protection of an author's making available right. The legal basis for the protection is Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. Article 3(1) has been implemented in the corresponding provision in section 2(4)(1) of the Danish Copyright 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?

yes

Please explain:

It is relevant to note that the answers to questions 3-9 assume linking to a webpage where the copyrighted work appears. If the link provides access to a starting page where the copyrighted work does not appear, then the link will not be considered as a communication of the copyrighted work.

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

yes

Please explain:

- 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:

In the Svensson case, the CJEU established that communication of a copyrighted work in order to constitute an infringement must be directed to a "new public", which the copyright holder did not take into account when the initial communication of the work was authorized. The CJEU found that if a copyrighted work initially is made available on a webpage without any restrictions, the communication is automatically directed to all Internet users and consequently, the copyrighted work cannot be directed to a new public and linking to the copyrighted work will not constitute an infringement.

The CJEU affirmed the "new public criterion" in the BestWater case.

- 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)?

Please refer to the answer to question 5.

- 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:

The Svensson case does not seem to make a distinction between the different methods of linking cf. par 29, and therefore the CJEU unifies the legal position of hyperlinks and deep links, thus an infringement requires communication to a new public.

- 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:

As mentioned in the answer to question seven, the CJEU does not make a distinction between the different methods of linking in the Svensson case, cf. par 29.

Additionally, in the BestWater case, the CJEU found that "the mere fact that a protected work, freely available on an internet site, is inserted into another internet site by means of a link using the 'framing technique' cannot be classified as 'communication to the public' within the meaning of Article 3(1) of the Directive 2001/29/EC" since the work is not transmitted to a new public or communicated using a specific technical method different from that of the original communication.

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:

Please refer to question 8 concerning the Svensson and BestWater Cases. The cases relate to both framing and embedding techniques.

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:

As explained above in our answer to question 5), if a copyrighted work is made available on a webpage without any restrictions, the communication is automatically directed to all Internet users and consequently, the copyrighted work cannot be directed to a new public and linking to the copyrighted work will not constitute an infringement.

On the other hand, according to the Svensson case, para. 31, "*Where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public*".

A written statement on the website that prohibits linking to the website is a legal restriction compared to a technical restriction, cf. question 11.

It is not clear from the Svensson case whether the term "restrictive measures"/"restrictions" cf. para. 26 and 31 includes both legal and technical restrictions. In Denmark, the Svensson case has been interpreted by some legal scholars to only concern technical restrictions and by other legal scholars to also concern legal restrictions.

11) If the copyrighted work has been uploaded on the website with the authorization of the copyright holder but the access to the work has been restricted in some way (e.g. a subscription is required in order to access the copyrighted work), would the answers to questions 3) to 9) be different? If yes, how?

yes

Please explain:

Yes. Our answers to question 5) to 9) will be different.

Following our answer to question 10) links are presumed to reach a "new public" where they circumvent technical restrictions placed on a website, e.g. payment walls or code instructions, cf. Svensson case, para. 31. Thus, links that circumvent technical restrictions placed on a website will be considered an infringement.

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:

Our answers to question 5) to 9) will be different.

The Svensson case does not explicitly consider this issue. However, the court's reasoning implies 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. Consequently, any subsequent act of communication of the infringing work to any public - including hyperlinking, deep linking, framing and embedding - makes the work available to a "new public", and will therefore be considered an infringement, cf. Svensson case, para. 25 and 31.

However, it must be noted that the Advocate General on 7 April 2016 has delivered its opinion in the case C-160/15, GS Media BV v Sanoma Media Netherlands BV, regarding a question on whether it constitutes "communication to the public" if a third party refers by hyperlink to a website which is accessible to the general Internet public, on which a copyrighted work has been made available without the consent of the copyright holder.

The Advocate General does contrary to Svensson cf. par 20, not find that linking constitutes an "act of communication" within the meaning of article 3(1) cf. the opinions par 53, 54, 57, 59 and 60. Consequently, since the first of the two cumulative criteria to be met for establishing "a communication to the public" under article 3(1) is not met the Advocate General further states that it is immaterial whether the copyright holder has authorised the placing of the work on the first site cf. par 61.

