



Response of United States Group

Copyrights: linking and making available on Internet

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## **Study Guidelines**

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### **2016 – Study Question (Copyright)**

#### **Linking and making available on the Internet**

##### **Introduction**

- 1) This Study Question focuses on the issue of whether and under what circumstances the act of linking to a copyrighted work on the Internet constitutes infringement of the making available right of the copyrighted work.
- 2) Copyright law grants to an author of a work certain exclusive rights to use the work in certain ways. A person who uses the copyrighted work in any of those ways without the authorization of the copyright owner will be liable for copyright infringement, provided that no exceptions or limitations to copyright protection apply, and may be subject to an injunction or payment of damages.
- 3) The "making available right" refers to the exclusive right to make available to the public 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.
- 4) Article 8 of the WIPO Copyright Treaty (**WCT**), which provides for the making available right, states:

*(A)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. (emphasis added)*
- 5) Article 3(1) of European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) provides that the Member States shall protect the making available right, the definition of which is substantially in accordance with Article 8 of the WCT. Similarly, in Japan, Article 23(1) of the Copyright Act provides for protection of the making available right.

- 6) By contrast, the US does not have a statutory provision that expressly provides for protection of a making available right. Analogous protection is granted through the protection of the right of reproduction, the right of distribution and the right of public display, as provided respectively in Articles 106(1), (3) and (5) of the Copyright Act.
- 7) In the Internet context, copyrighted works are typically uploaded onto websites. If a website is publicly accessible and a copyrighted work is displayed on the website, members of the public can generally access the copyrighted work from any place and at any time, as long as they are connected to the Internet. Thus, the copyrighted work is made available in the sense described in paragraph 3), above. If this occurs without the authorization of the copyright holder, the person uploading the copyrighted work infringes the making available right, unless any exceptions or limitations to copyright protection are applicable.
- 8) A copyrighted work may also be accessible to members of the public, by "linking" to a copyrighted work that has already been uploaded to a website. Typically this is done by creating a textual reference to the address of the webpage (i.e. a "hyperlink"), but there are other methods of linking, such as framing and embedding (described further below).

### **Scope of this Study Question**

- 9) This Study Question focuses on the following three methods of linking: (a) hyperlinking (including deep linking); (b) framing; and (c) embedding. In these Study Guidelines, references to **linking** refer to all three forms of linking collectively.
- 10) Hyperlinking is an act of creating a reference to data that a reader can follow by clicking or hovering over a "hyperlink" or "link". A hyperlink can direct a reader to another webpage on which a copyrighted work is posted. A hyperlink can be a text or a graphic. Linking in these forms does not involve reproducing the copyrighted work. To the extent that a link is a "thumbnail", thumbnails are outside the scope of this Study Question.
- 11) One particular mode of hyperlinking is "deep linking." A hyperlink can direct a reader to the starting page of a website or to another page within the website. Deep linking occurs when the hyperlink directs a reader directly to a webpage that displays the copyrighted work, rather than to the starting page of the website.
- 12) Framing is an act of dividing a webpage (first webpage) into multiple areas (i.e. "frames") that are capable of displaying contents independently from each other. A frame displays the content of another webpage (second webpage) that contains a copyrighted work. The content of the second webpage is transmitted directly from the server that stores the second webpage to the browser of the reader reading the first webpage.
- 13) Embedding is an act of creating a reference to data, the reference itself being capable of displaying the content of the data (i.e. an "embedded link"). An embedded link in the first webpage displays the content of the second webpage

containing a copyrighted work, as if it were part of the content of the first webpage. Notably, and similar to framing, the content of the second webpage is transmitted directly from the server that stores the second webpage to the browser of the reader reading the first webpage.

