



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

REPORT and OPINION

on the making available and communication to the public in the internet environment
– focus on linking techniques on the Internet

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Executive Summary

The exclusive right of “making available” under the WCT and the implementing EU legislation covers the *offering* to the public of a work for individualized streaming or downloading; in addition, where it takes place, the actual transmission of a work to members of the public also is covered, both irrespective of the technical means used for making available. In essence, what matters is that the act (i) is performed by an individual person (ii) directly or indirectly has the distinct effect of addressing the public, irrespective of the tool used by the individual, and (iii) concerns subject matter protected by copyright or related rights.

As applied to hyperlinks, these findings lead to the following conclusions: (i) The making available right covers links that enable members of the public to access specific protected material; (ii) the making available right does not cover links that merely *refer* to a source from which a work may subsequently be accessed.

It is irrelevant whether the link takes the user to specific content on a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website.

It is also irrelevant to the act of offering access whether the work made available through the link is itself infringing: it is the *act* of offering that triggers the making available right, and that act is the same whatever the copyright status of the work that is made available.

There is obviously no *infringement* of the “making available” right where the rightholder's decision whether and under which conditions the targeted content is made available on the internet is respected. In contrast, this means in particular that linking to targeted content infringes the “making available” right if (i) the content is initially made available without the rightholder's consent, or (ii) technical protection measures have been circumvented or (iii) the availability of the content, even if initially disclosed over the Internet with consent, otherwise clashes with the declared or clearly implied will of the rightholder.

Accordingly, courts should not introduce a *general presumption* of the rightholder's consent to *further communication* to the public of what initially has been posted on the Internet with the rightholder's consent, since this would amount to introducing an exception or limitation to the right, while general exceptions to the scope of the “making available” right require

legislative action. This finding does not exclude that a court may be inclined to infer such consent to permit the link based on the individual circumstances of a case.

Report and Opinion

The International Literary and Artistic Association (L'Association Littéraire et Artistique Internationale – ALAI), in its 9 March 2013 Executive Committee meeting decided to form a study group with the mandate to analyse the ramifications regarding linking measures with regard to the communication to the public and making available to the public rights of authors and related rightsholders. Several different types of links or linking measures exist, but basically two major categories - *hypertext links* and *inline links* – should be observed here, thus encompassing what is often called simple linking, deep linking, framing etc.

Following the result of the study group the Executive Committee has adopted the following text. It does so by firstly analysing three separate phenomena, (i) communication to the public, (ii) making available to the public and (iii) the notion of the public. This analysis is followed by (iv) a statement/conclusion focused on hypertext and inline linking.

(i) Communication to the public

National laws differ in their definition of authors' economic rights, as well as related rights. They either apply broader or more abstract notions of e.g. "reproduction", "making available" and "communication to the public" or, on the contrary, provide detailed, media-specific definitions of various restricted acts, like broadcasting, display or public performance, acts that, in some manner, convey protected works to the public in a manner covered by the author's exclusive rights. Moreover, some jurisdictions have come to use media-specific definitions, such as performance, in a broader way, that result in coverage much wider than their semantic meaning.

The substantive minima set out in the Berne Convention (BC) tend towards the second approach and itemize discrete rights to *perform*, *recite*, *communicate to the public* and *broadcast*, including re-broadcasts and cable distribution.¹

The specific right to *communicate a work to the public* (as phrased in English), clarified by the 1996 WIPO Copyright Treaty, WCT, overlaps with and generalizes the BC's guarantees.

Article 8 of the WCT provides that 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. The first part of this formulation extends the existing coverage of the BC Paris Act from certain categories of works to all such categories². In the second part of the provision, a

¹ See Articles 11, 11*bis* and 11*ter* of the BC Paris Act. The rule of national treatment supplies the full scope of these rights. See Arts. 5(2), 19.

² See *von Lewinski*, International Copyright Law and Policy, Oxford 2008, p. 148 at 5.138, and p. 468 at 17.107.

right to control individualized, interactive uses of copyrighted works is chartered.³ The “making available” right encompasses all forms of on-demand access, whether or not the access results in a retention copy. Thus, it does not matter whether the member of the public obtains access to the work via a real-time “stream” or via the delivery to her computer or other device of a digital copy that she subsequently “opens” in order to see or hear the work. Moreover, “making available” as set out in WCT article 8 necessarily encompasses not only the actual transmission of a work to members of the public, but especially the *offering* to the public of the work for individualized streaming or downloading, not merely the receipt of the stream or download.

