Opinion regarding the questions in the preliminary ruling case of Svensson/Retriever[1]

Introduction

This article aims to provide an analysis regarding the questions that were posed to the Court of Justice of the European Union (the Court) in the preliminary ruling case of *Svensson/Retriever Sverige AB* (C-466/12). More specifically it aims to provide an analysis regarding the (probable) legal relevance of the particular forms of hyperlinking and the fact that hyperlinking often plays an important role in the unlicensed use of musical works. This article does not aim to provide an overview and analysis of all possible forms of hyperlinking and all the different business models that have been created which use this technique. Instead it aims to provide an analysis of the different types of links and business models that are most relevant to the music industry.

Firstly the different appearances of hyperlinks that are relevant to this discussion will briefly be discussed. Secondly, another distinction will be made by looking at the type of source that a link refers to ('legal' or 'illegal'). In addition to this, some examples will be given of the different types of services that use hyperlinking (in whatever form) to provide access to musical works. This overview is not meant to be exhaustive. It merely aims to provide an idea of the different business models that are out there and which are relevant to the music industry. Finally this article aims to provide an analysis of the legality of these different types of links and business models after which a few suggestions for the answer to the questions will be given.

1. Different appearances of links

Many different technical forms of hyperlinking have been discerned in literature, but they can be divided in two main categories, as also becomes clear from the questions posed to the Court. There are hyperlinks which clearly refer to another source on the internet. These usually have the form of a regular web address (URL) displayed in bold text. When such a link is clicked, the page that the link refers to will open in a new window and the original page (on which the link was provided) will not be visible anymore (hereinafter called 'normal hyperlinks'). On the other hand there are links "where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website."[2] In this last category fall the so-called 'embedded links', 'framed links' and 'inline links'. For the purpose of this letter, only the first two of the last category mentioned, will be discussed, since these techniques are the most relevant for the music industry.

When it comes to the meaning of embedded links, what is meant here is the situation in which a particular media file is placed on a website and that media file technically originates from another website where the file can also be viewed or listened to. If a media file is placed on a website using this technique and the relevant link is clicked, the content in the file is viewed and/or listened to on

[1] Charlie Engels, legal counsel and Anja Kroeze, general counsel Buma/ Stemra, the Netherlands, member Gesac Legal Group

[2] Text derived from the third question posed to the Court.

the site on which the link is placed and the user will not leave the site and no separate frames (pop ups) will open. By framed links in this context what is meant is the situation in which, after a link is clicked, another separate frame (pop up) which contains a media file will open, but the original website on which the link was placed is still (largely) visible.

2. Links to legal or illegal sources

Apart from the way in which links visually appear, there is another way in which they can be generally categorized.[3]

Links to content which is made available with the permission of the author

A lot of websites/platforms offer links to content which is made available elsewhere on the internet with permission of rights holders (hereinafter: 'links to legal sources'). The most familiar and rather 'innocent' example is the embedding of Youtube videos on a Facebook page or on a forum.[4] There are however a lot of examples which are less 'innocent' and can easily be considered as a professional exploitation of the relevant musical works through the use of embedded or framed hyperlinks.

Some websites for instance offer a large amount of embedded Youtube content which they often divide into different categories. Examples of this are for instance a website that offers embedded Youtube videos of all the songs that are currently in the top 40[5] , a website which categorizes the videos according to certain styles[6] (e.g. pop, rock, Dutch) and a website which more or less combines the aforementioned.[7] In all cases the effect is the same: a professional music service is created through the categorizing of embedded content. There are similar services which (also) use content from other sources, such as 'Soundcloud' and 'Spotify' or a combination of different sources.[8]

Another well-known example from Dutch case law is the website Nederland.fm which provided embedded links to streams of radio stations.[9] On the relevant site, around fifty embedded radio streams are offered. This site indeed became very successful, attracting 2.470.000 unique visitors a month.