- 14) In all three methods of linking described above, the content of the second webpage containing the copyrighted work is not transmitted from the server that stores that second webpage to the server that stores the first webpage containing the link. Rather, the content of the second webpage is transmitted directly to the browser of the reader reading the first webpage. In other words, it is the user's browser that "assembles" the shown webpages and establishes a connection with both the first webpage and the second webpage simultaneously.
- 15) As noted above, some jurisdictions such as the US do not have a making available right that is expressly in line with the definition provided in Article 8 of the WCT. References in this Study Question to the **making available right** refers to any rights that are analogous or which correspond to the making available right defined in Article 8 of the WCT, to the extent such rights are protected under the copyright law of the relevant jurisdiction.
- 16) To the extent that a making available right is part of a neighbouring right granted to other parties, such neighbouring rights are outside the scope of this Study Question. Such neighbouring rights include, by way of example, rights granted to performers and producers of phonograms, as provided in Articles 10 and 15 of the WIPO Performances and Phonograms Treaty of 1996.
- 17) Other exclusive rights included in copyright, such the right of reproduction and the right of distribution, are outside the scope of this Study Question.

#### **Previous work of AIPPI**

- 18) The Resolution on Q216B – "Exceptions to copyright protection and the permitted uses of copyrighted works in the hi-tech and digital sectors" (Hyderabad, 2011) includes reference to hyperlinking. In that regard, AIPPI resolved that:
  - a) providing user-activated hyperlinks to a copyrighted work, in and of itself, should not be considered a reproduction of the work;
  - b) providing such 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;
  - c) however, providing hyperlinks may attract liability by contributing to acts of copyright infringement in relation to the targeted work.
- 19) The issues of deep linking, framing and embedding were not studied in Question Q216B, and nor were they specifically referenced in the Resolution on Q216B.

- 20) Further, in the recent *Svensson*<sup>1</sup> and *BestWater*<sup>2</sup> cases, the Court of Justice for the European Union (**CJEU**) considered hyperlinking in the context of the making available right. The CJEU identified two elements, namely "communication" and "to the public", and analyzed these elements separately. This approach was not studied in Question Q216B.
- 21) In light of case law developments since the Resolution on Q216B, it is useful to revisit the issue of hyperlinking and study it in more detail, including in relation to forms of linking described in paragraph 9) above, and with particular focus on the making available right.

## Discussion

### Whether linking is a "communication" of the work

- 22) Assuming that a making available right is recognized – whether in accordance with Article 8 of the WCT or by an analogous or corresponding right – the approach of the CJEU in *Svensson* premises a finding of infringement of the making available right upon the alleged infringer "communicating" the copyrighted work "to the public". This involves two elements: (a) whether the alleged infringer has "communicated" the work by the act of linking; and (b) if so, whether such communication is "to the public."
- 23) With respect to the "communication" element, in *Svensson* the CJEU that the "act of communication" should be construed broadly, and that providing clickable links falls under "the act of communication."
- 24) A comparison may be drawn to the decision of a Japanese lower court in a copyright infringement action which held that the act of embedding does not infringe the making available right<sup>3</sup>. The Japanese Court concluded that the server of the website on which the work was initially uploaded communicated the copyright work, not the person who did the embedding. The Japanese Court arrived at a similar conclusion, but on the basis of different reasoning, to the CJEU in *Svensson*.
- 25) The US Court of Appeals for the Ninth Circuit considered similar issues in *Kelly v. Arriba Soft Corp.*<sup>4</sup> and *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>5</sup>. In *Kelly*, the Court initially held that the defendant's act of hyperlinking and framing of images in the search results page of an Internet search engine is infringement of the right of public display, and that such an act does not constitute fair use. However, the Court later withdrew that aspect of its decision, so *Kelly* does not provide precedent on the issue of whether hyperlinking and framing in the circumstances of that case is or is not fair use.

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<sup>1</sup> C-466/12, judgement issued on 13 February 2014.

<sup>2</sup> C-348/13, judgment issued on 21 October 2014.

<sup>3</sup> Osaka District Court 2011(wa)15245, judgment issued on 20 June 2013.

<sup>4</sup> 280 F.3d 934 (9th Cir. 2002) withdrawn, re-filed at 336 F.3d 811 (9th Cir. 2003).

<sup>5</sup> 508 F.3d 1146 (9th Cir. 2007).

