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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 author's making available right according to Article 8 of the WIPO Copyright Treaty (WCT) was adopted into the Swiss legislation in 2008 by virtue of Article 10(2)(c) of the Federal Act on Copyright and Related Rights (Copyright Act, CopA)<sup>[1]</sup>. According to this Swiss provision, the author has the exclusive right to make available his work "in such a way that persons may access it from a place and at a time individually chosen by them". The wording of the Swiss provision corresponds largely to the one in Article 8 WCT. However, it is worth noting that the Swiss version, unlike the WCT original, does not include the element "to the public" and replaces WCT's "members of the public" with "persons".

<sup>[1]</sup> Article 10(2)(c) CopA states: "[The author of has the right, in particular:] to recite, perform or present a work, or make it perceptible somewhere else or make it available directly or through any kind of medium in such way that persons may access it from a place and at a time individually chosen by them". See for an English full text version of the CopA.

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?

yes

Please explain:

See response to Q1 above.

- 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 Swiss legislation itself does not provide an answer specifically to this question and there is no case law of the Federal Supreme Court or any other Swiss court providing respective precedent.

Nevertheless, there is a general consensus in legal doctrine that, under Swiss law, the act of providing a surface link does not qualify as a "communication" of the copyrighted work<sup>[1]</sup>. On a straight-forward level, this outcome is justified occasionally by an analogy to the undisputed perception that putting up a billboard poster that advertises a concert has no copyright relevance even if at the advertised concert copyright protected works are performed<sup>[2]</sup>.

More in-depth and specifically with regard to the making available right, Swiss scholars follow different approaches to support this conclusion. It is interesting to note that these approaches have not been influenced substantially by the respective landmark decisions of the ECJ<sup>[3]</sup> (interesting because the ECJ's jurisprudence, although not binding for Switzerland as a non-member state, in general has an impact at least to the academic discussions in Switzerland). Most of the Swiss commentators rather follow one of the two – different, but not excluding – lines of argumentation that are outlined below:

(1) One line of thought has its roots in the – undisputed – perception that the making available right according to Article 10(2)(c) CopA focusses on the actions that are necessary to make a work accessible (e.g., on an internet platform) while it does not comprise the actions performed by the user accessing the work<sup>[4]</sup>. Thus, according to this opinion, setting a link without having the control or any other influence over the initial communication of the work may not be considered as an act which falls under the making available right, as linking always remains an action distinctly downstream from making the work accessible<sup>[5]</sup>. Also from a technical point of view, it is argued that any form of link just refers to a work which has been made available elsewhere on the web by or under the control of the copyright holder<sup>[6]</sup>. Consequently, according to this opinion, providing a user-activated hyperlink to the starting page of a website to which the work has been uploaded would not be considered as a "communication" of the copyrighted work.

(2) The before mentioned arguments have been refined by other scholars in order to further isolate the essence of the actions that occur when a work is made available in the sense of Article 10(2)(c) CopA. Such analyses have shifted the focus from the question who has actual control about the (initial) communication of the work to the question whether the creator of a website communicates the works that are linked on his website independently from their initial communication. Thus, according to this opinion (2), the decisive question is whether the actions of the link-provider lead to what is often referred to as an "adoption of a work" within its own website<sup>[7]</sup>. The "adoption" criterion itself is inspired by foreign jurisdictions, in particular from German law<sup>[8]</sup>. Applied to a user-activated hyperlink referring to the starting page of a website to which the work has been uploaded, also this line of thought leads to the conclusion that such kind of link – lacking an adoption of the referenced work – does not qualify as a "communication" of the copyrighted work<sup>[9]</sup>.

In order to justify the consequences of the finding that copyright provides only limited means to control hyperlinks to protected works made available on the internet, it is also stressed in Swiss legal doctrine that copyright holders who, at least in a technical sense, remain in control of the initial online publication of their works, may at their own discretion remove the works or change the URL of their location in order to render respective links moot. In addition, copyright holders have the possibility to control their works and the linking thereto by implementing technological protection measures, which are protected against circumvention by law (Article 39a CopA)[10][#\_ftn10] .

