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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 Hungarian Copyright Act =HCA, Act 76 of 1999, as amended provides for the making available right as a subcategory of the general economic right of communication to the public (hereafter: C2P).

§ 26 (8) authors:

The author shall also have the exclusive right to communicate his work to the public in a manner other than broadcasting or the means referred to in Paragraph (7) and to authorise another person therefor. This right shall in particular cover the case when the work is made available to the public by cable or any other means or in any other manner in a way that the members of the public can choose the place and time of access individually.

§ 73 (1) e) performers:

Article 73 (1) Unless otherwise provided for by this Act, the performer’s consent shall be required for:

e) making his performance available to the public by cable or any other device or in any other manner in a way that the members of the public can choose the place and time of access individually.

§ 76 (1) c) sound recording producers:

Unless otherwise provided for by this Act, the consent of the producer of a phonogram shall be required for the phonogram to be:

c) made available to the public by cable or any other means or in any other manner in a way that the members of the public can choose the place and time of access individually.

Art 80 (1) d) broadcasters:

Unless otherwise provided for by this Act, it shall be subject to the consent of the radio or television organisation for its programme to be made available to the public by cable or any other means or in any other manner in a way that the members of the public can choose the place and time of the access individually.

§ 82 (1) c) film producers (neighbouring right)

The consent of the film producer [Article 64(3)] shall be required for the film to be made available to the public by cable or any other means or in any other manner in a way that the members of the public can choose the place and time of access individually.

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?

yes

Please explain:

It would be regarded as a communication, although the current HCA does not include a term: communication, only C2P as a comprehensive term, that is not broken down into communication (active intervention) and the term of public. Under the HCA a performance shall be deemed public ”if it occurs in a place accessible to the public or in any other place where people other than the user’s family and acquaintances gather or may gather”. This TRIPS-rooted rule can be applied via analogy to C2P. Still, following the ratio decidendi of Svensson, the court would be compelled to follow the legally unfounded approach of the CJEU.

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

no

Please explain:

Please see the previous answer. Under the current HCA it would be a C2P, however the court has to follow the Svensson decision, and therefore it would refuse to consider the act as described above as a C2P.

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:

It would not be an infringement since the court would be compelled to follow the Svensson decision.

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)?

The legal basis would be very simple. The act is not a relevant restricted act (use in terms of copyright) pursuant to the Svensson decision. The court would not take the time and effort to find a theoretical basis for the denying of the infringement.

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:

Since Svensson comprises all linking technology, there is no way to make a distinction among the types of hyperlinking.

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:

Since Svensson comprises all linking technology, there is no way to make a distinction among the types of hyperlinking.

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:

Unfortunately it would not be different. Since Svensson comprises all linking technology, there is no way to make a distinction among the types of hyperlinking.

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 answer is very difficult. Since the court would follow Svensson, the hyperlinking does not qualify as a restricted act, since no “real” access restriction is applied on the website. As a result, neither the holder of copyright nor the holder of the rights in the website have an exclusive right to prohibit the hyperlinking.

Still, we are of the view that such a statement should be regarded as a category of lawful restriction of the access to the content of the website. Since the ratio decidendi of Svensson is based on the unrestricted availability of the protected content on the website in question, there is room for the interpretation of the various types of the restriction of the availability.

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:

Since the ratio decidendi of Svensson is based on the unrestricted availability of the protected content on the website in question (entire public), there is room for the interpretation of the various types of the restrictions of the availability. We are of the view that all types of restrictions, from the mere registration, via the claiming of a remuneration and ending with a TPM offer a basis for the court to consider the hypelinking as a restricted act. The claiming of a remuneration is an accepted restriction after the C-More Entertainment decision, where the national court withdrew its questions addressed to the CJEU being of the view that the claim of a remuneration is a restriction of the access.

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:

Absolutely different. In such case there is no lawful C2P on the website. The uploading is an infringement. As a consequence the provider of the hyperlink is a contributor to the infringement. That is another issue, what kind of sanctions can be applied against the provider of the hyperlink.

