

**2016 – Study Question (Copyright)  
Linking and making available on the Internet**

**Group**      **Huib Berendschot; Micheline Don; Martin Hemmer; Carja Mastenbroek; Eliëtte Vaal**

**I. QUESTIONS**

**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?**

*Under Dutch current law, the statutory provision that provides for protection of an author's making available right is as follows:*

Article 12 Copyright Act: Disclosure to the public

1. *Disclosure to the public of a literary, scientific or artistic work includes:*

- 1°. the disclosure to the public of a reproduction of the whole or part of the work;*
- 2°. the distribution of the whole or part of the work or of a reproduction thereof, as long as the work has not appeared in print;*
- 3°. the rental or lending of the whole or part of a copy of the work, works of architecture and works of applied art excepted, or of a reproduction thereof which has been put into circulation by or with the consent of the rightholder;*
- 4°. the recitation, playing, performance or presentation in public of the whole or part of the work or a reproduction thereof;*
- 5°. the broadcasting of the work incorporated in a radio or television programme, by satellite or another transmitter or a broadcasting organization within the meaning of Section 1.1 of the Media Act 2008*

- 2. Rental, as referred to in the first subsection sub 3°, means making available for use for a limited period of time for direct or indirect economic or commercial advantage.*
- 3. Lending, as referred to in the first subsection sub 3°, means making available for use by institutions which are accessible to the public for a limited period of time and not for direct or indirect economic or commercial advantage.*
- 4. The expression 'recitation, playing, performance or presentation in public' includes in a closed circle, except where this is limited to relatives or friends or equivalent persons and no form of payment whatsoever is made for admission to the recitation, play, performance or presentation. The same applies to exhibitions."*  
*(...)*

**2. If no, does your Group's current law nevertheless protect the making available right or a rights analogous or corresponding thereto? If so, how?**

*See the answer to question 1.*

**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?**

*Taking as a starting point that the work is published on the starting page, it will be considered a "communication" under the CJEU Svensson judgment (13 February 2014, C-466/12). However, if the CJEU would follow the opinion of AG Wathelet of 7 April 2016 in the Geenstijl – Sanoma-case (C-160-15) the described act would not be considered a "communication" because such a link could not be considered to be vital or indispensable in order to benefit from or enjoy works.*

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

*No, the act as described in question 3 would not be considered as a communication "to the public" due to the fact that no new public is addressed. Since the initial website containing the copyrighted work is publicly accessible, the public that the hyperlink addresses is considered to be included by the copyright owner's authorization regarding the original communication of the work.*

**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?**

*Not applicable.*

**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 answer to questions 3) and 4) showed that there is no communication to the public under Dutch law. This means no authorization of the copyright holder was required and therefore, the act as described in question 3) does not constitute a direct infringement of the making available right.*

**7. If the relevant act is deep linking as described in paragraph 11) above, would the answer to questions 3) to 6) be different? If yes, how?**

*No.*

**8. If the relevant act is framing as described in paragraph 12) above, would the answer to questions 3) to 6) be different? If yes, how?**

*No, the same was decided in the CJEU BestWater judgment (19 December 2014, C-348/13).*

**9. If the relevant act is embedding as described in paragraph 13) above, would the answer to questions 3) to 6) be different? If yes, how?**

No, the same was decided in the CJEU BestWater judgment (19 December 2014, C-348/13).

**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?**

*If the website would display a statement that prohibits linking to it, the answers to questions 3 to 9 would not be different, as such statement does not constitute a technical measure restricting access to the work.*

**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 question 3) to 9) be different? If yes, how?**

*If the copyright holder restricted access to the site with a view to disclose the work to a limited number of people, so not the public as a whole, the answer is different.*

*In the event that access is restricted by means of a paywall or other form of limitation, then the making available of a work via a deeplink which circumvents that restriction is a communication to a new public, meaning that the right holder's authorization is required for this particular linking. The question as to whether this would constitute a direct infringement of the making available right would therefore have to be answered in the affirmative.*

*In addition, linking to works on a website of which the access is restricted by a paywall means technical measures are being circumvented. This constitutes an action of tort (article 29a paragraph 2 of the Dutch Copyright Act).*

