



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

**ALAI Report and Opinion on
a Berne-compatible reconciliation of hyperlinking and the communication to the public
right on the internet***

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In the two previous ALAI Reports and Opinions, namely on making available rights, in particular as far as hyperlinking is concerned of 15 September 2013, and on the "new public" criterion as introduced by the CJEU, of 17 September 2014, ALAI wanted to shed light on the making available and communication to the public rights of authors and related rights owners and to demonstrate the conflicts with international copyright law of the "new" "public criterion. ALAI takes a profound interest not merely in the correct application of international copyright norms, but also wants to promote feasible solutions to complex matters of internet uses of copyright and related rights.

Hence, the ALAI Executive Committee formed a new study group in September 2014 to analyse and report on such matters to the Executive Committee meeting in March 2015. At that Executive Committee meeting, the Study Group, with additional members, was again charged with examining: linking as an act of making available; means of authorizing linking, notably by collective licensing; and exceptions applicable to linking. Hereby the working group submits its views on how new means of communication can be fostered without emptying and exhausting the sources of creativity.

1. A nuanced and economically sensitive approach to copyright and related rights in the Internet environment

In *Svensson*, the "new public" limitation/carve-out seems intended to come to the rescue of the "open Internet." The criterion allowed the CJEU at once to re-affirm the broad reach of the making available right to the offering of access, while avoiding the apparent consequence of the application of that right to acts of linking and framing. Hyperlinks do make the linked-to content available to Internet users, provided a link brings the content, typically by use of a work's URL on the internet, directly to the public. The *Svensson* decision, just as the later *BestWater* decision of the CJEU,¹ clearly confirm this.

However, ALAI, recalling its Reports and Opinions of 15 September 2013 and 17 September 2014, proposes a more nuanced approach than the CJEU does.

* Adopted by the Executive Committee on 17 June 2015

¹ See C-348/13, 21 October 2014, *BestWater International GmbH vs Mebes et al.*

It is sustained that only a nuanced solution will work. The term of 'hyperlinking' covers a wide diversity of cases. To treat all these situations under one and the same heading would mean a denial of their factual and legal diversity. On the one hand, this means that it is not possible to offer solutions for all those situations, and this was certainly not done in either of the ALAI reports of 15 September 2013 or of 17 September 2014, but on the other hand, it seems safe to assume that in many cases, it will be possible to find solutions within the existing framework of copyright and without turning upside down the system established by the international treaties.

ALAI reaffirms its view that deep links and framing links make the referenced work available to the public, and therefore, in the absence of an exception or limitation, would require authorization. These links offer the works to the public in such a way that the members of the public may access the works at a place and time chosen by them. Those who furnish these kinds of links make it possible to bring the works directly to the computer or device screens of the user, or to download them directly to the computer or device, without further intermediation.² By contrast, a hyperlink to the home page of a website hosting the contested work is not itself a communication of a specific work to the public because what is communicated is the homepage, not directly the work. Another step, taken on the host site, is needed before the user accesses the work via the linking measure. In that case, there is a communication to the public, but solely by the linked-to site, not also by the linker.³

ALAI also reaffirms its view that the "new public" criterion relied upon by the CJEU to find that the making available was not a communication to the public, when the initial website communication was both authorized and not limited by technological measures, has no basis in the Berne Convention or other relevant international accords. But ALAI believes it is possible to permit certain otherwise infringing linking activities, both by the development of mechanisms for authorizing those activities, and by means of the application of exceptions already contemplated by the Berne Convention and other international instruments.

One approach, which ALAI has at length considered, but ultimately rejected, is implied license. In part, this approach does not offer a generally applicable solution because of, inter alia, different understandings in different Berne member states as to the existence or requirements

² The CJEU's recent decision on the scope of the distribution right, *C-516/13, Dimenzione Direct Sales v Knoll Int'l*, 13 May 2015, similarly affirms that the offer to commit an act that would infringe the author's exclusive distribution right is itself considered to be an act of distribution; it is not necessary that the copy actually change hands. ("Eu égard aux considérations qui précèdent, il convient de répondre aux questions posées que l'article 4, paragraphe 1, de la directive 2001/29 doit être interprété en ce sens qu'il permet à un titulaire du droit exclusif de distribution d'une œuvre protégée de s'opposer à une offre de vente ou à une publicité ciblée concernant l'original ou une copie de cette œuvre, quand bien même il ne serait pas établi que cette publicité a donné lieu à l'acquisition de l'objet protégé par un acheteur de l'Union, pour autant que ladite publicité incite les consommateurs de l'État membre dans lequel ladite œuvre est protégée par le droit d'auteur à en faire l'acquisition.")

