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## 2016 – Study Question (Copyright)

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Linking and making available on the Internet

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### 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?

yes

Please explain.:

Under § 19a of the German Copyright Act (*Urheberrechtsgesetz* - hereinafter "UrhG"), authors have the right to make their work available to the public, either by wire or wireless means, in such a manner that members of the public can access it from a place and at a time individually chosen by them. The making available right under § 19a UrhG is part of an overarching "right of communication to the public" (§ 15(2) UrhG) which covers the communication to an absent as well as a present audience (and includes performance rights).

§ 19a UrhG was introduced in 2003 to implement Article 3(1) Directive 2001/29/EC which in turn implemented Art. 8 WCT. As the economic rights covered by Article 3(1) Directive 2001/29/EC prescribe both a minimum and a maximum protection (full harmonization), German courts are bound to interpret § 19a UrhG with a view to the Directive. In addition, they take into account the relevant provisions of the international treaties on which the Directive is based (and to which Germany is also directly bound), including Art. 8 WCT.

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?

no

Please explain:

- 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?

yes

Please explain:

We understand the question to cover situations in which the link does not refer to the copy of the protected work itself but to a page on a website from which a user can access the work on another page (surface link). There have not been any decisions of the German Federal Court of Justice (Bundesgerichtshof - BGH) or the European Court of Justice (CJEU) on this issue. Hence, the answer to the questions can only be inferred from the case law of the German and European courts on deep linking which will be further described under 7. below.

Under the BGH case law, for the purposes of § 19a UrhG, the act of making available requires that access is provided to a copy of the work and that the relevant copy is in the sphere of the person providing access.<sup>[1]</sup> Neither of the two requirements is fulfilled in the case of a surface link: The link does not provide access to a work itself but only to a webpage on which the work can be accessed and the work is not in the sphere of the linksetter. The fact that access to the work is *facilitated* is not per se a use of the making available right.<sup>[2]</sup> Hence, the setting of a surface link does not constitute an act of making available for purposes of § 19a UrhG.

Under the case law of the CJEU, while generally the setting of a deep link may constitute an act of making available (question 7 below), the court has based this on the fact that the link provides *direct access* to the work.<sup>[3]</sup> This would not be the case for surface links. Hence, while the question has not yet been adjudicated on the European level, it would seem that also under European law, the setting of a surface link would not constitute an act of communication of the copyrighted work.

#### Footnotes

1. [↑](#) BGH, GRUR 2009, 845 no. 27 – *Internet-Videorecorder*; BGH, GRUR 2010, 628 no. 19 – *Vorschaubilder I*; BGH, GRUR 2013, 818 no. 8 – *Die Realität I*; BGH, GRUR 2016, 171 no. 13 – *Die Realität II*.
2. [↑](#) BGH, GRUR 2003, 958 (962) – *Paperboy*.
3. [↑](#) CJEU, C-466/12, GRUR 2014, 360 no. 18 – *Svensson/Retriever Sverige*.

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

- 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?

- 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)?

- 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?

yes

Please explain:

In its 2003 landmark decision, the BGH concluded that hyperlinking in the form of deep links may facilitate access to a work that is already accessible on another website but does not constitute an act of making available within the meaning of German copyright law. While the decision was issued on the basis of the general communication to the public right set out in § 15(2) UrhG, it has since been extended to the making available right under § 19a UrhG.<sup>[1]</sup> The BGH also concluded that hyperlinking does not constitute an act of communication within the meaning of Article 3(1) Directive 2001/29/EC.<sup>[2]</sup> In its reasoning, the BGH stressed the fact that the decision as to whether or not the work remains available to the public lies entirely with the person who first makes the work available, not with the person setting the link.<sup>[3]</sup> If the work ceases to be available on the original website, the link also loses its function of facilitating access to the work. More generally, under the BGH case law, the act of making available consists in the *provision of access to the work by the person holding the work ready for access*, i.e. the work must be in the sphere of the person providing access.<sup>[4]</sup> The second requirement is not fulfilled in the case of a link because the copy of the work to which access is provided continues to be in the sphere of the person operating the original website.