**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?**

*Neither in its BestWater-ruling nor in its C More-ruling (26 March 2015, C-279/13) did the CJEU clearly address this topic. The Dutch Supreme Court referred preliminary questions to the CJEU in the case of Playboy Enterprises & Sanoma Media vs GS Media (Case C-160/15). In this case, hyperlinks were made available to pictures that were stored on a webserver without the copyright owner's consent. No technical measures were made to restrict access to the work. The work was however only accessible if one knew or was able to retrieve a specific deeplink.*

*The question that lay before the Supreme Court was whether to a high degree facilitating the access to otherwise not easily retrievable images, by means of publishing hyperlinks to the exact location (URL), has to be regarded as circumvention of the restrictive measures referred to by the CJEU in Svensson, or an*

*intervention through which the pictures were nevertheless communicated to a new public. The Supreme Court therefore asked the following questions to the CJEU:*

*1(a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29?*

*1(b) Does it make any difference if the work was also not previously communicated, with the rightholder's consent, to the public in some other way?*

*1(c) Is it important whether the 'hyperlinker' is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party's website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?*

*2(a) If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?*

*2(b) In answering question 2(a), is it important whether the 'hyperlinker' is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?*

*3. Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?*

*Some time after the Supreme Court referred its preliminary questions to the CJEU, the appeal court of 's-Hertogenbosch struggled with similar issues. It therefore also considered referring preliminary questions to the CJEU, but decided to first await the CJEU's answers in the Sanoma/GS Media-case<sup>1</sup>.*

*The Dutch Midden Nederland Court, also referred questions to the CJEU, regarding hyperlinks leading to content published on websites without consent of the copyright holder<sup>2</sup>. The case relates to a media player containing add-ons with hyperlinks on which direct access is provided to copyright-protected works such as films, series and live broadcasts without the rightholders' consent. The Court asked whether the sale of such a media player is an act of communication to the public.*

*And more specifically whether this is different if*

<sup>1</sup> Hof Den Bosch, 30 juni 2015, MyP2P v Premier League Case nr. HD 200.149.632/01

<sup>2</sup>District Court of Midden Nederland, 30 September 2015, English translation available through: <https://drive.google.com/file/d/0B6d07lh0nNGNYjJcU0wTIZYYzA/view?pref=2&pli=1>

- the copyright-protected works have not been previously disclosed to the public online at all or solely via a subscription with the rightholders' consent?
- the add-ons that contain hyperlinks to websites on which online access is provided to copyright-protected works without the rightholders' consent are freely available and can also be installed on the media player by the users themselves?
- the websites on which access is provided to copyright-protected works without the rightholders' consent can also be located and accessed by the public without the media player?

**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, if made available without access restrictions, the work is considered to have been made available to the entire public that has access to Internet. This is in line with the CJEU's rulings in Svensson and BestWater and the Dutch Supreme Court ruling in GS Media/Sanoma of 3 April 2015.*

*Whether the same reasoning applies to a work that has been posted on the Internet without the copyright holder's consent, is unclear. The Dutch Supreme Court has requested the CJEU to answer the question if GS Media makes content available to the public, by providing a link to certain content that was placed on the Internet without the copyright holder's consent or on a location on the Internet that is very hard to find, and if it is relevant that GS Media was (clearly) aware of the fact that the content was illegal.*

**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?**

*Without any limiting measures, the work is available to all potential visitors of a website and thus to all Internet users.*

*Hence, in the event the work is placed on the Internet with consent of the copyright holder and is available to all Internet users, a hyperlink does not create a new public.*

*The communication would be considered as directed only at certain members of the public, if for example the communication only addresses a limited, identified public, or if access is subject to certain requirements. Then, a hyperlink creates a new public.*

**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?**

See under 16)

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

15) and 16) Indirect or secondary copyright infringement would under Dutch law be qualified as an act of tort.

