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2016 – Study Question (Copyright)

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Linking and making available on the Internet

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National/Regional Group	Uruguay
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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.:

Protection of author's making available right is expressly provided for by article 2 of Uruguayan Copyright Law Nº 9.793, dated December 17 1937, as amended by Law Nº 17.616 dated January 10, 2003 (the "Copyright Law"). Uruguay also approved the WCT by Law No. dated .

Article 2 of the Copyright Law provides that:

- authors have the exclusive right to communicate or make available to the public works in any form or by any process.
- in general, communication to the public includes any act through which the work is put within reach of the public, by any means (wire or wireless) or process, including the making available to the public of the works, in such a way that members of the public may access to these works from a place and at a time individually chosen by them.

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:

n/a

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 provisions expressly governing linking in Uruguayan Law.

There are also virtually no Court decisions where the linking issue has been analyzed in depth as to whether it constitutes or not a case of "communication", and more specifically of "communication to the public" of the copyrighted work.

As to scholars, they recognize that the issue is arguable, and is yet largely unresolved, but deem that situations should be distinguished, between linking and framing, the first being lawful, and the latter constituting a case of communication to the public.

Again, there are no statutory provisions, and no relevant Court decisions after the 2003 amendment of the Copyright Law.

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

no

Please explain:

Arguable, and unresolved as yet in Uruguay.

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:

N/A. See above responses.

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)?

N/A. See above responses.

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?

yes

Please explain:

See above responses. While scholars have distinguished between linking and framing, no definite position has been taken as to Deep linking and communication to the public or the making available

right.

The aforementioned, without prejudice of the fact that the scenario described may entail other violations of the rights of the copyrights holder, or of other statutory rights.

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:

Due to the fact that framing as described in paragraph 12) would be considered a case of communication to the public of a copyrighted work.

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:

As mentioned above, scholars recognize that the issue is arguable, and is yet largely unresolved, but deem that situations should be distinguished, between linking and framing, the first being lawful, and the latter constituting a case of communication to the public.

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:

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:

See above responses.

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:

See above responses.

In addition to the doubts in Uruguay as to whether this would constitute or not an act of communication to the public, this could also involve a case of a contributory infringement by the website which provides the hyperlink, in case it were found that the linking constitutes in fact an act of communication to the public of the work.

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:

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:

N/A

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?

N/A

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:

It would be desirable that the law clarifies the linking issue, and how each of the different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) should be treated.

III. Proposals for harmonisation

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

yes

Please explain:

Yes, harmonization in this area would be desirable. Yet, as already mentioned, this issue is not foreseen in Uruguay's current law, and also has not been subject of further in-depth consideration by case law. Since the issue is still largely undeveloped in our jurisdiction, it would be too early to consider harmonization before a position is adopted by the legislators and the Judiciary in Uruguay.

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:

See above response.

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

yes

Please explain:

See comments in number 19.

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:

See comments in number 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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:

See comments in numbers 3, 18 and 19.

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

See comments in numbers 3, 18 and 19.

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

N/A

Summary