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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 Law of the Republic of Latvia (hereinafter – “**CL**”) in Article 15 (Economic Rights of an Author) includes part 1, point 7, which sets forth that author, has exclusive right to make the work available to the public by wire or by other means, so that it is accessible in an individually selected location and at an individually selected time. The same is provided for the author of a computer program (part 2, point 2 of said Article) and database (part 3, point 3 of said Article).

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:

There are no specific regulations on linking in the CL. However, such situation would be decided in

accordance with the case law of the Court of Justice of the European Union (hereinafter – **CJEU**).

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

no

Please explain:

There are no specific provisions in the CL. However, such situation would be decided in accordance with the case law of the CJEU.

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 situation would be decided in accordance with the case law of the CJEU.

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)?

Judgment of 13 Feb 2014, C-466/12 (*Svensson*) provides that Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as there is no new public.

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:

There are no specific provisions in the CL. But in accordance with the case law of the CJEU the answer is no.

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:

There are no specific provisions in the CL. But in accordance with the case law of the CJEU the answer is no.

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:

There are no specific provisions in the CL. But in accordance with the case law of the CJEU the answer is no.

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:

There are no specific provisions in the CL. But we believe that in accordance with the case law of the CJEU the answer would be no.

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:

There are no specific provisions in the CL. But in accordance with the case law of the CJEU it is likely that the answer would be yes as the work will thus be communicated to a new public.

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:

There are no specific provisions in the CL. We believe that the answer would not be any different as the person providing hyperlinking may not know that the work has been uploaded illegally. Similar case is pending before CJEU.

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:

There are no specific provisions in the CL. But in accordance with the case law of the CJEU the answer is yes.

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?

no

Please explain:

Local law does not recognize indirect or secondary copyright infringement.

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

N/A

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?

There are no specific provisions in the CL on linking. However, such situation would be decided in accordance with the case law of the CJEU.

Communicating to the public of works protected by the copyright is an infringement (Article 68, part 1, point1), and right holders have the right to require that the illegal activity is terminated (Article 69, part 1, point3).

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:

We believe that such aspects will be dealt by the CJEU.

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:

Yes. It is also the current case law of CJEU.

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

yes

Please explain:

Only if by linking the work is made available to the new public. It is also the current case law of CJEU.

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:

Only if by linking the work is made available to the new public. It is also the current case law of CJEU.

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:

Equally due to the reasons explained in the paragraph 14 of the guidelines (as all of these forms of linking, the content of the second webpage containing the copyrighted work is not transmitted from the server that stores that second webpage to the server that stores the first webpage containing the link. Rather, the content of the second webpage is transmitted directly to the browser of the reader reading the first webpage. In other words, it is the user's browser that "assembles" the shown webpages and establishes a connection with both the first webpage and the second webpage simultaneously).

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?

no

Please explain:

N/A

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:

There are no specific provisions in the CL. However, we believe that the answer would not be any different, because unilateral prohibition by the right holder may not broaden his or her scope of rights, if the applicable law explicitly does not provide for such option.

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:

It is also the current case law of CJEU. As a result of it the work is made available to everyone although its accessibility was restricted originally to certain part of public, therefore such actions make the work available to new public to which the right holder has not given the consent to make the work available.

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:

There are no specific provisions in the CL. We believe that the answer would not be any different as the person providing hyperlinking may not know that the work has been uploaded illegally. Similar case is pending before CJEU.

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:

es. The concept of new public is developed by the case law of the CJEU.

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?

yes

Please explain:

Only if it could be established that under normal course of events such content could not have become available to all members of public.

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

In recent years use of content by means of internet has become more and more common - Internet TVs, radios, youtube and other services on demand etc. We believe that existing remuneration mechanisms do not work in favour of right holders. In our opinion more effective and easily applicable remuneration system shall be developed and implemented. Therefore, we believe that the discussion on development and implementation of a "culture access fee" shall be continued.

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

Summary

In the light of the above provided answers, it shall be acknowledged that there are no specific provisions in the CL, however, for all unclear situations CJEU may provide its interpretations. Nevertheless, harmonization is preferable in order to achieve greater predictability.

We are of the opinion that in certain situations use of certain hyperlinking technics like embedding or deep framing may be detrimental to the interests of authors. It is even more so when the protected work has been uploaded without permission of a right holder or when there has been a circumvention of technological measures. Therefore, we believe that the discussion on development and implementation of a “culture access fee” shall be continued. It shall be also discussed whether the application of the “blank type levy” has not become outdated with the continuous development of new means of data carriers and change of users habits. Maybe a “culture access fee” could be more effective and even replace the “blank type levy”.