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[1][#\_ftnref1] *Reusser*, L'admissibilité des hyperliens en droit d'auteur, thèse Neuchâtel, Bâle 2014, 129 ff.; *Thouvenin*, BestWater: Der EuGH auf blinder Fahrt in trüben Gewässern, sic! 2015, 704 ff., 709; *Cherpillod*, in: de Werra/Gilliéron (eds.), Propriété Intellectuelle, Commentaire Romand, Basel 2013, LDA 10 N 23; *Salvadé*, Droit d'auteur et technologies de l'information et de la communication, Genf/Zürich/Basel 2015, 59; *Rehbinder/Viganò*, URG: Urheberrecht, 3<sup>rd</sup> edition, Zürich 2008, URG 10 N 19; *Weber*, E-Commerce und Recht, Zürich 2010, 301 ff.; *Hilty*, Zur Zulässigkeit des "Link" - Rechtliches Damoklesschwert für die Internettechnologie?, in: *Weber/Hilty/Auf der Maur* (eds.), Geschäftsplattform Internet III, Zürich 2002, 131; similarly *Hilty/Schmid/Weber*, Urheberrechtliche Beurteilung von "Embedding", sic! 2016, 237 ff., 239.

[2][#\_ftnref2] *Salvadé* (Fn. 3), 59; see also *Reusser* (Fn. 3), 129 f.

[3][#\_ftnref3] See, however, *Hilty/Schmid/Weber* (Fn. 3), 242 f., who tend to tacitly adopt ECJ's "new public" criterion into Swiss law.

[4][#\_ftnref4] *Barrelet/Egloff*, Das neue Urheberrecht, 3<sup>rd</sup> edition, Bern 2008, URG 10 N 22; *Rehbinder/Viganò* (Fn. 3), URG 10 N 19; see also *Hilty*, Urheberrecht, Bern 2011, N 174.

[5][#\_ftnref5] *Rehbinder/Viganò* (Fn. 3), URG 10 N 19, which, however, do not differentiate between the different forms of linking discussed in connection with this study question.

[6][#\_ftnref6] See also *Brunner*, Die Zulässigkeit des Hyperlinks nach schweizerischem Recht, Diss. Bern 2001, 26, 98, 120, Abbildung 6 (published prior to the implementation of the making available right into Swiss legislation).

[7][#\_ftnref7] *Hilty* (Fn. 3), 131; see also AIPPI, Question Q216 B, Switzerland, Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors, 8.

[8][#\_ftnref8] Most recently *Hilty/Schmid/Weber* (Fn. 3), 239 f.; see also *Hilty* (Fn. 3), 131.

[9][#\_ftnref9] *Hilty* (Fn. 3), 131; *Hilty/Schmid/Weber* (Fn. 3), 239; 131; *Reusser* (Fn. 3), 133.

[10][#\_ftnref10] Further, it is noted that, in specific constellations, also actions based on unfair competition may be a useful tool available to website owners to counter potential abuse with links; see AIPPI, Q216 B, 8; *Hürlimann*, Replik: Das Leistungsschutzrecht für Presseverlage, Jusletter 13 May 2013, N 11.

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

no

Please explain:

See response to Q3. The reason why Swiss legal doctrine – at least so far – has not paid much attention to the criterion "to the public" might be linked to the fact that the Swiss version of the making available

right as set forth in Article 10(2)(c) CopA does not include this element (unlike the version in Article 8 WCT; see response to Q1 above).

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 response to Q3. As, under Swiss law, providing a link to the starting page of a website does not constitute an act covered by the making available right or any other of the copyright holder's exclusive rights, there is, in principle, no necessity to exempt such acts by virtue of the theory of an implied licence or the like.

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:

To the extent Swiss scholars differentiate between "classical" surface links and acts of deep linking, they unanimously draw the same conclusions for both types of linking<sup>[1]</sup>.

