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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.:

Article 20.2 (i) of Spanish Royal Legislative Decree 1/1996 of 12 April (consolidated wording of the Spanish Copyright Act - "SCA"), amended by Act 23/2006 of 7 July, makes explicit reference to the making available right within the meaning of Article 8 of the WCT.

According to that provision of the SCA, the following shall be considered an act of communication to the public: "making works available to the public, by wire or wireless means, so that anyone can access them from a place and at a time individually chosen by them".

On a legislative level, the making available right is therefore a "form" of the right of communication to the public. It is not a right that was brought *ex novo* into Spanish law, since prior to the reform introduced by Act 23/2006 it was understood that the making available right was implicit within the broad definition of the public communication right.

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:

According to the CJEU's *Svensson* judgment of 13 February 2014, C-466/12 (paragraph 20), whose doctrine is binding on the Spanish courts, the provision of clickable links to protected works must be considered to be "making available" and, therefore, an "act of communication".

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

yes

Please explain:

According to the *Svensson* judgment (paragraph 22), whose doctrine is binding on the Spanish courts, an act of communication such as that made by the manager of a website by means of clickable links, which is aimed at all potential users of the site, i.e., at an indeterminate and fairly large number of recipients, must be considered as an act of 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?

no

Please explain:

According to the *Svensson* judgment (paragraph 24), whose findings are binding on the Spanish courts, being able to class an act of this nature as an act of communication to the public is **not** enough for that act to be deemed to infringe the making available right.

- 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)?

According to the *Svensson* judgment (paragraph 24), whose findings must be applied by the Spanish courts, in order for a case of this nature to constitute infringement, the communication must be directed at a "new public", i.e., a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.

If the public targeted by the initial communication consisted of all potential visitors to the site concerned, and access to the works on that page was not subject to any restrictive measures, so all

Internet users could access them freely, then making the works available by means of a link by an unauthorised third party does not infringe the right because the public is not new.

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:

According to the legal doctrine established in the *Svensson* judgment, the answer would not be different if the relevant act were deep linking.

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:

According to the CJEU's order of 21 October 2014 in *BestWater*, C-348/13, whose doctrine is binding on the Spanish courts, the 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 would not change the answers to questions 3) to 6).

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:

According to the doctrine established in the *Svensson* judgment and *BestWater* order, even if the relevant act were embedding, the answer would not change

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:

The answers to questions 3) to 9) would not be different because it is irrelevant whether or not the owner prohibits the use of links to its content. As the CJEU had indicated in the *Svensson* judgment (paragraph 24), what is relevant for the purposes of determining whether a communication of content via linking requires the consent of the rightholder is whether that communication is directed at a new public, i.e., a public that was not taken into account by the copyright holder when he/she authorised the initial communication of the works to the public. The fact that the owner of a website places linking restrictions on users by means of visible notices on the website itself does not make the act of linking illegal from a copyright perspective if the linked content has been made available to the public by the copyright holder without any kind of restriction.

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, the answers would be different. According to the *Svensson* judgment (paragraphs 24 to 29), under those circumstances the linking would be considered as an act of communication to the public (or making available), because it would enable a new public, which had not been taken into account by the copyright holders when they placed the work on the linked website, to access the work.

Providing the link would constitute an act of direct infringement of the copyrighted work where the link enabled the access restrictions put in place by the owner of the linked website to be circumvented.

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:

If the holder had not made the linked content on the website unrestrictedly accessible, we would be looking at copyright-infringing linking based on simple application of the *Svensson* doctrine. Since the copyright holder had not made the work available to the public beforehand, the public at which this link is directed would have to be considered as a new public.

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:

Spanish law does not make any express statements as to whether or not making a work available to the public without any access restrictions means that the work must be considered to have been made available to all Internet users.

Nevertheless, according to the doctrine established in the *Svensson* judgment and the *BestWater* order (paragraph 18), which is binding on the Spanish courts, from the point when the work can be freely accessed on the website on which it was initially communicated with the copyright holders' authorisation, it should be considered that those holders have taken the public to be all Internet users.

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?

