

ASSOCIATION INTERNATIONALE
POUR LA PROTECTION
DE LA PROPRIÉTÉ INTELLECTUELLE

INTERNATIONAL ASSOCIATION
FOR THE PROTECTION
OF INTELLECTUAL PROPERTY

INTERNATIONALE VEREINIGUNG
FÜR DEN SCHUTZ
DES GEISTIGEN EIGENTUMS



Linking and Copyright

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Topics

- I. Who is AIPPI?
- II. Linking and copyright: What are the issues?
- III. AIPPI World Congress Milano 2016 –
linking and making available
- IV. The AIPPI Resolution

I. Who is AIPPI?

- The International Association for the Protection of Intellectual Property (AIPPI)
 - The World's leading international organization dedicated to the development and improvement of legal regimes for the protection of intellectual property (IP).
- Currently over 9000 Members, representing more than 100 countries.

I. Who is AIPPI?

- AIPPI's objective:
 - working for the development, expansion and improvement of **international and regional treaties and agreements** and **national laws** relating to intellectual property.
- AIPPI's work:
 - conducting **studies** of existing national laws **and proposing** measures to achieve harmonization of these laws on an international basis.

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- AIPPI's work:
 - conducting **studies** of existing national laws **and proposing** measures to achieve harmonization of these laws on an international basis.
- Where appropriate, AIPPI intervenes with submissions before major courts and legislative bodies to advocate for strengthened IP protection.

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The Working Methods of AIPPI

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 - (3) The Reporter General team prepares **Guidelines** which the National Groups follow in preparing their individual National Reports.
 - (4) **National Reports** are prepared by all interested National Groups.
 - (5) The National Reports are then synthesized by the Reporter General team into a **Summary Report**.

I. Who is AIPPI?

The Working Methods of AIPPI

- These National Reports and the Summary Report are the basis to prepare a **Draft Resolution** discussed at AIPPI World Congress.
- After group & plenary discussion, amendments & voting: adoption of **Final Resolution**
- Over 700 Resolutions have been passed by AIPPI. With those Resolutions, AIPPI has had a relevant influence on the development of international IP Law.

I. Who is AIPPI?

The Working Methods of AIPPI

- AIPPI's **Resolutions** are published in **English, French and German** and sent to WIPO, WTO and patent and trade mark offices around the world.
- **Standing Committees** guarantee that AIPPI is promptly informed about current developments in specific fields and monitor the long range projects of international legal development.

I. Who is AIPPI?

The Working Methods of AIPPI

- **AIPPI** has regular high level contacts with international and regional institutions. In particular, AIPPI has **annual meetings with the Director General of WIPO.**

I. Who is AIPPI?

- AIPPI World Congress Milano 2016 –
One topic: Linking and making available on the Internet
- (1) Study Question “Linking and making available on the Internet”
- (2) Study Committee formed
- (3) Guidelines
- (4) 41 National Reports were prepared by interested National Groups
- (5) National Reports synthesized into a Summary Report
- (6) Resolution

II. Linking and copyright: What are the issues?

- Linking on the internet means a reference to data on another page that the reader can directly follow either by clicking, tapping, or hovering.
 - Example:
<http://www.wipo.int/policy/en/sccr/>

II. Linking and copyright: What are the issues?

- Different scenarios:
 - (a) hyperlinking to starting page;
 - (b) hyperlinking in the form of deep linking;
 - (c) framing; and
 - (d) embedding
- **Central question: whether and under what circumstances such an act of linking constitutes use of the right of communication to the public concerning the copyrighted work, where the link leads**

II. Linking and copyright: What are the issues?

- **WIPO Copyright Treaty 1996**
 - **Article 8 Right of Communication to the Public**

*“Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing **any communication to the public** of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”*

II. Linking and copyright: What are the issues?

- Linking = **Communication to the public?**
 - (1) Communication?
 - (2) To the public?
 - If yes, in case of unauthorized link & no applicable exception or license = direct liability
 - If no, in case of link to a copyrighted work illegally on the internet = indirect copyright infringement?

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **Europe: Linking to lawfully published content**
(CJEU C-466/12 – **Svensson**)
 - Linking to works **freely available** on another website **with the consent of the right holder: communication to the public (-)**
 - No new public reached
 - Linking which **circumvents restrictions for access** by the public: **communication to the public (+)**
 - It reaches a new public
 - Access restriction examples: Paywall, Session-ID

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **Europe: Linking to unlawfully published copyrighted content (CJEU C-160/15 – GS Media/Sanoma)**
 - Linker **does not know and cannot reasonably know** that the linked content was published unlawfully:
communication to the public (–)
 - Linker **knew or ought to have known** that the linked content was published unlawfully:
communication to the public (+)
 - Note: rebuttable assumption of knowledge where linker has profit motive

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- Legal status around the globe
 - **Europe: Linking to unlawfully published copyrighted content (CJEU C-160/15 – **GS Media/Sanoma**)**
 - Reception in EU member states, e.g. Germany by German Federal Supreme Court (**BGH**) of 21.9.2017, I ZR 11/16 – **Thumbnails III**
 - Application of CJEU case law to search engines: (+)
 - Search engine liable, if “knew or ought to have known” that link went to illegal content
 - But: rebuttable assumption of knowledge (where linker has profit motive) does *not* apply to search engines

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **Japan:**
 - Osaka District Court June 20, 2013, 2011 (Wa) 15245
 - Link as such no sufficient communication
 - Also no assisting a third party (uploader) in infringing copyright, if unclear if upload was illegal and takedown of link after notice by rightholder

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **New Zealand:**
 - No case law and no specific statutory law yet
 - But New Zealand likely to follow EU approach

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **Turkey:**
 - No case law yet
 - But likely linking would be considered a “communication” and linking to illegal content would be considered a direct infringement of the right of communication to the public.