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:

We have no relevant case law in this regard (there are personality right civil law cases only). But, the court would follow Svensson, and would be enforced to follow the "first public" and "new public" requirements of the CJEU.

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?

Since we do not have a relevant case law, we have to make educated guesses. The rightholder would attempt to convince the court that if the language of the website is Hungarian, it is intended only to the Hungarian members of the public. We don't know whether the court would accept such an argumentation. On the other hand given the fact that any further use of the link would make the Hungarian content in the same way only available in Hungarian, practically it would be the same public, therefore the argument might be irrelevant.

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:

Please see our answer to Q 12.

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

The HCA does not provide for such forms of infringement. It simply transposes the IP Enforcement Directive of the EU, and the court would apply the following provision:

§ 94 (3) The author may seek the remedy referred to in Paragraph (1)b) [= injunction : inserted by the Hungarian Working Group]against a person whose services are being used in connection with the copyright infringement.

§ 94 (4) The author may seek the remedy referred to in Paragraph (1)d) [requesting of information- inserted by the Hungarian Working Group] against a person who:
(...)
b) was found to be using the infringing services on a commercial scale;
c) was found to be providing on a commercial scale services used in infringing activities;
d) was indicated by the person referred to in Items a) to c) as being involved in the production, production or distribution of the goods or the provision of the services.

(5) In the course of application of Paragraph (4)a) to c), acts shall be deemed to be carried out on a commercial scale if the nature and quantity of the goods or services involved obviously indicate that they are carried out for direct or indirect commercial or other economic advantage. Pending proof to the contrary, the definition of acts carried out on a commercial scale would normally exclude acts carried out by consumers acting in good faith.

(6) The infringer under (...) Paragraph (4) or the person referred to in Paragraph (4) may be obliged, in particular, to furnish the following information:
a) the names and addresses of persons involved in the production, distribution of goods, supply and performance of services affected by the infringement and of possessors of such goods, as well as of wholesalers and retailers involved or intended to be involved in the distribution;
b) the quantities of produced, delivered, received or ordered goods or services affected by the infringement, as well as the price paid or received therefor.

To put it in a nutshell: if the provider of hyperlink acts on commercial scale it will be subject to a limited liability (provision of information+ injunction). If the provider of the hyperlink is a consumer, only the injunction can be applied.

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 is no balance stricken. No matter whether the link is an embedded link provided for commercial purposes or a framing, the rightholder is not in a position to prevent the provision of the link, if it gave consent to the uploading of the protected content without any restriction of access.

(The court practice acknowledges the objective “minimal” liability of the sender of an email including a hyperlink that refers to a content that violates personality rights (BH2013. 266) and an establishment of violation and - if applicable under the circumstances - injunctive relief can be requested.)

This unbalanced situation may urge the rightholders to apply severe access restrictions which are not cost- effective and may deprive the members of the public from the access to the protected content.

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:

We are of the view that there may be two European solutions to the problem.

1. The term of C2P should be restored in compliance with the Berne Convention (ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/Guide-Berne-Convention-wipopub891.pdf, BC 11.4., BC 11.6., BC 11.7., -BC 11.11.). As a result legislation or at least authentic interpretation is required that is able to overrule the erroneous approach of the CJEU that results in the exhaustion of C2P right, although it lacks all legislative basis.
2. As a result all provisions of hyperlinks (no matter, whether surface, deep, embedded or framed links) shall be regarded as acts of C2P.
3. The licensing may only take place via mandatory collective management (statutory one stop shop), and the distribution of royalties shall also be based on proportions defined by legislation.
4. The intermediary service providers including the host provider and/ or the operator of the website shall be held liable for the obtaining of the license and paying the remuneration.
5. The hyperlinks that qualify as acts in compliance with the existing exceptions (citation, illustration of teaching purposes, exceptions for the benefit of press) shall be regarded as applying for hyperlinks as well.
6. All other hyperlinks provided by consumers not for commercial purposes shall be regarded as a new exception.
7. All hyperlinks provided by non-consumers or for commercial purposes shall be regarded as restricted acts.