We refer to our answer to question 13). In accordance with the aforementioned doctrine established in the *Svensson* judgment and *BestWater* order, in order to be able to consider that a work has been made available to all Internet users, access to the work on the website on which it was initially

communicated by the copyright holder (or with that holder's consent) must not be subject to any restrictions.

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:

Secondary copyright infringement was expressly introduced by the reform of the SCA, which took place in Spain in November 2014. Article 138, concerning actions and preliminary injunctions, contains the following paragraph: "Whoever knowingly incites the infringing conduct; whoever cooperates in same, in the awareness that the conduct is infringing or where there are reasonable grounds to believe that he/she is aware of it; and whoever, having a direct economic interest in the result of the infringing conduct, has the ability to control the infringer's conduct, shall also be deemed liable for the infringement."

In order for a subject to be deemed indirectly liable for an infringement, it is necessary, as can be gathered from the new wording of the SCA, for the infringement to have existed beforehand. Secondary liability will come about in such a case by the act of cooperating in, contributing to or obtaining financial gain from the infringement. The activity addressed by this questionnaire, i.e., linking to content that had previously been made available to the public by the copyright holder without restrictions, has been considered by the CJEU as a non-infringing activity, and so in the absence of direct infringement there cannot be secondary infringement either.

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?

Striking an adequate balance between the countless interests at play in the field of copyright on the Internet is becoming increasingly akin to an impossible dream.

Spain has taken some significant steps, though not exempt from objection and criticism, to arm copyright holders with the necessary tools to try and preserve their rights against linking to works on the Internet, namely:

(i) It has enshrined in its legislation the making available right in line with how that right is regulated in the WCT and in the EU Information Society Directive;

(ii) It has created an administrative safeguarding procedure before the Spanish Copyright Commission, which enables action to be taken against those who offer ordered and classified lists of links to copyrighted works;

(iii) Its Criminal Code considers that information society service providers who offer ordered and classified lists of links to copyrighted works or content are committing an offence;

(iv) It has introduced the concept of indirect/secondary infringement in order to hold those who incite, cooperate in or benefit from infringing conduct liable; and

(v) It has arbitrated a system of preliminary proceedings in the civil jurisdiction in order to identify information society service providers or users regarding whom there are grounds to believe that they are directly or indirectly making copyrighted works available.

Each of those instruments is nevertheless subject to a set of requirements that do not always make it easy to put them into practice. On some occasions, this involves imposing a certain number of visitors to the website in Spain, or measuring the number of works that can be accessed; on other occasions, there must be an intention of obtaining direct or indirect financial gain; sometimes it is necessary for the conduct to be carried out in the awareness that it is unlawful.

There is no doubt that these restrictions stem from the lawmaker's reverential fear of obstructing the very development of the Internet and of destroying linking as a basic tool in that regard. Whether or not this regulation has struck the sought after balance between the interests at stake is something that depends on the perspective from which the issue is viewed. However, it can be said that since the AIPPI is an Association whose name refers to the "protection" of "intellectual property" rights, this report can only be considered from the standpoint of the rightholders themselves and, as far as they are concerned, that balance is far from being achieved.

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:

Above and beyond the virtues and deficiencies of Spanish law on the subject of linking, it is clear that strengthening or weakening the rights of copyright holders essentially depends on how the subject is addressed in EU law and case-law.

In that sense, the *Svensson* judgment has as many bright spots as it has shadows, which suggests that the boundaries and contours of CJEU case-law are far from being defined and could even be reconstructed with each new finding (without going any further, in C-160/15, judging from the *mistaken* conclusions issued by the Advocate General of late).

While virtually nobody dares to question the essential core of this judgment (classification of linking as an act of making available and thus of communication to the public), alarm bells have sounded against the requirement introduced *ex novo* by the Court in order for an act of this nature to be dubbed *unlawful* and therefore *prohibited* (the reference to the “new public”).

It is clear that no country belonging to the European Union will be able to escape the effects of the CJEU’s evolving case-law, and that any drift towards an interpretation that is contrary to the rights of copyright holders will only be able to be circumvented by means of a legislative reform on a Community or international level.