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<sup>[1]</sup> See, however, *Salvadé* (Fn. 3), 62 et seq., who mentions that deep links, in specific constellations, portray the linked works in a context which is different from the context in which the works have been published before with the author's consent. In the rare constellations where this is the case, the deep link provokes an (indirect) alteration of the work which is covered by the author's integrity right as set forth in Article 11(1) CopA.

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?

yes

Please explain:

Also with regard to framing and embedding, there is no case law which specifically clarifies the relevance of these advanced forms of linking under Swiss copyright law.

One group of scholars argues, primarily based on opinion (1) set forth under Q3 above, that framing and embedding are just additional ways of referring to a work on a website controlled by the right holder<sup>[1]</sup>. Accordingly, framing and embedding are considered to be acts that are not covered by the copyright holders' making available right (because the link-provider has no control over the initial communication of the work).

However, the majority of commentators, mostly along the above presented opinion (2), conclude that framing or embedding a work made available elsewhere constitutes an "adoption of a work". Therefore, according to this prevailing opinion, copyright holders, based on their making available right, have the possibility to object to an integration of their works by way of framing and/or embedding. To further

support this outcome, scholars also refer to the generally accepted perception that Swiss copyright law must be interpreted in a “technology neutral” manner. As a consequence, it must be irrelevant from a copyright perspective whether the protected content that is integrated into a certain website is technically stored on servers that are controlled by the website owner or whether the respective content is stored elsewhere (and integrated by means of framing and/or embedding)<sup>[2]</sup><sup>[#\_ftn2]</sup> .

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<sup>[1]</sup><sup>[#\_ftnref1]</sup> Brunner (Fn. 8), 8, 121; Hürlimann (Fn. 12), N 11.

<sup>[2]</sup><sup>[#\_ftnref2]</sup> Cherpillod (Fn. 3), LDA 10 N 23; Salvadé (Fn. 3), 65; see also Reusser (Fn. 3), 203 ff., who basically comes to the same result (but follows a different line of argumentation).

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:

As in Swiss legal doctrine framing and embedding are generally treated likewise, see answer to Q8 above.

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:

A statement placed on the linked website that prohibits acts of linking does not alter the answers to Q3-Q9.

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:

As regards user-activated hyperlinks to the starting page and deep links, these acts are – according to the scarce doctrine – not considered to be covered by the making available right even though the access to a work has been restricted<sup>[1]</sup><sup>[#\_ftn1]</sup> . As regards framing or embedding, the answers as set out in Q8 and Q9 above do not change as well.

However, technological measures for the protection of works – which typically are used to restrict the access to a work – may not be circumvented as far as these measures are effective (Article 39a(1) CopA). Such a circumvention may be implemented by measures of linking. It shall be noted that, under Swiss law, the circumvention of technological measures for legally permitted uses, such as for private use, is admissible (Article 39a(4) CopA).

[1][#\_ftnref1] *Reusser* (Fn. 3), 185.

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:

The scarce doctrine holds that providing user-activated hyperlinks to the starting page and deep links to pages containing copyrighted works that have been uploaded on the website without the authorization of the copyright holder does not constitute a (direct) copyright infringement[1][#\_ftn1]. As regards framing or embedding, the answers as set out in Q8 and Q9 above do not change as well. Thus, even when assuming that opinion (1) is applicable, framing or embedding does not conflict with the making available right irrespective of whether or not the work has been uploaded on the website with the copyright holder's authorization.

However, since links may facilitate copyright infringement by third parties, in particular the infringement of the making available right, providing links may, in certain constellations, be considered as an indirect copyright infringement (see Q16 below).

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[1][#\_ftnref1] *Reusser* (Fn. 3), 226 f.

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?

no

Please explain:

As set out above (see Q3, Q8 and Q9), under Swiss law, the question whether a work is communicated to a "new public" by means of linking is not of relevance when assessing an infringement of the making available right.