It is important to note, that the Advocate General's opinion is not current law, but it is interesting to see the Advocate General's critical approach towards the "new public" criterion known from the Svensson case, including how the Advocate General is interpreting the "new public" criterion to imply, that if the copyrighted work was freely available on the third party website, a hyperlink to that website was not indispensable to the work's being made available and therefore there would not be a "new public". This opinion is contrary to how the "new public" criterion has been interpreted by other scholars. It will be interesting to see how the CJEU decides the case.

Also, to be noted is that the Advocate General elaborates on two further points of interest. Firstly, in par 78 of the opinion, the Advocate General stresses the importance of a freely accessible internet. Secondly, in par 80-87 the Advocate General points out that although the Advocate General does not find article 3(1) of the Directive to be infringed under the circumstances as described - where the provider of the link knew or ought to know to be linking to works not being communicated with the consent of the copyright holder - there are still remedies available to the copyright holder against the infringer, i.a. under the Infococ directive but also elsewhere.

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:

In the Svensson case the court held that "*the public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them*", cf. para. 26. This means that if a copyrighted work is made available on a webpage without any access restrictions, that work is considered as having been made available to all members of the public (globally) that have access to the Internet.

- 14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

No answer.

- 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:

Under Danish law, we do not use the terms indirect or secondary copyright infringement. However, under Danish Law it is possible to become liable for contribution to a third party's making available of a copyrighted work, if the person who is linking to the website with the illegally uploaded work, knows or should have known that that the copyrighted work was uploaded illegally.

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

No answer.

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?

According to sec. 2(3) of the Danish Copyright Act, the copyright owner has an exclusive right to make available his copyrighted work to the public and according to sec. 2(4) of the Danish Copyright Act the copyright owner has an exclusive right to communicate his copyrighted work to the public including inter alia to make the copyrighted work available via the Internet.

The said provisions of the Danish Copyright Act must however be interpreted in accordance with the principles that may be derived from the decisions made by the CJEU.

The balance between a copyright owner's ability (or inability) to control the act of linking by others to the copyrighted work and the interests of the copyright owner, the public and other relevant parties

follows from the CJEU decision cf. Svensson

Based on the decisions made by the CJEU it remains unclear what the term “*restrictive measures*” comprises. Thus, it remains unclear if it will be sufficient that the copyright owner includes a notice on the website stating that linking is not permitted leaving it to users of the website to investigate if linking is permitted or whether the copyright owner must apply technical measures, which effectively hinder linking and/or access to copyrighted content to retain control of the copyrighted work.

We find that current law favours users of the Internet in the sense that the rulings by the CJEU has changed the balance so that any linking is allowed despite the nature of such links and the copyright owner must actively apply technical restrictions to ensure that the copyright owner may retain and control the exclusive right of communication to public.

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:

As outlined above, the rulings of the CJEU most likely generally weaken the copyright protection and thus limit the exclusive right of the copyright owner to control to what extent the copyright owner may control that his copyrighted work is not communicated in a manner not desired by the copyright owner including in circumstances not contemplated.

Thus, based on the current CJEU rulings it appears that a copyright owner to be sure to enjoy protection in terms of a secondary communication to the public must apply effective technical protection measures which hinder that a third party may link to the copyright owner's website and even if such linking take place by means of deep linking, framing or embedded links.

Reference is made to Part III below with respect to possible improvements of current law.

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?

yes

Please explain:

The answer being yes is assuming the act of linking to a webpage where the copyrighted work appears. If the link provides access to a starting page where the copyrighted work does not appear, then the link should not be considered as a communication of the copyrighted work.

The Danish group agrees to the broad understanding of the concept of the "act of communication" as established by the CJEU in the Svensson case.

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

yes

Please explain:

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:

The answer being yes, however, is depending on the form of linking applied, cf. the answer to question 23 below.

The Danish group is critical towards the "new public" criterion.

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:

The Danish group is of the opinion that the acts of hyperlinking and deep linking to a copyrighted work should not be considered a direct infringement of the copyrighted work since the copyright holder should not be able to prohibit this type of linking which in reality constitutes a mere reference to the copyright protected work. However, the Danish group is of the opinion that framing and embedding should be considered as communication to the public and constitute a direct infringement of the copyrighted work.