### III. Proposals for harmonisation

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

yes

Please explain:

There would appear to be no doubt that harmonisation in an area of such international magnitude is not just desirable but also essential.

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 act of linking *per se* -leaving aside the various forms of linking that shall be specified later- must be considered as an act of making available and thus an act of communication. The *Svensson* judgment has prompted almost unanimous applause in that regard.

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

yes

Please explain:

Insofar as it implies making the work available to an indeterminate and large number of people, the act of linking must be considered as an act of communication “to the public”. The *Svensson* judgment does not merit reproach on this point either.

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:

Assuming that the act of linking is an act of making available which entails the communication of the

work to the public, linking, as is the case with any other act of exploitation, must require *the consent* of the copyright holder. *Where no consent has been granted*, linking infringes the right *unless any exceptions or limitations apply*.

It is here where the Svensson judgment is most controversial. It does not seem that the reference to the fact that the act of linking only infringes the right if the owner of the website has put in place technical measures to restrict free access to the content (because it is then understood that the public targeted by the link is a “new public”) can be simply accepted.

Regardless of the position taken in that regard, it is necessary to bear in mind the following:

(i) Neither the Berne Convention nor the WIPO Treaty provide for a similar requirement.

(ii) This requirement is tantamount to considering that there is an implied licence where content is uploaded to the Internet without the establishment of technological measures to restrict public access.

(iv) A general presumption of consent is tantamount to introducing an exception or limitation on the making available right without the necessary legislation to cover it.

(v) This case-law interpretation turns the *right* to put in place technological measures designed to protect copyright into an *obligation*, the breach of which deprives the holder of the very right to be protected.

It is paradoxical that EU law considers the removal or neutralisation of the technical devices used to protect works as a copyright infringement, but now denies holders of the very rights in their work if they refrain from using such devices.

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:

There is a certain consensus among the scientific community when it comes to treating surface links (hyperlinks) differently from deep links (deep linking, framing or embedding). In the case of hyperlinks, an act of making available does not even occur (because accessing the work calls for a second click that is carried out on the original linked website), and the exploitation of the work by its holder is not affected either (since when users are redirected to the starting page of the linked website, they can also access the advertising elements off which the site feeds).

On the contrary, in the case of links that direct users straight to the work (deep linking, framing or



embedding), there is no doubt that the work is being made available, and likewise none as to the potential harm to the copyright holder. Redirecting users to a website containing works is not the same thing as redirecting users to specific works hosted on the website.

What is more, it is this distinction which enables the various interests involved to be reconciled fairly, allowing for the natural development of the Internet.

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:

The establishment of deep links (deep linking”, “framing” and/or “embedding) to works on the Internet without the rightholder’s consent, and without it being possible to apply any of the exceptions or limitations provided for by law, should be considered as *direct* infringement insofar as whoever carries out the linking is responsible for making the work available and communicating it to the public.

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:

From a strictly lawful perspective, where a work is put on the Internet by its holder or with that party’s consent, there is no implied consent for that same content to be subsequently communicated to the public. Implied licences of this kind, inasmuch as they are limitations on the holder’s rights, should be regulated in the law rather than acknowledged in case-law. It should be established that the prohibition on linking does not alter the classification of the unlawful act.

In that regard, affixing symbols or notices referring to the existence of copyright does not, under international law, constitute a *requirement* for the creation of the right, but rather a *faculty* that the rightholder has in the event that the infringer tries to plead ignorance. Not making use of a faculty that the law places at the rightholder’s disposal cannot constitute grounds for the loss of the right.

From the perspective of the functioning of the Internet, however, it seems reasonable to believe that an express prohibition on the act of linking -i.e., a statement whereby the link must have the rightholder’s explicit consent- must be displayed in a visible manner on the website. The principle of legal certainty in an environment such as the Internet could imply that what is not prohibited is allowed.

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:

In an interpretation of the making available right that departs from the Berne Convention and the WCT, where there is no “new public” requirement such as the one laid down by the CJEU in *Svensson*, limiting public access to works uploaded to the website using technological protective measures should not be relevant for the purpose of the assessment of infringement.