³ If the linker knows that the content on the linked-to page is infringing, the linker may be a contributory infringer, but would not be directly liable for a violation of the right of communication to the public. This Report notes the possibility of liability under theories of secondary infringement but, in light of wide disparities among Berne member states as to the existence and elements of secondary liability, does not further explore that possibility.

of implied licenses. More importantly, ALAI is concerned that the inference of the license derives from the characteristics of the website or search engine through which the work is accessed, rather than from choices made by the author or rightholder. For example, if the author posts his or her work to a website which allows search engine crawling, has the author consented to unlimited forms of access because a search engine that indexes the website responds only to all-or-nothing instructions?⁴ It is not appropriate to leave the determination of consent to the designers of the code the intermediary services adopt. The enforcement of the author's rights should not turn on whether the author has complied with rules written by potential infringers.

An implied license approach risks cutting too broadly for another reason as well: an author's express or implied authorization to make a work available through linking *from a particular website* (even if a freely accessible one) does not justify inferring consent to linking from *any* third-party website. If the author's website carries advertising, for example, one may infer that the author would like to drive traffic to his or her site, including by means of third-party linking, so that an augmented audience will click on the advertisements on the author's site, thereby increasing his or her revenue. These same facts, by contrast, strongly suggest that the author would not consent to framing links which surround copyright content with advertisements on the framer's site, thus enriching the framer to the author's detriment. Yet if placement of the content on the site in the first place suffices, in the absence of technological or express restrictions, to permit the inference of authorization to deep link or to frame, then the implied license approach would override even evidence pointing toward the contrary inference that authorization was not permitted.

The dangers of broad inferences of authorization become all the more apparent when one recognizes that income from advertising fees have acquired a different role from the one they had in the traditional economy. Especially on the Internet, they have developed into a primary, and frequently even the only source of income. This sheds another light on the *Svensson/BestWater* decisions, which still proceed from a traditional perception of how the copyright economy works.

2. Express authorization

While ALAI is concerned about the potential for excessive implication of authorizations to engage in different forms of linking, the legal and technological means exist to implement *express* authorizations. If some assert that implied consent to free linking of all kinds is the default position, that is because the suppliers of the links and the search engines have endeavored to make it so, in part by declining to provide or comply with alternatives to all-or-nothing website accessibility. But these alternatives exist and should be further developed.

⁴ See, e.g., Valérie-Laure Benabou, Joëlle Farchy, Cécile Méadel, Josée-Anne Benazeraf, *Le référencement des œuvres sur Internet, Rapport du CSPLA 91-94* (2013) (criticizing all-or-nothing opt-out solutions imposed by service providers).

The requirement of a “new public” in the Svensson decision, if interpreted as a prerequisite to deeming the act a “communication to the public”, not only conflicts with the scope of the minimum right underlying international law, as stated earlier by ALAI, but also may conflict with contractual arrangements already in place for exploitation on the Internet and constitute a burdensome unjustified limitation on the contractual freedom of rightowners. It is, in fact, normal practice that licenses for the use of different types of works contain clauses defining the “targeted” public or the channel through which works are disseminated. In this respect it might be useful to recall that Directive 2001/29/CE art. 9 “*Continued application of other legal provisions*” expressly states that the provisions in the Directive “shall be without prejudice to provisions concerning [...] the Law of contract”. And contracts, particularly through collective licensing, can provide an effective means of express authorization.

a. collective licensing

Collective licensing may supply one means to reconcile the author’s exclusive rights with certain practices of deep linking and framing.

For some types of works, collective management organizations offer licensing schemes applicable to the communication to the public by commercial users. Such schemes specify that a mere hyperlink redirecting to another website is not subject to the exclusive right of communication to the public (therefore no license is needed), while embedding and framing links are subject to specific licensing provisions. The contractual arrangements can vary depending on licensing schemes and factual circumstances, but a contractual framework is available to regulate linking and framing as far as collective management is concerned.

As an example, in You Tube collective licensing agreements, Google stipulates specific clauses concerning the embedding of You Tube videos in third party web sites. Such clauses refer in particular to the cases where the third party websites receive advertising income from additional sources, where a separate license is required in addition to the authorization to allow embeds acquired by You Tube.