In the case of embedding or framing files that contain musical works, the added value of the service that is provided is evident. The categorizing and embedding of the files takes away a lot of the effort of having to look for the relevant files yourself. In theory it is also possible to create a platform which offers a selection of music that is just as expansive as the collection of music that can be found on platforms such as Spotify and iTunes, the only difference being that Spotify and iTunes do not provide their content through embedding. The object of using the technique of embedding and/or

[3] Dirk Visser, 'Openbaar Maken: Communication to the Public', in P. B. Hugenholtz, D. J. G. Visser and A. A. Quaedvlieg, *A Century of Dutch Copyright Law, Auteurswet 1912-2012*, deLex 2012, p. 257

[4] Of course it is questionable whether the content which is posted on Youtube can also be considered to be 'legal'. However in the Netherlands Buma/Stemra has concluded a licensing deal with Youtube, which covers all the user generated content placed on Youtube. Therefore Youtube is considered as a legal source in this context (at least when it comes to the territory of the Netherlands).

[5] http://www.indetop40.nl/

[6] http://gratismuziek.eu/category/pop/

[7] http://songa.nl/

[8] http://kickingthehabit.nl/

[9] http://www.nederland.fm/

framing by the DSP as opposed to using normal hyperlinks is also evident. It will keep the visitor on the relevant website and allows the DSP to generate revenues from advertising.

Although a lot of embedding which takes place is fairly 'innocent' and not commercial in nature, a lot of it is. Serious business models have arisen using this technique and the revenues that are generated by this, are often also very significant.

Links to content which is made available without the permission of the author

A lot of sites also provide links to content online which has not been made available with the permission of the relevant author (hereinafter: 'links to illegal sources'). Hyperlinks can also be used to circumvent certain limitations with regard to the accessibility of a particular website or part thereof. For instance a subscription fee may be required before a (particular part of a) website can be accessed. When a link is provided to such a site, and such restrictions are circumvented, the situation is of course different from the situation in which a link is provided to a source where no restrictions to access it apply. This is also what the second preliminary question (primarily?) refers to. For the purpose of this article these circumventions will also be referred to as 'links to an illegal source' as defined before.

Obviously the business models that have been created around the provision of links to an illegal source are often more or less similar to the ones that provide links to legal sources, the main difference being the legality of the content that they link to. More and more often this 'illegal hyperlinking' concerns links to movies, TV-shows and sports games. The reason for this is probably that nowadays it is very easy to provide links to musical content which is made available legally and for free somewhere else on the internet, whereas TV-shows, sports games and movies often cannot be viewed legally for free elsewhere on the internet, which in turn of course means that they cannot be linked to 'legally'. Naturally this does not mean that the music industry and collective rights organizations (CRO's) do not have an interest in the distribution of this type of content, since music is also used in audiovisual works.

Platforms that systematically link to an illegal source are abundant. As noted, the business models are often similar to the ones that link to legal sources. Different types of content are categorized according to for instance genre, popularity etc. Very often the relevant content can be viewed on the webpage through embedded or framed links whereas in other cases only normal hyperlinks are provided.[10]

In this regard it is probably also important to ascertain how broad the term 'link', as used in the questions for preliminary ruling, should be interpreted; a lot of platforms that 'refer' to illegal content elsewhere on the internet, strictly speaking, do not use techniques that are exactly the same as hyperlinking, but achieve a very similar result. Think of for instance of the platforms that provide indexes and referrals to files that can be found on Usenet (Usenet providers).[11] Of course it was not

[10] Such as: http://www.myp2p-eu.net/, http://projectfree.tv/. One just has to search for "free tv" or something similar to find a lot of examples.

[11] Platforms such as The Pirate Bay, Torrenthound, Newzbin etc. In a lot of Dutch cases the links that are provided by Bit torrent or Usenet providers are treated in the same manner as normal hyperlinks. However, torrent links are strictly speaking not hyperlinks because they are metadata files made available by way of links which contain information which enables users to download files circulating on the peer to peer Bit Torrent

the direct intention of the Swedish Court of Appeals to also get more clarity regarding the question whether e.g. Usenet providers should be held (directly) liable for copyright infringement. However, the answer that the Court will provide in this case will also be relevant for the answer to the question whether these type of DSPs can also be held (directly) liable for copyright infringement, due to the very similar nature of the 'referring' that they do and hyperlinking.

A final thing that perhaps should be noted in this context is that there can also be a difference in the extent to which the source which is linked to can also be found without the help of the link. Especially in the context of linking to an illegal source, it is often the case that the content that is referred to is very hard to find by searching yourself, although in theory it might be possible to find it. In this situation the role of the DSP is also different. Although in this situation the DSP is technically also merely referring to another location on the internet, he in fact plays an essential role in making the relevant source accessible. This factor will also be looked at more closely in the legal analysis.