Article 8 WCT must then embrace any act of making a work perceptible to a public⁴ other than by distribution or display of physical copies, that is, it is not restricted to specific individuals belonging to a private group. Further, the phrasing of Article 8 WCT is clearly independent of any specific technical measure or method to accomplish communication.⁵ It is to be noted, however, that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication in the sense the phrase is used in Article 8 WCT.⁶

Like the WCT, the European Information Society Directive 2001/29/EC,⁷ categorizes the right of making available to the public as one component of a more general right of communication to the public. The right to make available is limited to methods of interactive uses, of availability on demand. It applies when the work is accessible for members of the public, irrespective of whether and how often it is actually accessed. Examples include offering for download or streaming of a work from an online store or a pay-per-view television channel, as much as offering (sharing) music or video files over a peer-to-peer file-sharing network. Hence, the right of communication to the public, as based on the Directive 2001/29, includes the making available online, an activity that presumes an active role on the part of the communicator and also a potential activity on the part of the consumer.

There are obvious terminology differences, among the multinational copyright treaties and other regional or international legal instruments in the fields of authors’ rights and related rights. However, if one looks at e.g. Articles 11, 11*bis* and 11*ter* of the BC Paris Act – directed towards broadcasting and cable retransmission – it must be said that they have provided an adequate structure for uses within the context of most contemporary technologies. The issue under BC is not whether uses constitute e.g. a performance, but whether they are *public*, i.e. whether dealings with protected works address a potential public, an issue that is further developed under (iii) below.

³ See *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights. The Berne Convention and Beyond, Oxford 2006, 2nd ed., p 152 at 4.25; *Goldstein/Hugenholz*, International Copyright. Principles, Law, and Practise, 3rd ed., Oxford 2013, p. 325.

⁴ See under part (iii) *infra* about the concept of “the public”.

⁵ Cf. Records of the Diplomatic Conference on Certain Copyright and Neighbouring Right Questions, Geneva 1996, Vol. 1 (Geneva: WIPO, 1999) 206 p. 12. Cf. also *Ficsor*, The Law of Copyright and the Internet, Oxford Press, 2002, sec. 2.02-2.11.

⁶ See Agreed statements concerning Article 8 WCT; *Ficsor*, *ibid.*, 2.31- 2.33. Cf. Directive 2001/29/EC at (27).

⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

It may also be noted that for an act to fall e.g. within the right of broadcasting, it is sufficient that signals containing the work are emitted. Whether or not they are in fact received is immaterial. Thus, even if no single member of the public views or hears the content of the signal, it will nonetheless constitute a broadcast, an act which *per se* is considered addressed to the general public.

The common denominator is that uses of protected works may fall within the discrete authors' rights, irrespective of the technological character of the devices that are used in order to cause acts of communication, making available, performance etc. As a matter of principle, the authors' discrete rights are thus *technology neutral*.⁸

(ii) Making available to the public

As already stated there are different terminologies in national legislation as well as in international treaties, EU Directives etc. for various forms of copyright relevant uses of protected works. As for making works available to the public, this very formulation is sometimes used in national legislation to embrace virtually every act causing the public to come into contact with protected works, irrespective of how this is accomplished and thus including the rights of distribution and display. Such an occurrence again emphasizes the technological neutrality of the particular copyright use. At the same time, it also means that when using the terms "making available to the public", "communication to the public", "broadcasting" and "performance" it must be clarified whether they are used in the meaning of national legislation or any specific international instrument.

This approach underscores a basic goal of contemporary copyright, that it is independent of the dynamics of technological shifts in an ever changing and dynamic media environment: its description of the exclusive rights granted aims at broadly embracing every type of use of works of some economic relevance, while at the same time they are balanced by exceptions and limitations for the benefit of specific cultural and societal needs of significance. Again, the technique of neutrality is pretty obvious in respect of the reproduction right in the BC, and, as a result of the WCT, also respecting the communication to the public right.

As an example, the Swedish Copyright Act, just as the Copyright Acts of the other Nordic countries, offers an *overarching making available to the public right*, which encompasses communication to the public, public performance, distribution, and display.