These contractual solutions avoid the risk of unfair diversion of advertisement income (highlighted in the section on implied licenses above) on the one hand; and on the other, they allow the rightholder to determine the scope of the license in accordance with international law and thus without recourse to the concept of “new public”.

b. website-embedded instructions

Source websites and the authors who post their works to them may be happy to be the objects of hyperlinks that bring users to their home pages (these links, ALAI has already posited, do not in any event bring the making available right into play), but may be unwilling to entertain linking practices, such as those that deprive the source site of the economic benefit of users’ access to their content, or that remove or obscure attributions of authorship. Under current practices, however, too often an author may either block all linking by applying the robots.txt instruction, or must allow all linking; the author cannot confine authorization to hyperlinking

to his or her homepage. But there exist alternatives, such as Automated Content Access Protocol (ACAP) which would enable authors to permit or prohibit different kinds of linking, but with which the search engines do not currently cooperate. Were judicial or legislative authorities to follow ALAI's opinion that deep linking and framing require express authorization (in the absence of an applicable exception), further development and implementation of technological means of providing express consent would most likely follow.

3. Exceptions to the rights of communication and making available to the public

It does not follow that every deep or framing link has to be an infringement, in the absence of the rightholder's authorization. As with all exclusive rights, making available through linking remains subject to authorizations by law. Many instances of linking may be consistent with the exceptions set out in Article 5(3) of the Information Society Directive and with the scope of exceptions established in the Berne Convention and also applicable under the WIPO Copyright Treaty (WCT).

a. Makings available by the press

One of the provisions of Article 5(3) of the Directive deserves specific mention; namely the one included in the first part of point (c) in accordance with Article 10*bis*(1) of the Berne Convention, reading as follows:

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 [on the right of reproduction] and 3 [on the right of communication to the public, including making available to the public] in the following cases:

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated...

The EU wording uses somewhat broader terms than the exception as set out at Article 10*bis*(1) of the Berne Convention, which covers

reproduction by the press, the broadcasting or the communication to the public by wire of articles *published in newspapers or periodicals* [emphasis supplied] on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

This provision is relevant for the issues discussed in this report and opinion for two reasons.

First, it is relevant because it allows the free use by the press of a broad category of works published by other members of the press which – due to their nature linked to political, economic and religious issues – are frequently used through hyperlinks in their electronic versions.⁵ Indeed, the copyrighted works at issue in the *Svensson* case – articles written by Swedish journalists appearing on the website of a Swedish newspaper – might under certain circumstances have qualified for the exception.

Secondly, it is also relevant since, in the cases covered by the provision, the absence of express reservation results in free use. On the one hand, such absence of reservation may be regarded as a specific form of implied licence – a legal fiction – but, on the other hand, the reservation as a condition of subsequent applicability of the rights concerned is a kind of formality which – in this case – has been explicitly and strictly permitted by the Berne Convention itself in spite of the general prohibition of formalities in Article 5(2) of the BC.⁶

On the other hand, the beneficiaries of this exception are “the press”; as a result not every linking intermediary will qualify. It is not clear, for example, that every news aggregator or every blogger would be considered the “press,” particularly if the former provides no independent content.

b. Quotations

⁵ There are two definitional issues: first, whether the source websites are “newspapers and periodicals” or “broadcast works”; second, whether the disclosure of the content on the source website (if unaccompanied by a print version) would mean that the content was “published” for purposes of the Article 10*bis*(1) exception. Regarding the first, Sam Ricketson and Jane Ginsburg point out in connection with this as follows: “Ultimately, it would seem to be a matter for national laws to determine what are ‘newspapers and periodicals’ and whether these extend to electronic versions that are made available online. However, there is nothing in Article 10*bis*(1) that excludes such extensions.” See S. Ricketson – J. Ginsburg: “International Copyright and Neighboring Rights – The Berne Convention and Beyond”, Oxford University Press, 2006, p. 801.

Second, as expressed in ALAI’s Report and Opinion of 14 January 2012 on *Determination of the Country of Origin When a Work is First Publicly Disclosed Over the Internet*, in which ALAI expressed its view that works disclosed only on websites, were not “published works” for purposes of determining a work’s country of origin under Article 3(3) of the Berne Convention:

It is important in this respect to underscore that a work which, while technically “unpublished,” has been publicly disclosed and made available to the public with its author’s consent would, by virtue of its divulgation, be subject to the Union member copyright exceptions permitted under art. 10(1). In other words, “publication” (specifically in the context of first publication) is a term of art entailing particular consequences under the Berne Convention. In the sense of the Convention, the term should be employed with precision, and not conflated with the more colloquial meaning of “publicly disclosed.”