- 26) In *Perfect 10*, the Court concluded that the defendant's act of framing images was not infringement of the right of public display. The Court held that the defendant did not communicate a copy. Rather, the defendant provided HyperText Markup Language (*HTML*) instructions that directed a user's browser to a website publisher's computer that stored the full-size photographic image. The Court held that providing these HTML instructions was not equivalent to showing a copy.
- 27) Accordingly, as can be ascertained from the above discussion, there is inconsistency between jurisdictions as to whether the act of linking constitutes an act of "communication".

#### Whether there is communication "to the public"

- 28) If the act of linking is a "communication," the next issue is whether the communication is directed "to the public."
- 29) In *Svensson*, the CJEU held that the communication must be directed to a "new public", namely, a public that the copyright holder did not take into account when they authorized the initial communication to the public. In *Svensson*, the CJEU concluded that as all Internet users had free access to the copyrighted work when it was uploaded by the copyright holder, there was no "new public". That is, the public to whom the linking was directed was the same public to whom the work was made available by the copyright holder. Thus, there was no infringement of the making available right.
- 30) The *BestWater* case involved embedding. In that case, the CJEU followed its judgment in *Svensson* and denied infringement.
- 31) The rulings in *Svensson* and *BestWater* have received some criticism, especially regarding the concept of a "new public." In 2015, the Association Littéraire et Artistique Internationale (*ALAI*) issued a report and opinion (<http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf>), criticizing the CJEU ruling on the "new public" criterion as having no basis in the Berne Convention and other international treaties.

#### Different methods of linking

- 32) Another issue is whether the methods of linking described in paragraph 9) above should be treated differently for the purposes of an infringement analysis.
- 33) The rulings of the CJEU, the US Court and the Japanese Court described above do not seem to make a distinction between these different methods of linking. However, the ALAI report described above proposes that deep links and framing (and possibly embedding) should require authorization of the copyright owner, while hyperlinking to the starting page is not communication of a specific work to a public.

#### Other issues

- 34) Other issues regarding linking that are yet to be resolved include the following.

- 35) First, if a webpage to which a copyrighted work is initially uploaded contains a statement that expressly prohibits certain methods of linking or linking generally, should this affect the infringement analysis?
- 36) Second, where access to a webpage to which a copyrighted work was initially uploaded has been limited in some way (e.g. a subscription is required to access the copyrighted work), should this affect the analysis?
- 37) Third, the copyrighted work initially uploaded to the website may have been uploaded without the authorization of the copyright owner. Should this affect the infringement analysis? This issue was not decided by the CJEU in *Svensson* or *BestWater*, but may be decided in the *Sanoma*<sup>6</sup>, a case currently pending before the CJEU. In *Sanoma*, the CJEU has been asked to rule on whether it is a copyright infringement to link to a third party website, which is freely accessible, but to which a copyrighted work has been uploaded without the consent of the copyright owner.
- 38) Fourth, the CJEU in *Svensson* adopted the view that, if a work is initially made available on a webpage without any access restrictions, the communication is automatically directed to all Internet users, so there is no "new public." However, if it is possible to direct the communication to certain members of the public only, other members of the public may possibly constitute a "new public." If a person makes a copyrighted work available on a webpage without any access restrictions, are there any circumstances under which communication of the copyrighted work would nevertheless be considered as directed only to certain members of the public (e.g. people living in a certain country or region, people who speak a certain language)?
- 39) Finally, if the act of linking is not found to be direct infringement of copyright, is it capable of constituting an act of indirect (secondary) copyright infringement? Should the answer depend on whether the initial upload of the work was made without authorization of the copyright owner?

***You are invited to submit a Report addressing the questions below. Please refer to the 'Protocol for the preparation of Reports'.***

## **Questions**

### **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?

As noted in the Study Question's preface, the U.S. does not have a statutory provision that expressly provides for protection of a making available right *in haec verba*. In effect, however, Section 106 of the US Copyright Act provides for protection of an author's making available right. Even though Section 106 does not use the express language of Article 8, the making available right is subsumed by the exclusive rights set forth in Section 106. See also the answer to no. 2 below, which provides a more thorough explanation.