It is argued in Swiss legal doctrine that, under the assumption that the "new public" criterion would be of relevance under Swiss law nevertheless, the perceptible intent of the copyright owner to only address a limited group of people would be decisive (and not the actual existence of effective technical measures that restrict access)[1][#\_ftn1]. Thus, according to this opinion, the work would be deemed made available to a restricted group of people, even though it is, in a technical sense, freely accessible for all members of the public.

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[1][#\_ftnref1] *Hilty/Schmid/Weber* (Fn. 3), 241 f.

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?

See response to Q13 above.

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:

See response to Q16 below.

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

Since links may facilitate or even make possible copyright infringements committed by third parties, in particular infringements of the making available right by means of uploading the work without the authorization of the copyright holder, acts of framing and embedding may be considered as an indirect infringement of the making available right (as far as these acts do not constitute a direct infringement in accordance with opinion [2]; see Q8 and Q9 above)

Further, providing links can constitute an indirect infringement of exclusive rights other than the making available right, especially the reproduction right (as far as the main offence is unlawful and not covered by a copyright exception to such as the exception for private use).

## 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?

In Switzerland, copyright owner's right to control the use of the copyrighted work is backed by Article 26(1) of the Swiss Federal Constitution (BV) as part of the property guarantee. Notwithstanding the constitutional protection of such exclusive right, its effects have to be balanced with other fundamental rights, namely the communication rights of the public that are also protected by the Swiss Federal Constitution[1][#\_ftn1]. These constitutional communication rights grant, inter alia, the right to receive any communication by third parties and to further disseminate such communication.

The Swiss Federal Court held that the guaranteed constitutional rights of both, the copyright owners on the one hand and those making usage of the protected work on the other hand, have to be considered when deciding whether a certain type of use of a work (on the internet) requires the copyright owner's prior consent[2][#\_ftn2].

At this stage, there is no specific decision by the Swiss Federal Court as to the question whether providing a link (see Q3-Q9 above) would be covered by the fundamental communication rights. This might be one reason why there are different opinions in the Swiss legal doctrine (see Q3-Q9 above) on how current Swiss Law strikes the balance between the interests of the public to have access to any type of content with the least amount of restrictions on the one hand and – on the other hand – the copyright owner's interest to remain in exclusive control and/or to receive adequate compensation with

respect to the exploitation of the copyrighted work (according to Three-Step-Test, Article 9(2) of the Berne Convention).

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[1][#\_ftnref1] E.g., Freedom of Information (Article 16 BV), Freedom of Media (Article 16 BV) and Freedom of Commerce (Article 27 BV).

[2][#\_ftnref2] See BGE 133 III 473, consid. 6 - Elektronischer Pressespiegel.

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:

Taking into consideration that it is unclear whether the current Swiss Law – when interpreted by the Swiss Federal Court – strikes an adequate balance between the interests of the public on the one hand and the interests of the copyright owner on the other hand, the question whether the law itself needs to be improved cannot be answered at this stage.

### III. Proposals for harmonisation

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

yes

Please explain:

A harmonisation in this area is desirable as the use of copyrighted works by linking typically affects the legislation of numerous countries because the Internet, as a matter of fact, ignores national boundaries. A harmonization in the field of linking would therefore be an appropriate measure to countervail the fragmentation of applicable laws, as it is today, having also in mind that such a fragmentation is associated with undesirable legal uncertainty for all of the involved stakeholders, including copyright holders, consumers and intermediaries. Harmonised rules, in contrast, would improve copyright holders' possibilities to enforce their exclusive rights and the users' and intermediaries' ability to assess the legal consequences of their behaviour – such as providing links to copyrighted works as set out in the answers to the following questions.

However, the Swiss Group, even after intensive discussions, has not come to a common opinion on how such harmonisation should be designed. In particular, the positions of the Swiss Group's members are divided along the two different lines of thought in Swiss legal doctrine as set forth above (see Q3 above). Accordingly, while one part of the Swiss Group ("Swiss Group [1]")[1][#\_ftn1] is of the opinion that all forms of linking should be treated the same and not be considered an infringement of the making available right (see Q18-21 below), the other part of the Swiss Group ("Swiss Group [2]")[2][#\_ftn2] suggests to differentiate between the different forms of linking (see Q23 below).