Despite this general definition which has been upheld in very recent decisions,<sup>[5]</sup> in the *Session-ID* decision, the BGH found that if the work is *not* freely accessible on the original website, setting a deep link to the work provides access to the work and thus *the linksetter* uses the making available right. It is not explained how this fits with the general rule that the act of making available requires that the work is in the sphere of the person providing access, so that with respect to terminology, the *Session-ID* decision seems not fully aligned with the case law on links to webpages that are freely accessible.<sup>[6]</sup>

In *Svensson*, which also concerned deep links, in interpreting Article 3(1) Directive 2001/29/EC, the CJEU came to similar results as the BGH, but with a slightly different reasoning. The CJEU found that the setting of a link that provides direct access to a work constitutes an act of communication within the meaning of Article 3(1) Directive 2001/29/EC.<sup>[7]</sup> In response to the CJEU case law, the BGH has upheld its prior rulings that setting a link (or frame) does not constitute an act of making available within the meaning of § 19a UrhG, but has accepted the position of the CJEU stating that the relevant use is part of the overarching communication to the public right as set out in § 15(2) UrhG.<sup>[8]</sup> It should be noted, however, that the question of whether or not the setting a link is regarded as an act of communication, has again been discussed in submissions of member states in the *GS Media* case currently before the CJEU.<sup>[9]</sup> In his opinion issued on April 7, 2016, Advocate General Wathelet came to the conclusion that the setting of a link cannot be classified as an act of communication to the public within the meaning of Article 3(1) Directive 2001/29/EC because the intervention of the operator of the website posting the hyperlink is not indispensable to the making available of the works to users.<sup>[10]</sup>

Even though the CJEU ruled that the setting of a deep link constitutes an act of communication, the court also ruled in *Svensson* (and confirmed in *BestWater*) that such a communication is not made to the public within the meaning of Article 3(1) Directive 2001/29/EC if the work is freely accessible on the original website (question 4). As the protected work has already been communicated to the public on another website, and the linksetter uses the same technical means that were already used for communicating the work on another website, the CJEU requires that the communication reaches a new public, i.e. an audience which the rightholder had not considered when he or she permitted the original communication.<sup>[11]</sup> According to the CJEU, this is not the case as the rightholder takes into account all internet users when authorizing the original communication to the public.

While this reasoning seems to be based on an implied license concept (question 5), it is currently unclear whether or not, under which circumstances, the fact that the rightholder has expressed an actual will to the contrary (i.e. denial of consent for the further communication) is relevant and which form such an expression of the rightholder' will would have to take (see also questions 10 and 11).

#### Footnotes

1. [↑](#) BGH, GRUR 2011, 56 no. 23 – Session-ID;
2. [↑](#) BGH, GRUR 2003, 985 (962) – Paperboy.
3. [↑](#) BGH, GRUR 2003, 985 (962) – Paperboy; BGH, GRUR 2011, 56 no. 24 – Session-ID; BGH, GRUR 2013, 818 no. 9 – Die Realität I.
4. [↑](#) BGH, GRUR 2009, 845 no. 27 – Internet-Videorecorder; BGH, GRUR 2010, 628 no. 19 – Vorschaubilder I; BGH, GRUR 2003, 985 (962) – Paperboy; BGH, GRUR 2011, 56 no. 24 – Session-ID.
5. [↑](#) BGH, GRUR 2013, 818 no. 8 – Die Realität I; BGH, GRUR 2016, 171 no. 13 – Die Realität II.
6. [↑](#) Cf. BGH, GRUR 2011, 56 no. 27 – Session-ID.
7. [↑](#) CJEU, C-466/12, GRUR 2014, 360 no. 18 – Svensson/Retriever Sverige.
8. [↑](#) BGH, GRUR 2016, 171 no. 13 f., 22 f. – Die Realität II.
9. [↑](#) CJEU, C – 160/15 – GS Media BV/Sanoma Media et al.
10. [↑](#) Conclusions of the Advocate General in C-160/15 under:  
<http://curia.europa.eu/juris/documents.jsf?num=C-160/15>[<http://curia.europa.eu/juris/documents.jsf?num=C-160/15>].
11. [↑](#) CJEU, C-466/12, GRUR 2014, 360 no. 25 - 28 – Svensson/Retriever Sverige.