3. Legal analysis of the different forms of linking

So how are the different appearances of linking to be qualified in the context of copyright law? And to what extent does it matter that they refer to an illegal source or a legal source? The two different appearances of links will be dealt with consecutively hereunder. The central question is whether these links can be considered as a communication to the public and/or making available in the sense of Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter: 'Copyright Directive').

The Court has never specifically dealt with the question whether hyperlinking constitutes a communication to the public or making available (hereinafter referred to collectively as 'communication to the public') in the sense of the Copyright Directive. However, the case law concerning the interpretation of article 3 of the Copyright Directive and the criteria that follow from it, make it possible to provide a possible answer to this. In addition to an analysis of the case law of the Court, an occasional reference will be made to judgments of national courts.

If we look at the case law of the Court, the following (main) elements seem relevant with regard to a communication to the public: an intervention, whereby a (new) public is provided access to the works and, possibly, it has to be assessed whether this is done with the aim of making a profit.[12]

networks. These links which automatically result In a download or the online playing of the file by way of dedicated drive are more than hyperlinks. If you look at the results, these torrent links can be compared to embedded or framed links because they enable a direct access to the work contained in the file.

[12] CJEU, 13 October 2011, Joined cases C-431/09 and C-432/09 (*Airfield*) CJEU, 7 December 2006, Case 306/05 (*Rafael Hoteles*), CJEU, 7 March 2013, case C-607/11 (ITV) It has to be mentioned that in different specific situations these criteria may be met to varying degrees. See for example CJEU, 7 March 2013, case C-607/11 (ITV), where the ECJ acknowledges that profit making is not necessarily an essential condition for the existence of a communication for the public.

Embedded and Framed links

Intervention

Is there an intervention in the case of embedded and framed links? The answer to this question is clearly yes. If a DSP puts particular embedded or framed content on a website, he can clearly be considered as an organization which "intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers."[13] Without this intervention, the visitors of the website would not be able to watch or listen to the relevant media files on that location (the website) where these files are 'transmitted'. Of course it is often possible to view or listen to the content elsewhere on the internet, but it becomes apparent from the decisions of the Court that this does not matter. What matters is that the content could not be viewed or listened to in this particular place (the website) without the intervention of the DSP.[14] Whether this is done by framing or embedding is not relevant. In both cases the audiovisual content is presented within the context of the website and it makes the works perceptible to the visitors of the website. The fact that the files technically originate from another source is also not decisive. The concept of communication is to be "construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used."[15] When particular content is placed within the context of a website, and by doing so a profit is derived therefrom, it would be artificial to regard this as a mere 'reference' and not as a transmission of those works to the public. In the situation of a hotel that gives its customers access to protected works, the Court also did not find it important that the broadcast technically originated from another source. The fact that the hotel owner provided access to the protected works by (re)directing the signal to the TV-sets, constituted a transmission of those works to the public.[16] What the Court seems to want to ensure by its judgments is that the term communication to the public is interpreted in a very 'functional' way, meaning that the (technological) manner by which access to a copyrighted work is provided, is never to be considered decisive. Any different approach could also lead to very unreasonable consequences. It would encourage DSPs to try to construct their service in such a way that their content technically originates from another source, thereby avoiding liability, even though the consumer does not notice the difference.

In addition to this it is perhaps worth to note that when a DSP embeds or frames certain content within the context of its website, the DSP also creates the impression that it concerns its own content. Consumers will very often not be aware that the media files technically originate from another source. This factor was also seen as relevant by some courts in the Netherlands.[17] It is also clear in cases like this that the intervention is carried out by a different organization than the one that initially communicated the works to the public in the sense of article 11bis (1) (ii) of the Berne Convention.[18]

[13] CJEU, 7 December 2006, Case 306/05 (*Rafael Hoteles*) par. 42
[14] See also CJEU, 15 March 2012, Case C-162/10 (*PPL/Ireland*), par. 31
[15] CJEU, 4 October 2011, Joined cases C-403/08 and C-429/08 (*Premier League*), par. 193
[16] CJEU, 7 December 2006, Case 306/05 (*Rafael Hoteles*)
[17] See for instance: District Court of the Hague, 19 december 2012 (*Nederland FM*), case no. 407402 / HA ZA 11-2675
[18] CJEU, 7 December 2006, Case 306/05 (*Rafael Hoteles*) par. 40