Article 10*bis*(1)’s inclusion of “broadcast works” within the works subject to the press reporting exception bolsters the conclusion that the works need not have been “published” in the formal sense required for application of the country of origin point of attachment; rather the exception addresses certain kinds of works that have already been communicated by various press media.

⁶ This is noted in the new Guide to the Berne Convention in this way: „It would be needless to deny that this is an element of formality, the only minor and – considering the nature of these information-related works – quite understandable harmless exception to the principle of formality-free protection. (As it can be seen on the basis of its origins in the very first act of the Convention, it was adopted at the time when formalities still were acceptable under the Convention).” See “Guide to the Copyright and Related Rights Treaties Administered by WIPO”, WIPO publication No. 891 (E), 2003, pp. 65-66. Jørgen Blomqvist expresses the same opinion by referring to Article 10*bis*(1) of the Berne Convention: “The provision... contains a remainder of the formalities, which once were used as a condition for protection, in that the limitation may be taken out of force by explicitly reserving the right.” See J. Blomqvist: “Primer on International Copyright and Related Rights”, Edward Elgar, 2014, p. 163.

A further well-established exception that may, in principle, play a role in the context of hyperlinks is the quotation provision laid down in Article 10(1) of the Berne Convention and Article 5(3)(d) of the Information Society (Copyright) Directive. But the many conditions on that provision's application substantially circumscribe its impact.

An initial question in that regard is whether a deep link to or frame around the entire work would be a "quotation", given that the act is a communication and arguably not a reproduction, and in any event communicates the whole work, not merely a part of it.⁷ Article 10(1) authorizes "quotations *from* a work," not quotations "of a work": the preposition points toward partial rather than entire communication of the work's contents.⁸ On the other hand, since the normal meaning of "quotation" implies less than the whole, one can argue that the rejection during the Stockholm revision of the Berne Convention of the limiting language "short" before "quotations" might leave room for whole works in certain, exceptional, cases.⁹

A further question regarding the Article 10(1) provision for quotation exceptions arises: must there be a purpose of illustrating or dealing with the quoted work in the user's own analysis or criticism (i.e., what French authorities call an *oeuvre citante*, requiring that the quotation be part of a work in its own right), or does it suffice merely to reproduce or communicate the quoted work? For example, aggregators of links often identify the source work targeted by the link, but provide no discussion or analysis of the content of the targeted work. In requiring that the extent of the quotation "not exceed that justified by the purpose," the text may assume that the quotation *has* a purpose beyond mere repetition of the referenced work. The ensuing phrase, "including quotations from newspaper articles and periodicals in the form of press summaries" reinforces that conclusion because a "press summary," in the authoritative French¹⁰ "revue de presse," is not merely a string of excerpts from newspapers and periodicals, but rather implies a thematic selection and comparison of the excerpts.¹¹ Of course, this is only one species of quotation covered here: there may be others of the more traditional kind where a section of a work is quoted as part of a separate critique or discussion of the particular topic being made by the second author.

Assuming that these threshold issues might be resolved in favor of the applicability of the exception (about which, as discussed above, there are serious doubts), the article's language may supply some further considerations:

(1) It shall be permissible to make quotations from a work which has *already been lawfully made available to the public*, provided that their making is *compatible with fair practice*, and

⁷ Compare Berne art. 10bis(1), which clearly permits reproduction or communication of the entire work.

⁸ This conclusion emerges even more clearly from the French text, which states, "citations tirées d'une oeuvre" – more precisely translated as "quotations drawn from a work."

⁹ See Ricketson & Ginsburg, para. 13.42

¹⁰ Under Article 37 of the Berne Convention, if the French and English versions carry different meanings, the French prevails.

¹¹ See Ricketson & Ginsburg, para. 13.41: "A 'revue de presse' is not really a summary of an article appearing in a newspaper; rather, it is a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue."

their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, *mention shall be made of the source, and of the name of the author if it appears thereon.*

“*already been lawfully made available to the public*”: the author has first to have authorized the disclosure of the work, whether on a website or through other means of dissemination. If the digital source to which the work has been posted is not available to the public, for example, if access is limited to the author’s family, the work would not already have been lawfully made available to the public.