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[1][#\_ftnref1] Andreas Glarner, Marc Wullschleger, Christoph Caprez.



[2][#\_ftnref2] Fabian Wigger, Marco Handle, Matthias Gottschalk.

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:

According to Swiss Group (1), all acts of linking should not be considered a "communication" of the work in the context of the making available right as providing a link to a work is an act distinctly downstream from making the work accessible and, therefore, should have no legal significance with regard to the making available right. Also from a technical point of view, this part of the group argues that a link is nothing else than a referral to a work which has been made available elsewhere.

According to Swiss Group (2), also this question is too general to be answered. The different types of linking should be treated differently and, in particular, only some of them should be considered a "communication" of the copyrighted work (see Q23 below).

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

no

Please explain:

For Swiss Group (1), the answer is no; see Q18 above.

According to Swiss Group (2), this question is too general to be answered. As stated above, the different types of linking should be treated differently and, in particular, only some of them should be considered a "communication" of the copyrighted work (see Q23 below).

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:

According to Swiss Group (1), such acts of linking should not constitute infringement of the making available right (see Q18 above).

According to Swiss Group (2), this question is too general to be answered as well. As stated above, the different types of linking should be treated differently and, in particular, only some of them should be considered a "communication" of the copyrighted work (see, therefore, Q23 below).

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?

no

Please explain:

According to Swiss Group (1), the different forms of linking should be treated equally and none of them

should constitute an infringement of the making available right (see Q18 above).

According to Swiss Group (2), the different types of linking require a specific analysis as follows:

### **i. Hyperlinking to the starting page**

As the act of hyperlinking to the starting page of a website does not result in a display of the work on the linking website, the user is required to visit the linked website in order to gain access to the copyrighted work. In other words, the act of hyperlinking is a mere referral to a website where a copyrighted work is accessible. Consequently, such act should not be considered a “communication to the public” of the work and should not constitute an infringement of the making available right.

### **ii. Deep linking**

Although a deep link directly leads to the sub-page where a copyrighted work is accessible, the conclusion remains the same as set out above in relation to the (ordinary) hyperlink to a starting page. At the end of the day, a deep link is nothing more than a referral to a source website where a work can be accessed. Such referral should not be considered a “communication to the public” which means that acts of deep linking should, in principle, not constitute an infringement the making available right as well.

Only under special circumstances, acts of deep linking to a copyrighted work may result in a copyright infringement. Acts of deep linking should be considered a direct infringement of the making available right if the activation of such link directly initiates the download of a copyrighted work made available on a third parties' website as in such cases there is no need to visit the third parties' website to gain access to the work (seen this way, this pattern is more closely related to the situation in case of embedding than to the “classical” setup of a deep link and, thus, should be equally treated).

### **iii. Framing**

The act of framing should be considered a communication since the copyrighted work is displayed directly within the linking website. Users of the linking website can access the copyrighted work directly on this very website; thus, it is not necessary for them to visit the source website to look up the work. As in this case the work is communicated over the Internet through the linking website, such communication should be considered “to the public”. Accordingly, the act of framing should constitute an infringement of the making available right.

### **iv. Embedding**

As an act of embedding leads to a similar result as framing (i.e. to a communication of the embedded work to the public directly within the linking website), the same conclusions as for framing should be drawn also for such behaviour.

### **v. Summary**

According to Swiss Group 2, acts of linking should be considered a communication to the public and constitute an infringement of the making available right if the work is directly accessible within the linking website. Such an accessibility of the copyright work directly on the linking website itself has the effect that there is no need for the public to visit the linked website to look up the protected work. According to Swiss Group (2), this is the best manageable indicia that the work has been communicated to the visitor of the linking website. As in the Internet such communication is generally made to the public, the making available right is infringed.