Technological measures for the protection of the work are an instrument to guarantee copyright protection, and circumventing those measures constitutes infringement *per se* of the right. The incorporation of such measures cannot become an obligation for the rightholder or a requirement for the very creation of the right. Please note that since Berne (Article 5.2), the enjoyment and exercise of copyright shall not be subject to any formality.

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 works have been uploaded without the copyright holder’s consent, linking would constitute an infringement *in any case* regardless of any circumstances. The *original* unlawful nature of the act vitiates any subsequent exploitation of the work. Otherwise, unlawful conduct would be successively validated and its harmful effects would be multiplied.

Let us consider a scenario where the link redirects to a *pirate* website that grants free, unrestricted access to its content. An *ab absurdum* interpretation of the *Svensson* judgment would lead it to be held that linking to that website is not a prohibited act of making available since the public is not new, as access to the linked website was not restricted.

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:

The notion of “new public” coined by the CJEU in the *Svensson* judgment introduces an exception or limitation on the making available right that is not provided for in the Berne Convention, the WCT or in the Information Society Directive. Unless there is a legislative reform on an international and/or Community level that expressly introduces a limitation of that nature, infringement of the making available right should not depend on whether the act of unauthorised communication of the works is directed at a “new public”.

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:

The establishment of access restrictions should not influence the consideration of linking as an act of making available and thus of communication to the public.

In any event, the inclusion of warnings by the owner of the website, expressing the need for authorisation in order to be able to link, should suffice in order for the linking to be considered as an infringement of the right.

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

It is for the international and/or Community legislature, rather than the CJEU or national courts, to establish a clear legislative framework for the making available right and to define it in respect of the use of links on the Internet.

Despite the rich casuistry and the fact that the possibility of finding something that fits all current or future hypotheses is extremely unlikely, there are some parameters that should not raise too many reservations:

(i) It is undisputed that surface links (hyperlinks) do not in themselves constitute acts of making available; nor do they pose any threat to copyright holders except in cases where the work has not been made available on the Internet by the rightholder or with that party's consent.

(ii) Following the *Svensson* judgment, there is likewise no debate as to the fact that deep links (deep linking, framing or embedding) constitute acts of making available and acts of communication to the public.

(iii) It is also clear, following *Svensson*, that if the owner of a website has put in place measures to restrict access to the work, then linking is an act of communication to the public and thus an infringement of the right, regardless of whether or not the concept of "new public" is followed.

(iv) It can be inferred from the *Svensson* judgment itself that at least two other scenarios involving unauthorised linking merit being classed as infringing, namely: where the rightholder has withdrawn his/her consent and subsequently restricted access to subscribers or buyers; and where the rightholder has withdrawn the actual work so that it can no longer be accessed.

(v) The problem is therefore limited to cases in which the rightholder makes a work available to the public on the Internet without putting in place any access restrictions. Considering that by doing so the rightholder is granting an implied licence for subsequent linking is what, from the perspective of those who champion copyright protection, could merit reproach.

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

The perspective from which we have replied to the third part of the questionnaire can be none other than that of the copyright holders themselves. It is not without reason that the AIPPI is an Association whose initials refer to the "protection" of these rights.

## Summary

Spanish law regulates the making available right in keeping with Article 8 of the WIPO Copyright Treaty (WCT). Since Spain is part of the European Union, the Spanish courts are obliged to interpret the making available right in line with the provisions of the CJEU's *Svensson* judgment.

The AIPPI's Spanish group nevertheless considers that it is the international and/or Community legislature, rather than the CJEU or national courts, which must establish a clear legislative framework for the making available right and determine the scope of that right in view of the use of linking on the Internet.

Whilst understanding the current situation of the Internet, the Spanish Group expresses its concern at the adverse impact of the findings of the *Svensson* judgment on copyright holders, and proposes and opts for an interpretation of the making available right that preserves the exclusive rights of the weaker party, i.e., the holders of such rights.

The perspective from which we have replied to the third part of the questionnaire can be none other than that of the copyright holders themselves. It is not without reason that the AIPPI is an Association whose initials refer to the "protection" of these rights.