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?

no

Please explain:

Under the definition of framing set out in paragraph 12) of the Study Guidelines, we understand framing as a particular form of linking to a third party webpage where the link provides direct access (deep linking), upon a click of the user, to a copyright protected work which is transmitted from the third party website but which appears in the context of the webpage on which the frame is placed.<sup>[1]</sup>

In the *BestWater* case, the BGH referred to the CJEU the question whether or not a frame should be distinguished from a simple deep link without frame. In the reasoning of the referral, the BGH saw room for a distinction because by using a frame the linksetter makes, or has the possibility to make, the work appear to be part of his or her own website and therefore to appropriate the work without paying a license fee.<sup>[2]</sup> The CJEU rejected this theory.<sup>[3]</sup> As a consequence, under German law, framing will be treated in the same manner as a deep link.<sup>[4]</sup>

#### Footnotes

1. [↑](#) We note that this definition slightly differs from the technical definition of framing which is commonly used. In particular, the framing technology generally is a way to divide a webpage into various parts. The content appearing in the frames can be transmitted from the same or from a different server than the content in other frames on the same page.
2. [↑](#) BGH, GRUR 2013, 818 no. 26 – Die Realität I.
3. [↑](#) CJEU, C-348/13, GRUR 2014, 1196 no. 19 – BestWater/Mebes et al.

4. [^](#) BGH, GRUR 2016, 171 no. 27 ff. – Die Realität II.

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?

no

Please explain:

From the definition of “embedding” in paragraph 13) of the Study Guidelines, we understand embedding as a form of framing where the protected work (stored on a third party website) appears in the browser of a user when the user clicks on the site containing the link without requiring a further click on the relevant frame (i.e. not a clickable link). This form of linking is sometimes also referred to as “inline-linking”.

Neither the BGH nor the CJEU has ruled on this form of embedded content. In the *BestWater* case, however, the CJEU rejected a distinction based on whether or not the impression is created that the work is being shown from the website where the link is located although in reality it originates from a different website.<sup>[1]</sup> It is therefore likely that the courts would treat embedded content (“inline-links”) in the same manner as deep links (question 7 above).

#### Footnotes

1. [^](#) CJEU, C-348/13, GRUR 2014, 1196 no. 17 – *BestWater/Mebes et al.*

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?

yes

Please explain:

It is currently unclear under European (and consequently under German) law whether or not, and under which circumstances it is relevant that the rightholder has expressed his or her consent to the first communication and/or his or her objection to the further communication and which form such an expression of the rightholder’s will should take (see also question 7 above). The CJEU’s rulings in *Svensson* and *BestWater* contain no qualification to the effect that the absence of actual consent of the rightholder would result in an infringement of copyright of the person setting the link.<sup>[1]</sup> The reasoning of the decisions, however, seems to rely on the rightholder’s consent to the first communication. If this would have to be read as a requirement of actual consent, express or implied, the question arises whether or not, and how, the rightholder can prohibit linking through restrictions on the original website or in terms of service. In an *obiter dictum* in the *BestWater* decision issued by the BGH after the referral to the CJEU, the BGH seems to imply that it should be possible for the rightholder to limit its consent to the first communication, i.e. to restrict linking of content made available on the original website (see also question 12).<sup>[2]</sup>

#### Footnotes

1. [^](#) CJEU, C-348/13, GRUR 2014, 1196 no. 17 – *BestWater/Mebes et al.*; CJEU, C-466/12, GRUR 2014, 360 no. 32 – *Svensson/Retriever Sverige*.
2. [^](#) BGH, GRUR 2016, 171 no. 35 – *Die Realität II, referring to the pending proceedings CJEU, C-160/15 – GS Media BV/Sanoma Media et al.*

