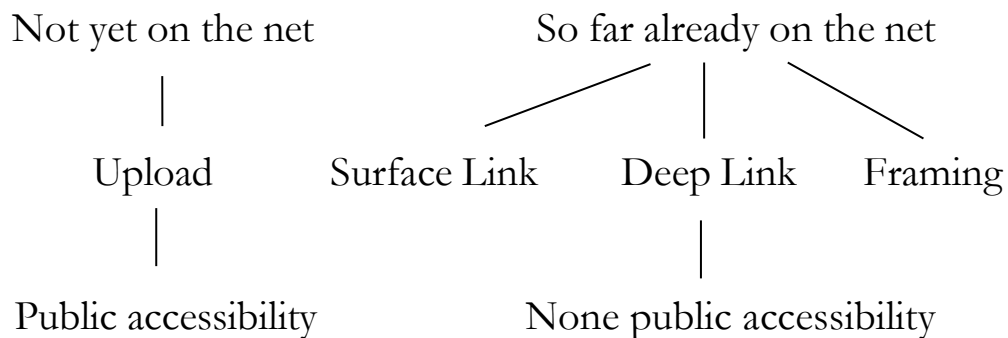


Posts in Copyright Law

I. Post as making available to the public

(e.g. post information on Facebook).

Making available to the public pursuant to Sec. 19a UrhG generally requires that the protected work is within the *access sphere* of the person making it available and that third parties are given access (BGH, WRP 2016, 224 para. 13 – *Die Realität II*).



- Upload: Upload a file to a server
- Simple link: Reference to other website (ECJ, WRP 2014, 414 – *Svensson/Retriever Sverige*).
- Framing: Embedding of a protected work publicly accessible on a website in another website by means of a link (ECJ, WRP 2014, 1441 para. 15 et seq. – *Bestwater International*; BGH, WRP 2016, 224 – *Die Realität II*).
- Deep link: Link that bypasses the home page and leads to another, deeper page of the website (Dreier/Schulze/Dreier, UrhG § 19a UrhG para. 6a).

=> No making available to the public if only reference is made to another server and no technical protection device is circumvented in the process (BGH, GRUR 2013, 818 – *Die Realität*).

II. Other communication to the public pursuant to Sec. 15 (2) UrhG?

1. Reproduction occurs when the work is made available to the public in such a way that its members have access to it, whether or not they make use of this possibility (ECJ, WRP 2014, 414 para. 24 – *Svensson/Retriever Sverige*).
2. The reproduction is public if it is made either by using a technical process that is different from the one used before or - otherwise - if it is reproduced for a *new audience* that the author did not have in mind (ECJ, GRUR 2017, 510 para. 26 et seq. – *AKM/Zürs.net*; WRP 2014, 414 para. 24 – *Svensson/Retriever Sverige*; BGH GRUR 2019, 950 Para. 34 – *Testversion*; GRUR Int. 2023, 399 para. 74 – *YouTube II*).

If the other website is only restrictedly accessible (registration, password), then the link users represent a *new audience*. If, on the other hand, the website is freely accessible, then there is *no new audience*.

Linking and *framing* are in principle reproductions, but these are only "in the public domain" if the work is reproduced for a *new audience* or is reproduced by a technical process that differs from that of the original reproduction (ECJ, WRP 2014, 414 para. 24 – *Svensson/Retriever Sverige*; ECJ, WRP 2014, 1441 para. 15 et seq. – *Bestwater International*).

Problem:

Content on a freely accessible third-party website was uploaded there without the author's permission (e.g. photos or videos). The linking to it constitutes communication to the public if the linking party *knew* or *should have known* of the unlawfulness of the publication of the works on the other website (ECJ, WRP 2016, 1347 para. 49, 55 – *GS Media*).

Rule:

If the intention is to make a profit, knowledge or gross negligence is rebuttably presumed. If there is no intention to make a profit, knowledge or grossly negligent ignorance is required.

Exception:

Commercial website with Google link

=> Author must prove knowledge or grossly negligent ignorance of the linking party, as search engines cannot recognize the illegality and a general duty of control would be unreasonable.

This would call into question the existence of search engines (BGH, WRP 2018, 201 para. 60 et seq. – *Vorschaubilder III*).