- 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?

Yes. Section 106 of the Copyright Act, 17 U.S.C. § 106(4)–(6), establishes the exclusive rights of a copyright owner to perform or display a work publicly. Section 101 of the Copyright Act provides the definition that to perform or display a work “publicly” includes “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” This analogous right provides authors the exclusive right to communicate a performance or display a work by making the performance or display available to the public through means of any device or process, including the Internet. Section 106(3) of the Copyright Act may protect the author’s exclusive right of making available of the copyrighted work through copies by establishing the exclusive right of the copyright owner to distribute copies of the copyrighted work to the public. Depending on the facts, the reproduction right may also be implicated.

It is important to note that protection under the Copyright Act requires the work to be fixed in either a copy or a phono record. A copy is the material object by which the work can be embodied, meaning that a copyrighted work stored on a computer’s server is the “copy” for purposes of U.S. copyright law. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9<sup>th</sup> Cir. 2007).

- 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?

Since under the U.S. Copyright Act the §106 exclusive rights of the copyright owner are not couched in terms of “communication to the public,” we find it difficult and inaccurate to answer this question using this phraseology. Under U.S. law, one would look to see whether one of the exclusive rights under §106 were implicated by the linking. Whether one of the §106 rights is implicated by the linking in the situation described above depends on all the facts. For example, a link that results in a display or a stream may implicate the public display or public performance right. A link that permits a user to download a copy may implicate the distribution and reproduction rights. Whether such implicated rights are infringed, whether the infringement would be direct or indirect (contributory, vicarious or induced), and whether there would be a defense, an applicable limitation or exception (including fair use), or a limitation on liability (such as under the Digital Millennium Copyright Act (“DMCA”) safe harbors), would depend on the facts.

That said, we are aware of no U.S. holding that the mere provision of a hyperlink to copyrighted content that had been uploaded to the public Internet with the authorization of the copyright owner, such as by a search engine, infringes the exclusive rights of the copyright owner, nor are we aware that any court has

considered the question. *Cf., A.P. v. Meltwater*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (distinguishing a “true” search engine from a news aggregator who copied content in news digest linking to stories owned by plaintiff). Whereas such linking could be considered a “communication to the public” within the plain meaning of those words, and within the definition of “publicly” in §101, it is not determinative of whether a right has been implicated or infringed. In addition, any linking or other use of content protected under § 106 is subject to U.S. Copyright Act’s “fair use” provisions, 17 U.S.C. § 107.

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

See above.

- 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?

See above.

- 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)?

See above.

- 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?

We are aware of no distinction between hyperlinking and deep linking under U.S. law for purposes of these analyses. In a non-binding, unpublished district court opinion in 2003, one court explained: “A URL is simply an address, open to the public, like the street address of a building, which, if known, can enable the user to reach the original to make the URL a copyrightable item, especially, the way it is used . . . . There appear to be no cases holding the URLs to be subject to copyright. On principle they should not. “*Ticketmaster Corp. Tickets.Com, Inc*, 2003 U.S. Dist. LEXIS 6483 (citations omitted). We are unaware of any courts that have challenged this analysis.

- 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?

The act of framing (otherwise known as “in-line linking”) has been held by one appellate court to not constitute an act of direct infringement of the display right (The HTML instructions direct the user to the copyrighted work which is not the equivalent of communicating a copy. *Id.* at 1161)., but that it could be an act of contributory infringement if the defendant had sufficient knowledge and failed to take steps to minimize the damage in the context of a search engine. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1160–61 (on remand finding that Google was protected from liability under the DMCA safe harbors.). However, U.S. courts have not addressed the issue of framing outside the search engine context.

- 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?

We are aware of no distinction between framing and embedding under U.S. law for purposes of these analyses.

- 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?

We are aware of no case in which a U.S. court has considered whether a statement that prohibits linking to a publicly available website is an infringement.