Further, the German Copyright Act encompasses several defined categories of conduct within a broad right of *communication* to the public (Recht der öffentlichen Zugänglichmachung) in nonmaterial form: the right of recitation, performance and presentation; the broadcasting

⁸ It is obvious that the BC has fragmented rights which are in that sense not technology neutral, and it seems not always clear whether or not there might be gaps between the different forms of making things public. The historical accretion of technology-specific rights (and exceptions) in the Berne Convention cannot, however, especially in light of the WCT, be seen as an obstacle to state today that the discrete rights of authors are technology-neutral.

right; the right of communication by means of video or audio recordings; and the right of communication of broadcasts. To be particularly observed is that if the technology of a particular type of communication to the public is not explicitly mentioned in the law, the broad formulation of Art. 15 (2) of the German Copyright Act still provides for an “undefined” right of communication to the public.

Further still, the French Copyright Act offers an overarching notion of *représentation* that encompasses any communication of the work to the public, that is public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a broadcast work.

As for the European Union, it has obviously harmonized a number of copyright relevant uses, but certainly not all. Tellingly, the Directive 2001/29 is devoted to “certain aspects” of copyright and related rights. Together with the rights of adaption and translation, the right of public performance is one of the economic rights that remain unharmonized in the European Union.⁹

The act of “communicating” works to the public, as it is thus phrased in English, obviously earned its distinction in the WCT and the WPPT of 1996 in order to embrace uses that were widespread on the (then emerging) Internet. Making available to the public (and other overarching phrases) is a phrase that has been used for a much longer time as a means to implement the basic policy of letting copyright embrace whatever method there is - or may be - by which protected works are made available to the public.

(iii) The public

One requirement underpins all types of dissemination, communication or making available, however they are expressed: the exploitation must be to the *public*. Doctrinal variations are easily found worldwide about what is “the public” and there is extensive case law developed around this question. The European Union has not actually harmonized the concept of the public, although quite extensive case-law of the CJEU has dealt with it.

Basically, this expression must be understood as covering all environments implicating a substantial number of persons beyond the confines of family circles and close friends. This means that copyright relevant communication may occur at any place where a substantial number of persons outside of a normal family circle and its social acquaintances are gathered. This embraces all places which are “open” to the public without restrictions, other than generally applicable restrictions such as an admission fee or a membership card imposed on the public at large. Hence communication acts, like performance or display, in public as well as semipublic places, such as bars, clubs, hotels, lodges, factories and schools subject to more specific entry conditions, may also constitute communications to the public.

⁹ The right of communication to the public prescribed by the 2001/29 Directive concerns acts of communication “by wire or wireless means” and therefore does not apply to on-site performances. Cf. a number of CJEU decisions, i.a. C-283/10 – *Circul Bucuresti* [2012].

Although works offered over the Internet may be accessible to publics much larger than those reached by traditional radio and television broadcasts, access to the Internet will often entail dissemination of a work to an individual user on demand, so that it is possible to receive by the public at large, but in the individual case merely transmitted to that single user on his or her demand, typically in the privacy of his or her home. But since communication to the public may also come about in a *one-to-one connection* on the Internet, it is clearly irrelevant, in order to determine if an act is a communication to the public, whether the potential recipients access the communicated works through a one-to-one connection, at least if the technique used offers a sufficiently great number of persons to have potential access to the work being disposed of.¹⁰ As set out above, not only are broadcasts communications to the public, but so are online streaming to consumers where one person at a time uses his or her own device for listening or viewing at home, provided that the faculty to access the work is open to a public circle. A communication of a work in a person-to-person conversation on e.g. Skype would normally be considered private.

The European Court of Justice (CJEU) has, in a number of decisions of late, added parameters to what causes a specific situation to be public. It has opined e.g. that *broadcasting* by satellite requires “an indeterminate number of potential viewers” for the exclusive right to become effective.¹¹ In Joined Cases C-403/08 and C-429/08 *Football Association Premier League & Murphy* [2011] ECR, the Court observed: “in order for there to be a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive ..., it is also necessary for the work broadcast to be transmitted to a *new public*, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public...”. The Court has indicated that the question of whether a public is “new” depends upon whether the public was contemplated by the copyright owner at the time of authorising the initial transmission. In Joined Cases C-431/09 and C-432/09 [2011], *Airfield*, it refers, at [76] to: “a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation.”

However, the CJEU has very recently decided that the concept of “communication to the public” within the meaning of Article 3(1) of the Directive 2001/29 covers a retransmission of the works included in a terrestrial television broadcast, where the retransmission is made by an organisation other than the original broadcaster and by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server, even though those subscribers are within the area of reception of that terrestrial broadcast and may lawfully receive the broadcast on a television receiver. Further, the CJEU noted that communication to the public was neither influenced by the fact that retransmission is funded by advertising and is therefore of a profit-making nature, nor by the

¹⁰ Cf. C-607/11, *TVCatchup* [2013].