“*mention shall be made of the source*”: this language makes it possible to distinguish linking from framing. If the frame obscures the source-identifying information on the source website, then the "quotation" (if it is one) does not identify the source, and does not qualify for the exception.

“*compatible with fair practice*”: this limitation enables distinctions based on linking/framing that, in particular, effectively deprives the source website of advertising revenue on the one hand, and links that bring the user directly to the work, but which preserve the source website's attribution and remuneration mode, on the other. For example, where the linker derives no economic benefit from the link (e.g. does not substitute its advertising for the source website’s), and where the linker does not obscure the work’s authorship attribution, a link that brings the user directly to the content that is the subject of the linker’s analysis, or which the linker has cited in support of a proposition advanced in the linker’s text, may well be compatible with fair practice.

4. Possible new exceptions or limitations under WCT for linking measures?

It may, in this context, be mentioned that Contracting Parties to the WCT are free, at least as a matter of principle, under that treaty to develop new exceptions or limitations for the digital environment, hence for hyperlinking measures. Such a solution may be in line with the Agreed Statement concerning Article 10 WCT.

The Agreed Statement concerning Article 10 WCT reads as follows:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

But such an exception or limitation must of course be accomplished on the basis of and in compliance with the three-step test (as follows from Article 10 WCT). The three-step test

ensures that exceptions and limitations provided for in national law shall only be applied (i) in certain special cases, (ii) which do not conflict with a normal exploitation of the work or other subject-matter and (iii) do not unreasonably prejudice the legitimate interests of the rightholder (“author” in Article 9(2) of the Berne Convention). Exceptions interpreted or devised to accommodate linking measures must resolve, at least, the following matters within the frames of the three-step-test:

1. Would hyperlinking at all be a "certain special case"? This question needs to be addressed because it was, after all, the pervasiveness of the practice of linking that propelled the CJEU’s application of the “new public” criterion. While it may nonetheless be possible to satisfy the first step, the language calls for caution, and also for distinctions based on different types of links (hyperlinks, deep links, embedding and framing links) and how they actually function in the individual case.

2. By the same token, for the reasons explored earlier in this Report and Opinion, the "normal exploitation" criterion may call for distinguishing among different kinds of links, depending on their economic impact. Links which deprive the author of revenue opportunities may conflict with the author’s “normal exploitation” of his or her work, particularly in an environment in which advertising supplies a significant source of remuneration.

3. Further, one must bear in mind that the three-step-test could play a balancing role in its inquiry into whether the link would "unreasonably prejudice the legitimate interests of the rightholder," notably moral interests, even where, because of possible beneficial economic effects of potential extra clicks back to the source website, the link might not conflict with a normal exploitation.

It may be difficult to articulate the appropriate contours of such a new exception, given its likely fact-specificity. However, legislatures may establish in particular the purposes for which such linking should be covered by an exception or limitation, such as news reporting or education, and indicate further criteria (in particular relating to the unreasonable prejudice) to be then applied by the courts to the specificities of each individual case. Courts, rather than legislatures, may then be better equipped to appreciate the economic impact and other potentially unreasonable prejudice that may result from certain practices of linking, and therefore legislation might be confined to posing a general framework within which courts might operate.

5. Summary

When taking the 15 September 2013 and 17 September 2014 ALAI Reports and Opinions as a starting point, it can thus be concluded that new means of communication can be fostered within the framework of current international copyright protection standards. In light of ALAI’s previously-expressed critique of the CJEU’s “new public,” “specific technical means” and “restricted access” criteria, ALAI believes that a correct application of the communication to the public right set out in the Berne Convention, TRIPS Agreement and the WCT and WPPT, can accommodate a reasonably broad possibility of free use of certain kinds of linking (indeed,

basic hyperlinking to home pages is free in any event), as well as of authorized (by authors) use of deep and framing links in general.

These goals may be accomplished through a combination of the development of different means of express consent, including by CMOs, to deep linking or framing, and the application to deep linking of various relevant exceptions and limitations under the international treaties and the EU directives. Relevant exceptions may be those allowed under Article 10*bis*(1) of the Berne Convention and Article 5(3)(c) of the Information Society (Copyright) Directive, which exceptionally makes it possible for the press to freely use works published or broadcast in the press on current political, economic and religious, and possibly (to the extent that the doubts indicated above might be eliminated) Article 10(1) of the Berne Convention and Article 5(3)(d) of the Information Society Directive, as well, potentially, as some carefully-tailored exceptions construed in accordance with the three-step test.