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?

yes

Please explain:

In its *Session-ID*-decision, the BGH held that the setting of a deep link infringes the making available right if the operator on the website on which the work originally appeared restricted access to the work through technical means, e.g. such that the work is only accessible through the starting page of the website. The restriction must be technical in nature but does not need to qualify as a technological protection measure within the meaning of Art. 11 WCT.<sup>[1]</sup> The CJEU followed that assessment in *Svensson*. By restricting access through technical means, the operator of the original website has defined the public to which the first communication is made and thus, by circumventing the restriction, a user reaches a new public.<sup>[2]</sup>

#### Footnotes

1. <sup>^</sup> *BGH, GRUR 2011, 56 no. 30 – Session ID.*
2. <sup>^</sup> *CJEU, C-466/12, GRUR 2014, 360 no. 31 – Svensson/Retriever Sverige.*

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?

yes

Please explain:

The CJEU has not yet ruled on the question whether or not hyperlinking constitutes an infringement of the right to communicate the work to the public if the initial communication on the first website was not authorized by the rightholder.<sup>[1]</sup> This question is subject to the pending *GS Media* case which is likely to be decided in 2016.<sup>[2]</sup> In its opinion of April 7, 2016, Advocate General Wathelet came to the conclusion that it is not relevant whether or not the initial communication is made with the consent of the rightholder. Most importantly, the opinion is based on the argument that a person setting a link cannot assess whether or not the original communication is lawful or not. In view of the fact that hyperlinks are an essential feature of the internet architecture, such a situation would endanger the functioning of the internet as such.

In an *obiter dictum* in its *BestWater* decision (after the CJEU referral), the BGH came to a different result. Relying on the reasoning in *Svensson* and *BestWater*, namely the repeated reference to the public that the rightholder has taken into account when authorizing the initial communication, it came to the conclusion that in the absence of actual consent of the first communication, the setting of a link constitutes a communication to the public within the meaning of Article 3(1) Directive 2001/29/EC (albeit not § 19a UrhG).<sup>[3]</sup>

#### Footnotes

1. <sup>^</sup> *CJEU, C-348/13, GRUR 2014, 1196 no. 19 – BestWater/Mebes et al.; C-466/12, GRUR 2014, 360 no. 32 – Svensson/Retriever Sverige.*
2. <sup>^</sup> *CJEU, C-160/15 – GS Media BV/Sanoma Media et al..*
3. <sup>^</sup> *BGH, GRUR 2016, 171 no. 34 – Die Realität II.*

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

Please explain:

see answer to question 4.<sup>[1]</sup>

#### Footnotes

1. <sup>^</sup> *Under the German conflict of law rules, however, the applicable law in case of copyright infringement depends on the country for which protection is sought (lex loci protectionis). As conflict of law questions exceed the scope of the Study Questions, we do not further elaborate on this.*

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

Please explain:

Under German copyright law, a person is only directly liable if she has committed the relevant acts constituting copyright infringement herself or together with others or if she has knowingly aided or abetted the copyright infringer. In addition to direct copyright infringement, German law has developed a doctrine of secondary liability based on general civil law principles. Under these general principles, whenever a right which is enforceable against everyone (i.e. an 'absolute' right, including an intellectual property right) has been infringed, any third party, even though it is not itself an infringer of the right or has aided or abetted the infringer, can be asked to stop the interference to which the third party has contributed (*Störerhaftung*).<sup>[1]</sup> In applying this general rule to copyright infringements (and infringements of other intellectual property rights), the courts have developed restrictions to this very broad rule akin to a rule of reason. Most importantly, a third party, even though he or she may have contributed to the infringement, cannot be held liable, if it would be unreasonable to burden him or her with a duty to examine whether or not his or her behavior could interfere with the property of a third person. While these limitations would exclude the duty of linksetters to examine the wrongfulness of a first communication before setting the link, once the linksetter has been notified of the wrongfulness of the first communication, the linksetter would have to take the link down. This secondary liability (*Störerhaftung*) leads, however, only to cease and desist claims, not damage claims. Also, secondary liability is subject to the liability privileges for intermediaries (such as host providers) as set out in Directive 2001/31/EC (E-Commerce Directive).