¹¹ See C-192/04, *Lagardère* [2005].

fact that the retransmission was made by an organisation which is acting in direct competition with the original broadcaster.¹²

Clearly, even by the standards set out by the CJEU, an audience needs not to be “new” in the sense that it is merely addressed by one single communicator with a specific media content. What matters is that that grouping be also a *public* in each of the communications setting, whether the works made available to it via broadcast are also simultaneously available to it via Internet or by other technical means.

The CJEU has also elaborated on the notion of “the public” in other cases that are not related to broadcasting. It has then indicated that the term ‘public’ refers to an indeterminate number of potential listeners and a fairly large number of people.¹³ This interpretation has also been repeated in more recent cases.¹⁴ In short, the CJEU seems to say, that “the public” should not relate to small or “irrelevant” groupings, although, on the other hand, the *cumulative effect* of series of minor or one-to-one uses should also cause a use to be public.¹⁵ Clearly, the concept of “public” requires a certain *de minimis* threshold, which excludes from it groups of persons which are too small, or economically insignificant. Hence, the CJEU has concluded that account must be taken of the cumulative effect of making works available to potential audiences.¹⁶ In that context, not only was it relevant to know how many persons had access to the same work at the same time, but it was also necessary to know how many of them would have access to it over time.

It is fair to conclude that the definition of “public” tends to shrink or expand depending on the nature of the right at stake. The CJEU has clearly not found a concept of “the public” that defines it once and for all within the EU context. On a more general basis, it may be concluded that there must be potentially a “large number” of people in the target audience. By focusing on the offer of access (regardless of whether any member of the public accepts the offer), the emphasis is put on the *enabling role* of the communicator to the public.

(iv) Conclusions for linking activities

a) Different types of links

Hypertext structures of the Internet are essential for its functioning. There are several different types of links, but basically two major categories - *hypertext links* and *inline links* – should be observed. The above described functional approach to basic copyright uses tends to let equivalent methods be treated in the same way, irrespective of their technological construction.

¹² See C-607/11, TVCatchup [2013], para. 42 - 44. It should be observed that the CJEU in C-403/08 & C-429/08 [2011], para. 204, *Premiere League & Murphy*, found it “not irrelevant” that communication within the meaning of Article 3(1) of the Directive 2001/29 is of a “profitmaking nature”. In its TVCatchup decision the CJEU reduces this (para. 42); a profit-making nature of a communication is “not necessarily an essential condition for the existence of a communication to the public.”

¹³ See C-306/05, *Rafael Hoteles* [2005] (see, to that effect, paragraph 84).

¹⁴ C-89/04, *Mediakabel*, REG 2005, p. I-4891, p. 30, [2005].

¹⁵ Cf. C-135/10, *Marco del Corso* [2012], and C-162/10, *Phonographic Performance*.

¹⁶ See e.g. cases C-89/04, *Mediakabel*; C-192/04, *Lagardère*.

A click by a user on a *hypertext link* creates a request to a server on the Internet, where a certain work is stored, to “send” the requested file of the work to the user’s computer so it can be available on the user’s web reader. Accordingly, when the user activates the link, there is communication between the user’s computer and the web server where the requested file is stored, provided, of course, that the relevant file is at all available. The person who determines what kind of access the web server shall offer can in several ways hinder access by links to certain files stored on the server, for instance by allowing access merely to a web site, but not to underlying files of specific works. It is also possible for the owner of the server to prevent visitors from certain web addresses from accessing specific files or to prevent users with certain IP-addresses from accessing specific files. Such measures can be taken with the help of a configuration file (.htaccess), supported by most web servers, or with the help of so-called cookies.

For practical reasons it may be useful to identify one or several subcategories of hypertext links, such as so called *deep-links*, a phrase often used for hypertext links which do not link merely to someone’s homepage, what may be called a *reference link*, but (typically) to some page deeper in the linked sites menu, meaning in practice that the link connects directly to a file, in some way chosen by the supplier of the link, carrying an individual copyrighted object. But this merely indicates that use of a linking measure as such may not necessarily be copyright relevant, namely if it in the individual case cannot be said to relate to protected works or protected material in a sufficiently manifest manner.

