

Congress Milan 2016
Adopted Resolution
September 20, 2016

Resolution

2016 – Study Question (Copyright)

Linking and making available on the Internet

Background:

- 1) This Resolution concerns the issue of whether and under what circumstances the act of linking to a copyrighted work on the Internet should constitute infringement of the making available right of the copyrighted work.
- 2) For the purposes of this Resolution, the term **linking** refers to the following four methods of linking: (a) hyperlinking to the starting page; (b) hyperlinking in the form of deep linking; (c) framing; and (d) embedding, where in each case the act does not involve reproduction of any work from the second website by the linker. Rather, the provision of the link allows or causes the user of the first website to access the second website either directly or by display of a work from the second website framed or embedded in the first website.
- 3) In case of hyperlinking, the link is a user-activated reference to the second website (typically a URL address), which allows a user of the first website to access the second website by clicking or hovering over a "hyperlink" placed in the first website. On the other hand, in case of framing and embedding, the first website causes the user's browser to establish a connection to the second website automatically and to assemble copyrighted works from the second website. For the purposes of this Resolution, it is considered that a hyperlink or deep link is always a user-activated link, while a framing link or an embedding link is always an automatic link.
- 4) For the purposes of this Resolution, the **making available right** refers to the exclusive right of a copyright owner to authorize any communication to the public of their work, including the making available to the public of a copyrighted work in such a way that members of the public may access the work from a place and at a time individually chosen by them, as provided in Article 8 of the WIPO Copyright Treaty (**WCT**).

- 5) By its Resolution on Q216B - "Exceptions to copyright protection and the permitted uses of copyrighted works in the hi-tech and digital sectors" (Hyderabad, 2011), AIPPI resolved *inter alia* that "providing ... hyperlinks to a copyrighted work that has already been made available to the public on the Internet with the authorization of the relevant rights holder does not, by itself, constitute a further act of making such a work available to the public." That Resolution and the underlying study referred to user-activated hyperlinks only and did not take into account deep linking, framing and embedding specifically. Further, since that Resolution, there have been important case law developments, particularly in the Court of Justice for the European Union (**CJEU**).
- 6) Currently, the treatment of the act of linking in relation to the making available right varies from country to country to a significant degree. Since issues relating to the Internet easily extend beyond national boundaries, harmonisation in this area is strongly desirable.
- 7) 41 Reports were received from AIPPI's National and Regional Groups and Independent Members providing detailed information and analysis regarding national and regional laws relating to this Resolution. These Reports were reviewed by the Reporter General of AIPPI and distilled into a Summary Report. (See below links.)
- 8) At the AIPPI World Congress in Milan in September 2016, the subject matter of this Resolution was further discussed within a dedicated Study Committee and again in a full Plenary Session, which led to the adoption of the present Resolution by the Executive Committee of AIPPI.

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 itself, constitute a further act of making such a work available to the public. To this extent, the Resolution on Q216B is confirmed.
- 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.
- 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.

- 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.
- 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.
- 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.
- 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.

Links:

- Study Guidelines
<http://aippi.org/wp-content/uploads/2015/12/2016-Study-Guidelines-Linking-and-making-available-on-the-Internet.pdf>
- Summary Report
http://aippi.org/wp-content/uploads/2016/08/2016_Summary_Report_Copyright_FINAL_090816.pdf
- Reports of National and Regional Groups and Independent Members
<http://aippi.org/committee/linking-and-making-available-on-the-internet/>