#### Footnotes

1. <sup>^</sup> § 1004 German Civil Code (*Bürgerliches Gesetzbuch*).

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

be applicable.

See answer to question 15).

## II. Policy considerations and proposals for improvements of the 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 balance between the copyright owner's ability to control the act of linking by others to their copyrighted work and the interests of third parties such as the public is primarily based on the case law of the BGH and the CJEU. Even though the details are currently unclear, it can be noted that the copyright owner can influence in certain ways whether the linking by a third party constitutes an act of making available within the meaning of § 19a UrhG. However, if the copyright owner consented to the first communication without any restrictions, an act of making available would not be present.

In general, setting a deep link constitutes an act of making available if the protected work is not freely accessible on the original website. If the work is freely accessible on the original website, an act of making available is only present if the communication reaches a new audience which the copyright owner had not considered when permitting the original communication. This is regularly not the case as the copyright owner takes into account all internet users when authorizing the original communication to the public.

According to the opinion of Advocate General Wathelet as mentioned under question 12) it is not relevant whether or not the initial communication is made with the consent of the rightholder. Most importantly, the opinion is based on the argument that a person setting a link cannot assess whether or not the original communication is lawful or not.

However, the case law of the BGH additionally seems to imply that it should be possible for the rightholder to limit its consent to the first communication, possibly not only by restricting access to the work through technical means. It is unclear whether or not the CJEU shares this view. If not, the position of the CJEU will overrule the position of the BGH.

- 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?

yes

Please explain:

From the perspective of the German Group it would be desirable to clarify by law under which circumstances, the copyright owner has the possibility to strengthen his or her control over the linking and which form such expression of the copyright owner would have to take.

## III. Proposals for harmonisation

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

yes

Please explain:

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?

yes

Please explain:

In the majority view of the group, an act of linking should be considered as a "communication" of the copyrighted work. <sup>1</sup> However, the mere communication does not necessarily constitute an infringement of a copyright. The term "communication" should be construed broadly. Limitations should follow from the term "to the public".

#### Footnotes

1. <sup>1</sup> *Albrecht Conrad does not share this view (see Conrad, CR 2013, 305).*

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

no

Please explain:

The German Group agrees that in any event not every act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) can be considered as a communication to the public and therefore as a copyright infringement. However, in particular cases setting a link might be regarded as communication "to the public".

As mentioned under question 7), the CJEU held that the term "to the public" requires a communication 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. Taking this definition into account the German Group agrees that an act of linking should be considered as a communication "to the public" if the access to the work is restricted by technological protection measures within the meaning of Art. 11 WCT. Furthermore, the German Group agrees that a repeated communication by third party should not be a communication "to the public" when the work has already been communicated to the same public by the copyright owner or another entitled entity. However, the German Group is of the opinion that a separation of public in "old and new" shall only be possible by technical means.

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?

no

Please explain:

The German Group agrees that an act of making available requires a "communication to the public". Therefore an act of linking should not constitute per se a copyright infringement.

Taking question 21) into account, the German Group consequently agrees that an act of linking should constitute an infringement of the making available right if the access to the work is restricted by technological protection measures within the meaning of Art. 11 WCT. Furthermore, the German Group agrees that the mere repeated communication by third party should not constitute an infringement.

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

Please explain:

No, with regard to the right of making available to the public no differences should be made. However, the use of a copyright protected work by way of framing or embedding without making clear that it is a third party right might constitute a violation of the German Unfair Competition Law in exceptional cases by way of a delusion of the public or a misleading statement.

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?