The fact that an address is available as a hypertext link to click on need not be the result of a deliberate act on the part of the one who makes the address available each time a link is created. The user’s web programme, e.g. his web reader or e-mail programme, may be so formatted or adjusted to automatically identify an address in the text and to make it possible to click on. Moreover, a link may also be construed so as to circumvent technological protection measures set up by the file owner.

The other category of links, here called *inline links*, makes it possible to link to files with pictures (stills) or video content so that such content seems integrated on the web page on which the link is placed. A standard web reader automatically downloads the linked-to picture/video and shows the material integrated with other content on the said web page. The user need not click on such a link to activate it, but otherwise this kind of link works in the same way as ordinary hypertext links. For example, inline links are often used to link so called banner-ads on a website or to embed a video clip from YouTube in a blog.

Generally speaking, hypertext links and inline links make it easier for the user to search the Internet, as he or she can click on the link instead of copying and pasting or writing the relevant web address. The fundamental contribution of links to Internet traffic is to speed up the user’s access to files on the Internet. This is an improvement upon merely providing its factual address, i.e. information on the name of the file and where it is stored. Consequently, links facilitate availability, although users can also access the desired works through other means.

b) Links falling within the framework of copyright uses

As set out above, activities that communicate or make protected works available to the public may come about in many forms, now known or to be invented. What in principle matters is not how such a communication is effected, but rather that **(i)** *the act* of an individual person, directly or indirectly, **(ii)** has the distinct *effect* of addressing the public, irrespective of the tool, instrument or device that the individual has used to bring about that effect, and **(iii)** that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright.

Clearly, there may be instances where hypertext links or inline links, as described above, can be used for the purpose of addressing a protected work or related subject matter to the public. Hence, it is totally irrelevant if the public thinks, perceives or senses that it has been directed to another website or if it believes that the access to the protected materials happened on the website that it has logged on to. This is, as such, irrelevant for deciding whether a particular link causes communication to the public (makes the work available to the public) or not. What is decisive is the notion of the “public” and whether a making available or transmission covered by the discrete rights has taken place.

It is just as clear that such a result is not reached when the link does not make a specific protected material available, but merely works as a *reference* to a source where it may be possible to access it and where access to the specific work itself or otherwise protected material is not achieved.

On the other hand, links which lead directly to specific protected material, thereby using its unique URL, fall normally within the framework of a copyright use. This kind of linking is thus a “making available” regardless of whether the link takes the user to specific content in a way that makes it clear to the user that she has been taken to a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website.

This being said, whether the addressed work is readily available on the Internet from an open source or, on the contrary, is hidden by technological measures is also irrelevant for determining the status of a link as part of an author’s discrete rights. In the former case a license, implied or not, may exist for the further making available/communication to the public that is potentially caused by a linking measure. This is an issue to be determined in each individual case. But the open source availability of a work has no impact on the status of a communication as a copyright relevant act.

The same logic applies to the distinction between pirated files and fully licit material as objects of linking activities. Use of illegal material is typically notoriously illicit in itself, but, again, for the assessment of an act of making available to the public or to communicate a protected work to the public within the framework of authors’ exclusive rights or of related rights, it does not matter whether such an act leads to pirated material or to works already made available to the public with the rightholder’s consent.

An *illicit* act would obviously not occur as long as the rightholder's decision whether and under which conditions the media content is made available on the internet is not interfered with. This means in particular that linking would indeed be illegal if (i) the content is made available without the author's consent, or (ii) technical protection measures have been circumvented or (iii) the availability of the content otherwise clashes with the declared or clearly implied will of the rightholder. It would be irrelevant in those cases whether the person setting the link knew about the previous history of a protected subject matter that makes the linking illegal.

The basic concepts of exclusive copyright and related rights uses may arguably put commercial actors on the Internet, using linking measures as their tool to communicate protected works and protected subject matter to the public, under certain pressure of getting necessary consent from the rightholders to do so. To ease that pressure, if found necessary, interpretation of the basic concepts of copyright uses, as described here, is not an available method. Such appropriation should come about on the basis of limitations and exceptions to copyright and related rights.

In that respect, a *general presumption* of the rightholder's consent to *further communication* to the public of what initially has in fact been posted on the Internet with the rightholder's consent, would need measures of the legislator to be valid. But such a rightholder may very well find that courts in the individual case may be inclined to infer such consent to permit the hyperlink.
