



Submission date: 25th April 2016

## 2016 – Study Question (Copyright)

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Linking and making available on the Internet

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Date	25-04-2016

### 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.:

*Yes, according to Article 25 of the Paraguayan Copyright Law, the economic rights granted to the authors over their works include the communication of such works to the public by any means; in addition, Article 27 of the law mentioned provides that "communication to the public may in particular be effected by means of: the transmission of any work by broadcasting or other medium of wireless transmission or by wire, cable, optic fiber or other comparable process serving to disseminate signs, words, sounds or images over a distance, whether or not on subscription or against payment and, in general, the dissemination or disclosure of signs, signals, words, sounds or images by any known or as yet unknown means or process.*

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:

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:

*Yes, such act would be considered "communication".*

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

yes

Please explain:

*Such act could be considered communication to the public depending on the circumstances. For example, if the link was posted by a person on a social network but limited to the person's contacts, the act would not be considered as communication to the public. This is also subject to variation, depending on the person's social status (that is to say, whether the person posting the link has a considerable number of followers or is a public personality).*

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:

*No, such act would not be considered direct infringement.*

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)?

*In Paraguay, there are no legal provision that directly apply to the act of linking and whether such act could potentially constitute infringement of copyright. However, the basis for the denial of infringement is comprised by the fact that from the moment the author uploaded his/her work to the internet with no restrictions whatsoever and no limitations as to the linking of such work, he implicitly authorized the retransmission or broadcasting of such work, e.g. the act of hyperlinking. Internet is global and it's public; it is accessible to everyone unless non-access is expressly mentioned or provided for. In this sense, it could be inferred that the author, by making his/her work available on Internet, granted an implied license to all Internet users to have access and retransmit such work.*

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:

*No, they wouldn't.*

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:

*No, they wouldn't.*

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?

yes

Please explain:

*Yes. In such case, the party performing the embedding could be exposed to an infringement action, as it is no longer only communicating what the author already made available, but he/she is removing the copyright work from its original position to one he/she has created in order to make it available to other parties. It may be inferred that when the author or copyright holder uploaded the work to the Internet, the intention was for the same to be available to the public only through the website in which it was uploaded. Authorization would not be extended to the appropriation of the work for communication by other means.*

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?

yes

Please explain:

*Yes, given that in such case, the author or owner of the copyright material would be expressly putting a limitation or prohibition in regards to the communication and broadcast of such work. Under such circumstances, any person giving access to the link or disclosing it in any form would be committing an infringement under the terms of the Copyright Law and even the Penal Code in Paraguay and subject to prosecution*

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, because in such case the author or copyright holder has given access to some people only and under certain limitations (for example, payment of a subscription). Hence, access is restricted to some people only (the subscribers) and under compliance of a number of requirements (payment of subscription). The subscriber may have access to the contents of the copyright work but may not otherwise broadcast the same, unless the broadcast is comprehended within the limitations or exceptions mentioned in the law (for example, if communication/linking is performed in a domestic where it is done in an exclusively domestic environment, provided that there is no direct or indirect profit-making purpose).*

*Otherwise, the party giving access to the link would be committing a copyright infringement and subject to the actions foreseen in the law.*

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:

*Yes, in such case the act of uploading the work would constitute an infringement of copyright, as well*

*as the act of linking.*

*The parties performing such acts would be subject to civil and criminal actions foreseen in the Copyright Law and the Penal Code.*

- 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:

*Yes, such work would be considered to have been available to all internet users, irrespective of their country of residence or other considerations.*

- 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?

- 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:

*No. Considering that the act of linking does not constitute a direct infringement, the same circumstances cannot support a finding of indirect or secondary copyright infringement, although the Copyright Law does not refer expressly to indirect or secondary infringement and does not define it in anyway.*

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

## 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?

*Currently, there are no provisions in the Paraguayan legislation that refer expressly to the disclosure, making available, communication and broadcasting of copyright works through the Internet and it does not foresee any norms in regards to the act of linking copyrighted works.*

*The protection of copyrighted work within the Internet spectrum follows the same legal framework foreseen for communication through other means, which may greatly undermine the authors' or copyright holders' rights over their works, as Internet may be considered a "public space" and disclosure of or making available of works in the Internet could be consider practically a "liberation" of the work and permission for access to it by all Internet users unless otherwise stipulated. Therefore, the authors/copyright holders have practically no control over the linking of their works and may have great difficulties when trying to prevent access to them by certain users.*

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:

*Certainly. Special protection within the Internet environment should be included in the Paraguayan legislation as well as protection over the current means of communication which differ greatly from those of the past.*

### III. Proposals for harmonisation

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

yes

Please explain:

*Yes, it is.*

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:

*Yes, it should.*

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

yes

Please explain:

*Yes, if communicated outside a "domestic environment" (see question 4).*

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?

no

Please explain:

*No. If the author or copyright holder uploaded his/her work on a website which is available to the public in general without no limitations or restrictions, then the act of linking should not constitute an infringement.*

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

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Please explain:

*Hyperlinking, deep linking and framing should be treated equally; they all comprise the mere act of communicating a work that was already made accessible to the public.*

*However, embedding should be treated differently, as it implies the act of appropriation of a work and of communication by other means not intended by the author/copyright holder.*

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:

*Making reference to the act of embedding, which is the only act we consider should be treated differently, the same should constitute a direct 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.

yes

Please explain:

*Yes, they do, given that if there are no such statements, it is considered that the author/copyright holder authorized – implicitly – the communication of his/her work, the act of linking in general.*

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:

*Yes, they do, given that if there are no limitations to the public's access to the work uploaded, then it is considered that such work is available to all Internet users.*

*On the contrary, if the author has imposed some kind of limitation, such limitation should be respected.*

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:

*Yes, due to the fact that if the author/c copyright holder did not himself/herself upload the copyrighted work and did not expressly consent that the work be uploaded to the Internet and made accessible to the public, then the act of linking should definitely constitute an 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."

yes

Please explain:

*Yes, the finding of infringement of the making available right should depend on a subsequent express act of unauthorized communication of the work to a "new public".*

*In this sense, new public should be defined as all persons – regardless of whether they have previously had access to the work or not – who retrieve the work, unless the author/copyright holder gives express permission to a limited public following a number of requirements.*

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:

*No. If the copyrighted work is made available to the public in general with no express restrictions, then it should be inferred that it has been made available to the public in general.*

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

*It should be highlighted that currently the Paraguayan Copyright Law gives limited protection to copyrighted works on the Internet, as it has no express regulations in regards to the broadcasting, making available or communication of such works within the digital environment provided by the Internet and is steps behind the current technological developmentsits norms directed mostly to the protection of material that is reproduced in a tangible form, not in a digital form.*

*The introduction of new forms of protection for digital works in the Internet environment, new civil and/or criminal actions and ways of infringements to the current legislation is highly advisable in order to bring our copyright legislation in line with global tendencies and developments and other countries' legislations.*

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

Summary