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

Please explain:

No, if a work is made available to the public by the copyright owner, he or she made it available to the public. An exchange or the work within this public shall not be deemed as a copyright infringement. General restrictions on the website of the copyright owner can be unclear or hidden in some general terms. If the copyright owner wants to restrict the use, he has to restrict the public by way of technical means and restrictions, clearly indicating, that content behind this "fence" is not public.

The use of the internet and exchange of content needs general rules. Specific rules in the discretion of the copyright owner for each of his or her works after he or she has decided to upload the work in the internet without restrictions would hinder the use of the internet. There even would be a threat that internet users following a "forbidden" link would copy an unavailable, not communicated work and in this way may commit a copyright infringement.

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.

yes

Please explain:

Yes. If the copyright owner choses to restrict his communication of the work to a certain public by way

of technical limitations of access, a communication of the work to different or unrestricted public of a third party should be deemed as an unlawful communication of the work to the (different) public.

As pointed out under 25) a technical restriction is clear and obvious to the other internet uses. A breach of this technical barrier is obviously not in consent of the copyright owner and internet users have no recognisable interest to be able to reach out for restricted works.

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.

no

Please explain:

No. It should be not relevant whether or not the initial communication is made with the authorization of the rightholder. It will be almost impossible for the linking entity to assess if the work is communicated with or without the authorization of the copyright owner. In view of the fact that links are an essential feature of the internet architecture, such a situation would endanger the functioning of the internet as such.

However, as mentioned under question 15) German law has developed a doctrine of secondary liability based on general civil law principles in addition to direct copyright infringement. Under these general principles, whenever a copyright has been infringed any third party, even though it is not itself an infringer of the right or has aided or abetted the infringer, can be asked to stop the interference to which the third party has contributed (*Störerhaftung*).<sup>[1]</sup> In applying this general rule to copyright infringements, the linking party should be liable for infringement when he knew about the infringement or upholds his link after he has knowledge of the infringement. This secondary liability (*Störerhaftung*) leads, however, only to cease and desist claims, not damage claims.

#### Footnotes

1. <sup>^</sup> § 1004 German Civil Code (*Bürgerliches Gesetzbuch*).

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

Please explain:

A separation of public in "old and new" shall only be possible by technical means. New public is an unspecific higher number of unspecific individuals which had no access to the work as set up by the copyright owner.

Any other definition would make the communication to the public uncertain and not recognizable by the internet users.

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

Please explain:

see question 28.

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

Please indicate which industry sector views are included in part “III. Proposals for harmonization” of this form:

#### Summary

According to the current legal situation and the relevant case law a balance between the copyright owner's ability to control the act of linking by others to their copyrighted work and the interests of third parties such as the public is guaranteed. Even though the details are currently unclear, it can be noted that the copyright owner can influence in certain ways whether the linking by a third party constitutes an act of making available within the meaning of § 19a UrhG. However, if the copyright owner consented to the first communication without any restrictions, an act of making available would not be present.

In general, setting a deep link constitutes an act of making available if the protected work is not freely accessible on the original website. If the work is freely accessible on the original website, an act of making available is only present if the communication reaches a new audience which the copyright owner had not considered when permitting the original communication. This is regularly not the case as the copyright owner takes into account all internet users when authorizing the original communication to the public.

According to the opinion of Advocate General Wathelet as mentioned under question 12) it is not relevant whether or not the initial communication is made with the consent of the rightholder. Most importantly, the opinion is based on the argument that a person setting a link cannot assess whether or not the original communication is lawful or not.

However, the case law of the BGH additionally seems to imply that it should be possible for the rightholder to limit its consent to the first communication, possibly not only by restricting access to the work through technical means. It is unclear whether or not the CJEU shares this view. If not, the position of the CJEU will overrule the position of the BGH.

From the perspective of the German Group it would be desirable to clarify by law under which circumstances, the copyright owner has the possibility to strengthen his or her control over the linking and which form such expression of the copyright owner would have to take.