The starting point for copyright law is that the copyright holder has to consent to the making available of the copyrighted work by linking to the copyrighted work. However, in order to strike a balance between a copyright holder's ability to control the act of linking by others to their copyrighted work and the interest in keeping linking to a copyrighted work on the Internet a practical option without this being an infringement of the copyrighted work, the copyright holder should not be able to prohibit all kinds of linking.

This means that the copyright holder should not be able to prohibit hyperlinking and deep linking, which in reality constitutes a mere reference to the copyright protected work. Thus, when creating a hyperlink or a deep link to a copyrighted work it is sufficiently clear to the Internet user that the work is still only accessible at the website where the copyright protected work is made available by the copyright owner. This opinion reflects the fact that the Danish group acknowledge that it is difficult for the Internet to work optimally if hyperlinking and deep linking should constitute an infringement.

However, when creating framing or embedded links to a copyrighted work, the work appears to be copied from the website where the copyright protected work is made available by the copyright owner and placed directly on the website where the link is created. The result of creating a framing link or, in particular, an embedded link, is so similar to making a copy of the copyrighted work that it constitutes a more extensive use of the copyrighted work than what should reasonably be accepted by the copyright holder, since it interferes with the copyright holder's commercial and individual rights. Framing and embedding should therefore be considered a direct infringement.

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:

Please see our answer to question 23.

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:

The Danish group is of the opinion that if the website expressly displays a statement that prohibits the relevant act of linking, this would not in itself result in linking being an infringement.

However, if the statement is combined with any sort of a technical restriction, e.g. a reasonably visible banner with a notice that linking to the website is not allowed, which is shown when the website (including subsites) is accessed and prohibits the Internet user from getting access to the website, until the Internet user ticks a box or merely provides a click somewhere on the banner, which will then be deemed to constitute a confirmation that the Internet user accepts the notice providing a link to such a website which circumvents the statement and the technical restriction should be considered an act of infringement both with respect to hyperlinking and deep linking. Framing and embedding will in any case be considered an act of infringement, cf. our answer to question 23.

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 the copyrighted work has been uploaded to a website, and access to the website has been restricted as mentioned in our answer to question 25, or access to the website requires a password or payment, that implies that the copyright holder does not accept to make the copyrighted work available to the public by an act of linking to the website. Therefore, linking to such website should be considered an infringement in relation to both hyperlinking and deep linking. Framing and embedding will in any case be considered an act of infringement, cf. our answer to question 23.

27) Do your answers to any of questions 20) to 24) depend on whether the copyrighted work has been uploaded on the website without the authorization of the copyright holder? If yes (in any case), please explain.

yes

Please explain:

If the copyrighted work has been made available on the website *without* the authorization of the copyright holder, providing hyperlinks and deep links to the work should constitute an infringement in relation to people linking in bad faith about the legality of the work linked to. Additionally the copyright holder should in any event be able to establish an infringement in relation to the person uploading the copyrighted work.

Framing and embedding will in any case be considered an act of infringement, cf. our answer to question 23.

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:

As mentioned in our answer to question 22, the Danish group is critical towards the new public criterion. The group is of the opinion that the new public criterion should not alone define whether an infringement occurs.

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.

No additional comments.

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

No industry sector views are included.

Summary

Danish law provides for protection of an author's making available right.

Danish law must comply with European law and decisions from the Court of Justice of the European Union (CJEU).

In the Svensson case, the CJEU applied the "new public" criterion as a decisive criterion when assessing whether linking to a copyrighted work should constitute an infringement. In the Svensson case, the CJEU does not make a distinction between the different methods of linking; hyperlinking, deep linking, framing and embedding. The Danish group is of the opinion that a distinction between the different methods of linking should be made.

The Danish group is critical towards the "new public" criterion introduced by Svensson and later confirmed in the BestWater case. When assessing whether linking to a copyrighted work constitutes an infringement, the Danish Group finds that an alternative assessment should be made, and that the "new public" criterion as applied in the Svensson case should therefore not be applied as the criterion for the infringement assessment, as this criterion in itself risks to lead to too far reaching results.

The Danish group considers that harmonization in the area of linking is desirable.