- 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?

A fact of this nature would likely affect the infringement analysis because it suggests that the linking party may have circumvented technological protection measures imposed by the copyright owner and is thereby engaging in an unauthorized display, performance or distribution of copies or may have violated the Digital Millennium Copyright Act by circumventing access controls. Even if the linking party was not responsible for the circumvention, it might still be liable depending on its level of participation, knowledge and culpability, whether any defenses, limitations or exceptions apply, and whether safe harbors apply.

- 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?

A fact of this nature may affect the infringement analysis since if the copyrighted work has been uploaded without the authorization of the copyright holder this means a violation of the reproduction right has occurred. If the linking party is also the uploading party then that party may be directly liable for the reproduction as well as any display, performance or distribution of copies that is implicated by the linking, again subject to the defenses and limitations described above. Even if the linking party is not responsible for the uploading, the linking party could be indirectly liable for the reproduction under theories of contributory or vicarious liability or inducement, again, subject to the defenses and limitations. described above.

DMCA take-down notices and safe harbor protection is often used in this context (but can also be used when the copyrighted material was uploaded lawfully). Section 512 of the U.S. Copyright Act provides limitations on monetary liability relating to online material for qualifying parties who employ repeat infringer termination policies and where the service provider does:

1. Not have actual knowledge of the material or activity is infringing;
2. Not receive a financial benefit directly attributable to the infringing activity; and
3. Upon notification of the claimed infringement, expeditiously removes or disables access to the alleged infringing material.

17 U.S.C. § 512(d).

- 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. Under the Copyright Act, to perform or display publically means to perform or display at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered. No U.S. law limits the access of a webpage having no access restrictions to members of the public including the global public. A webpage without any access restrictions would be considered as having been made available to all members of the public that have access to the Internet.

- 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?

- 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?

Yes. Secondary liability for copyright infringement may be found against the website containing hyperlinks, deep links, framing and embedding if it is established that the website facilitates or otherwise contributes to direct copyright infringement by a third party. Secondary copyright infringement is limited by the safe harbor exclusions set forth in Section 512 of the Copyright Act as well as all other applicable defenses and limitations and exceptions under the Copyright Act.

Additionally, section 1201 of the Copyright Act, Circumvention of Copyright Protection Systems, provides that no person shall circumvent a technological measure that effectively controls access to work protected under the Copyright Act. A website may be in violation of the copyright owners anti-circumvention right found in 17 U.S.C. 1201 when circumventing a measure that was created to prevent access to copyrighted material.

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

There are three types of secondary liability for copyright infringement: contributory, vicarious and inducement. Contributory liability requires knowledge and a material contribution by the defendant. Vicarious liability requires that the defendant have the right and ability to control the infringement and enjoys a direct financial benefit from it. Inducement liability is found where the defendant has actively encouraged the infringement. Secondary or indirect copyright infringement is limited by the safe harbor exclusions set forth in Section 512 of the Copyright Act, as well as all other applicable defenses and limitations and exceptions under the Copyright Act.

## **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 "Fair Use" provisions of the U.S. Copyright Act, 17 U.S.C. § 107 coupled with the free speech protections of the First Amendment to the U.S. Constitution seek to strike a balance between the incentive given to rights holders to create protected

content and the public's interest in dissemination of ideas, information and discoveries.

- 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?

### III. Proposals for harmonisation

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

*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?

**No. The act of linking, in and of itself, cannot categorically be considered an act of communication of the copyrighted work, but rather is driven by the facts of each situation.**

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

- 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?

- 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?

**The inquiry should focus on the particular facts of any alleged acts and appropriation instead of the particular technology employed to reach the goal**

- 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?

**The determination should be based on the specific facts of any such alleged infringement, including knowledge and intent of the "linker."**

- 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.**

- 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.

[See answers above.](#)

- 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.

[Yes. To the extent that such linking knowingly causes a violation of the rights as discussed in paragraph 24, a linker could be subject to either direct or secondary liability.](#)

- 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.](#)

- 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.