*In the GS Media/Sanoma case, the Amsterdam Court of Appeal was of the opinion that the placing of a hyperlink did not constitute a communication to the public because the files were - though hard to find - not completely private as a result of which no new channel was provided to the public for accessing the files.*

*Nevertheless, the Amsterdam Court of Appeal ruled that GS Media's facilitating the dissemination of all photos was unlawful under the specific circumstances. The Amsterdam Court of Appeal considered the following circumstances to be relevant:*

- *GS Media knew that the photo's to which the links were provided were published on the internet without the consent of Sanoma and that therefore this publication by the third party infringed Sanoma's rights;*
- *There was no indication that the GS Media public would have been able to find the photo's on the internet without the help and facilitating efforts of GS Media.*
- *The text in the message containing the hyperlinks to the photos encouraged the readers to access the content that had placed on the internet illegally.*

**II. POLICY CONSIDERATIONS AND POSSIBLE IMPROVEMENTS TO YOUR 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?**

*The Svensson and Bestwater cases imply a departure from the criteria set out by the Dutch Supreme Court in the eighties of the 20<sup>th</sup> century in various cases relating to cable transmission<sup>3</sup>. In those cases the question whether or not there was a new public was explicitly deemed irrelevant. The essential element was the question whether there was an "autre organisme" which criterion has its basis in article 11bis of the Berne Convention. When this test would have been used, the conclusion might have been that there was a communication to the public (unless a hyperlink is no communication as concluded by AG Wathelet of 7 April 2016 in the Geestijl – Sanoma-case (C-160-15)).*

*Taking into account the essential role hyperlinks play in the use of the internet, we believe that current Dutch / EU copyright law strikes a reasonable balance between all interests and parties involved. The current statute provides clear and workable terminology which covers the ground for copyright infringements and activities reserved to the right holders ("the exclusive right of the author of a work of*

<sup>3</sup> Dutch Supreme Court 14 January 1983, NJ, 1984/696, and 25 May 1984, NJ 1984, 697.

*literature, science or art, to publish and duplicate such work"). The statute is also neutral in terms of technique, which makes it applicable both in online and offline situations.*

**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?**

*It has not been clearly decided yet whether a link to illegal content that is freely accessible is considered to be a communication to the public.*

*The Dutch group considers it to be important that the answer to the question whether there is a communication to the public can be found on the basis of objective criteria. Therefore it should be irrelevant whether the copyright holder has authorized the publication of a work that is freely accessible on the internet.*

*On the other hand, depending on the circumstances of the specific case, it should be possible for the copyright holder to take action against a person posting links to illegal content which action could be based on tort.*

**III. PROPOSALS FOR HARMONISATION**

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

*The working group is of the opinion that it is important that the Dutch Copyright Act maintains its current concept for the making available of works. This concept is not technically defined and can therefore easily adjust to changing times. If anything the Dutch group believes that there is merit in using the same concept across the European Economic Area and given the international character of the internet, also outside the EEA.*

**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?**

*The working group is of the opinion that the making available of a work by means of a hyperlink that links directly to the page at which the copyrighted work is made available, should be considered a "communication" of the copyrighted work. Linking to a page at which the work is not made available, for example a home page not containing the work, should not be considered a "communication" of the copyrighted work.*

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

*No, the working group is of the opinion that such an act of linking should not be considered a communication to a new public when such work is freely accessible.*

**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?**

*The working group is of the opinion that such an act of linking may constitute an infringement when the communication is a communication to a new public, i.e. a public that the author of the work did not intend to address on publication of the work, and no exceptions to the copyright apply.*

**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, save that linking to a page that does not contain the work, should not be considered the making available of the work.*

**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?**

*Not applicable.*

**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, the working group is of the opinion that the situation should not be different on the basis of a simple statement without using adequate technical measures preventing a new public from having access to the work.*

**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.**

*Assuming that the public's access to the work is technically and adequately restricted, the uploader expressly limited his intention to disclose the work. The uploader decided not to make the work available to the public as a whole. Linking to the work in a way that would circumvent such technical measures (such as a paywall / or access through a user name and password), causes communication to a "new public" without the consent of the copyright holder. Such linking should constitute an infringement in case no exceptions to the copyright apply. Article 21 would in that case be answered with Yes.*

*The answers to questions 20), 23) and 24) would remain the same.*

**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.**

*When a work is uploaded without the authorization and illegally (no exceptions to the copyright apply) and the work is freely accessible, a link to such work cannot be considered to be a communication to a new public.*

**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. New public in this situation is any public that the copyright holder did not intend to address on publication of the work, provided that the copyright holder has taken adequate and appropriate technical measures to prevent such access.*

**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.*

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

*Depending on the circumstances of the case, providing a hyperlink to a work that has been published illegally can be unlawful under Dutch law. As a minimum requirement for unlawfulness, the person providing a hyperlink should be aware of the fact that the work to which the hyperlink directs is unlawful.*