II. Linking and copyright: What are the issues?

- Legal status around the globe
 - **USA:** Does linking infringe the **display right** in case link goes to unlawfully published copyrighted content
 - 9th Circuit *Perfect 10 v. Google, Inc.* (416 F Supp. 2d 828 (C.D. Cal. 2006)):
 - **Server test**, i.e. the display right only used if copy stored on own server
 - US District Court Southern District New York: 15.2.2018 – **Goldman v. Breitbart**
 - Embedded link of Breitbart to photo illegally public on Twitter
 - Display right infringed by Breitbart, although no copy on own server, active role of Breitbart as embedder

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

- See for all the materials for Milano 2016
 - Study Question
 - Guidelines
 - National Reports
 - Summary Report
 - Resolution

<http://aippi.org/committee/linking-and-making-available-on-the-internet/>

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

- **41 Group Reports received in total**
 - Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Malta (Independent Member), Bosnia/Herzegovina (Independent Member), Cyprus (Independent Member), Italy, Japan, Latvia, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom (UK), United States of America (US), Uruguay, Venezuela

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Communication:

- Whether linking should be considered as
“communication”

- Yes (40%)

- No (25%)

- Depend on form of linking (25%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

To the public:

- Whether communication to “new public” should be necessary for finding infringement

- Yes (60%)

- No (40%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Different forms of linking:

- Whether different forms of linking should be treated differently (hyperlinking to the starting page, deep linking, framing or embedding)
 - Yes, at least to some extent (60%)
 - No (35%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Access restrictions:

- Whether access restriction to the work should be relevant
 - Yes (65%)
 - No (35%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Access restrictions:

- Whether a statement that prohibits linking should be relevant
 - Yes (15%)
 - No (85%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Work made available without access restriction:

- Whether a link to a work made available on the Internet without any access restriction should be considered as no communication to the public
 - Yes (85%)
 - No (15%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Results of the study questions

Work uploaded without authorization:

- Whether the fact that a work was uploaded without the authorization of the copyright holder should be relevant
 - Yes (65%)
 - No (35%)

III. AIPPI World Congress Milano 2016 – Linking and making available on the Internet Summery to linking and making available on the Internet

Direct or indirect infringement?

- Type of infringement, if any infringement is to be found:
 - ca. 40% of the Groups are of the view that direct infringement should be found,
 - ca. 15% of the Groups are of the view that indirect infringement should be found.
 - ca. 20% of the Groups are of the view that either direct or indirect infringement should be found, depending on the case.

IV. The AIPPI Resolution

AIPPI resolves that:

1) Providing a hyperlink to a copyrighted work that has already been made available to the public on the Internet with the authorization of the relevant rights holder or in otherwise lawful circumstances should not, by it self, constitute a further act of making such a work available to the public.

IV. The AIPPI Resolution

AIPPI resolves that:

- 1) Providing a hyperlink to a copyrighted work that has already been made available to the public on the Internet with the authorization of the relevant rights holder or in otherwise lawful circumstances should not, by it self, constitute a further act of making such a work available to the public.
- 2) Further, providing a hyperlink to a copyrighted work that has already been made available to the public on the Internet lawfully should not, by itself, constitute a communication of such work to the public.

IV. The AIPPI Resolution

AIPPI resolves that:

3) For the purposes of paragraphs 1) and 2), no distinction should be made between a hyperlink reference to a starting page of a second website or a deep link reference to another page within this second website.

4) If a copyrighted work is made available lawfully on a webpage without any access restrictions, such work should be considered as having been made available to all members of the public that have access to the Internet.

IV. The AIPPI Resolution

AIPPI resolves that:

5) The act of placing a framed link or an embedded link should constitute a communication to the public, at least when the manner in which the work has been framed or embedded misleads the public into believing that the party engaging in the framing or linking is the source of the work.

IV. The AIPPI Resolution

AIPPI resolves that:

6) A mere statement on the second website that prohibits linking should not, by itself, make placing a link to the second website on the first website an infringement of copyright by the linker.

IV. The AIPPI Resolution

AIPPI resolves that:

7) The act of placing a hyperlink or deep link on the first website to the second website that contains a copyrighted work that has been posted to the second website unlawfully, should not by itself constitute an infringement of copyright. However it may attract liability where the linker:

- (a) knows or ought to have known that the copyrighted work has been uploaded without the consent of the rights holder;
- (b) provides an inducement or authorization to copy or display or communicate to the public the unauthorized work; or
- (c) contributes to the copying or communication to the public or display of such work.

IV. The AIPPI Resolution

AIPPI resolves that:

8) Linking to a copyrighted work which circumvents a technological restriction, in particular but not limited to a technical protection measure, pay wall or a password protection on a website, should attract liability under copyright law. Additionally, liability pursuant to other laws relating to the violation of such restrictions may arise.

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