On the other hand, a copyrighted work cannot be considered as communicated to website visitors where such visitors have to look up the linked website in order to access the work. Without a communication of the work, there is no basis for an infringement of the making available right.

This conclusion should be valid irrespective of the technology that leads (or does not lead) to the accessibility of the work on the linked website.

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:

According to Swiss Group (2), the acts of framing and embedding should, in general, constitute a direct infringement of the making available right because the copyrighted work is directly communicated to the public through these acts of linking – meaning that the work is made available straight through such behaviour. In other words, framing and embedding are not acts that merely assist in making available the work but are acts of making available itself.

According to Swiss Group (1), acts of framing and embedding may constitute an indirect infringement of the making available right, in particular, in case the referenced work has been uploaded without the authorization of the copyright holder (see Q25 below).

Further and according to both parts of the Swiss Group, acts of deep linking should constitute an indirect copyright infringement in constellations where (direct) copyright infringements committed by third parties after having accessed the linked websites are enabled or at least facilitated by the act of providing deep links to these third parties. However, it should be noted that such behaviour typically affects other rights than the making available right, in particular the reproduction right (in case of illegal downloading).

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:

According to both parts of the Swiss Group, a statement placed on the linked website that prohibits acts of linking should not affect the answers to Q20–Q24.

In particular, such a statement should not be considered as the basis of a contractual relationship between website holder and visitor that prohibits the latter from acts of linking. The mere visit of the website may not be seen as a consent to a unilateral declaration placed on a website. This is of course subject to access limitations that require the user to explicitly accept the terms of the website holder or, at least, to an information note communicated to each visitor prior to its access to the website's content.

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:

According to both parts of the Swiss Group, a limitation of the public's access to the work should not change the legal situation as set out in Q20–Q24.

For the sake of completeness, it should be mentioned that the protection of technological measures

against circumvention could be relevant in this context (see also Q11 above). At least, there is no reason to treat such protection of technological measures differently in the context of linking.

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:

According to Swiss Group (1), acts of framing and embedding should be considered an indirect infringement of the making available right in case the work has been uploaded without the authorization of the copyright holder.

According to Swiss Group (2), the legal situation should not depend on whether the work has been uploaded to the linked website without the authorization of the copyright holder.

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:

Both parts of the Swiss Group agree that the requirement of a communication to a "new public" is not an appropriate one. The assessment of whether a public is "new" would cause serious legal uncertainty due to its vagueness. Such uncertainty would run counter to the actual aim of a harmonization.

According to Swiss Group (2), a distinct criterion asking if the copyrighted work is accessible on the linking website itself is preferable. Thus, the decisive factor on whether an act of linking infringes the making available right should be the accessibility of the work on the linking website itself or – put reversely – the fact that a user is not required to visit the linked site in order to gain access to the work.

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:

As both parts of the Swiss Group agree that the requirement of a communication to a "new public" should have no relevance within the legal assessment of acts of linking, there is no need to differentiate between groups or members of the public by means of the language and content or the top-level domain of the linked website.

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

A harmonization with regard to acts of linking is only reasonable if such harmonization includes all exclusive rights of the copyright holder that are possibly affected by acts of linking. In particular, a harmonization should also address the impact of acts of linking to the copyright holder's reproduction

and retransmission right. By acts of framing and embedding, the reproduction right may be affected, for example, in connection with temporary copies of the copyrighted work that are cached on the device of the visitor of the linking website. The right of retransmission may be affected, for example, by acts of framing or embedding related to the live stream of a TV programme.

Further, a harmonization of the content and scope of the copyright holder's exclusive making available right in the area of linking is only desirable if the limitations of this right are harmonised as well. By doing so, the balance of interests of the right holders and the users/the public, in particular with regard to uses for reporting on current events or for scientific or political purposes, should be addressed.

Last but not least, a harmonization should not be limited to the classic copyright in artistic works but should also cover neighbouring rights, such as the rights of performers, audio/video producers and broadcasters.

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

Summary