The other proposed solution can be as follows:

1. The term of C2P should be restored in compliance with the Berne Convention (ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/Guide-Berne-Convention-wipopub891.pdf, BC 11.4., BC 11.6., BC 11.7., -BC 11.11.). It can not be carried out on national level in Europe. As a result legislation or at least authentic interpretation is required that is able to overrule the erroneous approach of the CJEU that results in the exhaustion of C2p right, although it lacks all legislative basis.
2. As a result all provisons of hyperlinks (no matter, whether surface, deep, embedded are framed links) will be regarded as acts of C2P.
3. The licensing may only take place via mandatory collective management (statutory one stop shop), and the distribution of royalties shall also be based on proportions defined by legislation.
4. The intermediary service providers shall be held liable for the obtaining of the license and paying the remuneration.
5. The provision of surface and deep links that require the active intervention of the visitor of the website that offers the hyperlink, shall be regarded as an exception.
6. Embedding and framing shall be regarded as a restricted act, unless the provision of such links is an act of a consumer without any commercial purposes.

III. Proposals for harmonisation

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

yes

Please explain:

It is extremely desirable since the provision of hyperlinks is a per se multiterritorial act.

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:

Please see under 17.

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

yes

Please explain:

Please see under 17.

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:

Please see under 17.

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:

Please see under 17 (the second solution). In the event of framing and embedding the user does not even note, that a linking occurred. The content will appear as if it were a part of the content that is made available on the website where the link is provided.

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:

Direct infringement. Framing and embedding is a clear-cut, intentional C2P, that – in addition – deceives the visitor concerning the origin of the protected content.

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:

The provision of hyperlinks is a C2P per definitionem.

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:

The provision of hyperlinks is a C2P per definitionem.

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:

It does not play any role in the legal qualification of the second act of hyperlinking.

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 new public concept is erroneous and violates the Berne Convention as corroborated by the TRIPS Agreement and the WCT!

Please see our references to the official explanation of the Berne Convention that would bind the EUCJ as well. Instead of the new public one should think in terms of new act of C2P. E.g if a TV set is installed in a pub, and the operator subscribed to an average package of retransmitted programs and the programs of the TV are made perceptible for patrons that all do have the same subscription in their homes, then:

- if we follow the “new public” concept, the operator does not have to obtain a license, because there is no new public. (The operator installs the TV set with a clear profit making purpose!) Or the cable network operator would not have to obtain a license if the territory of its operation were within the footprint of a satellite and the satellite broadcast takes place with the license of the affected copyright holders obtained by the broadcaster. It is clear, that the cable operator does not reach a new public but conducts a business other than the satellite broadcaster. As a result: it is a new communication and this is what matters.
- if we follow the new C2P =new user that communicates concept, which is the only correct approach, the operator of the pub and the cable operator will be obliged to obtain the appropriate copyright licenses.

The provider of the hyperlink is a new user that carries out a separate, new C2P, no matter, whether the protected content was made available on the website referred to by the hyperlink without any restriction. In other words: the initial C2P, and the subsequent C2P-s shall be treated and qualified separately.

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:

It is not relevant. What is relevant, that the provider of the link (a new user) carries out an independent restricted act. Those who use the link, are not identical with those who got access to the content directly via the first webpage.

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

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

Summary

The Hungarian Working Group is of the view that the European Court of Justice (ECJ) is in error in the legal qualification of hyperlinking. The "new public" criterion does not exist in the international regulatory framework (the new use criterion exists, if an act of use is carried out by a person other than the first user), and the ECJ should be bound to the authentic interpretation of the relevant international instrument (Berne Convention). The Hungarian Working Group is of the view that the hyperlinking should be regarded as an independent communication to the public, and the existing exceptions should apply (e.g. quotation, exception for the benefit of the press), and new exceptions should be introduced for the benefit of bona fide consumers who act on a strictly non-profit basis.