In this context it is also important to assess the relevance of the Court's recent judgment in the case between *ITV* and *TV Catchup* for the question whether the different forms of hyperlinking constitute a communication to the public. The Court seemed to discern two different types of 'interventions' in this case; interventions by which protected works are (re)transmitted with "specific technical means" (different from that of the original communication) and interventions by which works are made accessible to a new public without the use of specific technical means (different from that of the original communication).[19] In short, the most important conclusion of the Court was that, when such specific technical means are used to (re)transmit protected content, and a public is reached thereby, that, as a rule, should be regarded as a communication to the public.[20] In such a case it is not necessary to assess whether the ´public´ that is reached is in fact ´new´. So the threshold to regard these types of interventions as a communication to the public is lower than in the situation in which an operator makes protected works accessible to the public without the use of specific technical means different from that of the original communication. Consequently it is important to determine whether different technical means are used when an operator makes particular works available to the public. However it seems that the Court interprets this criterion in a rather strict manner, since it points out that the situation in the ITV case was clearly different from the situations in the cases of *Rafael Hoteles*, *Airfield* and *Premier League*. In these latter cases there (apparently) was no use of specific technical means different from that of the original communication.

So, assuming that there is an 'intervention' in the case of (particular forms of) hyperlinking, can the technique of embedding or framing be considered as technically specific and different from the original communication? Given the rather strict manner in which this criterion should (probably) be applied, the answer to this question is likely to be no. When content is presented on a website through the use of links, this transmission is probably not different enough from the original communication to consider it as a ´specific technical means´ in the sense of the *ITV* case. In the remainder of this article it will be assumed that this is indeed the case.

Finally it should be noted here that when protected works are presented 'within the context of the website' it does not really matter whether it concerns a link to an illegal or legal source. In both cases there will be an intervention through which content is made accessible.

New public

As noted above, in the remainder of this article it will be assumed that when hyperlinks are used to make content available, it will not only have to be proven whether there is a 'public', but also that this public is 'new'. In most cases there will clearly be such a new public. The Court has repeatedly stated that the term public refers to an indeterminate number of potential viewers/listeners and a fairly large number of persons.[21] The public can in particular be considered as new when the protected subject matter is made accessible to a public wider than that targeted by the original communication (for which the rights holders granted permission).[22] It follows from these criteria that the interventions as described above will usually reach a new public.

[19] CJEU, 7 March 2013, case C-607/11 (ITV), par. 38 and 39
[20] CJEU, 7 March 2013, case C-607/11 (ITV), par. 24
[21] See also Case CJEU, 15 March 2012, C-162/10 (*PPL/Ireland*), par. 33
[22] CJEU, 13 October 2011, joined cases C-431/09 and C-432/09 (*Airfield*), par. 76

Normally, a website is open to the general public. If it indeed is, the number of people that are able to view its content, is of course enormous. This surely means that a website which does not have any restrictions in place as regards accessibility will be open to an 'indeterminate number of persons[23]'.

Perhaps a bit more complicated is the answer to the question whether the public can in fact be considered as 'new'. In most instances where content is provided on a particular platform by a DSP through embedded or framed files, it can be assumed that the rights holders did not have these platforms in mind when they gave permission for the (original) communication of the protected works to which the relevant DSP is linking to. This, of course, depends on the circumstances of each case. If in a particular contract with a DSP, the rights holders clearly gave permission for the embedding and/or framing of the protected works on websites of third parties, there will of course not be a new public. But in many instances this will not be the case. As an example the *Nederland FM* case can be mentioned here. As noted before, Nederland FM bundled a large amount of streams from radio stations on its webpage. Although the radio stations all had licenses which allowed them to provide streams on their individual websites, these licenses did not encompass the making available of the streams on third party websites.

As noted before, in the case of embedded or framed files, the relevant content can also be seen/heard elsewhere on the internet. This fact has led some to argue that by embedding or framing content a new public is never reached. Since most websites are accessible to anyone, the placement of content from such a website on another website reaches the same (general) public.[24] This is a strange proposition. This would lead to the situation where the placement of material which originates from another website, would never be regarded as a communication to the public, because the public could have also viewed the relevant content on the website it was originally placed on. In other words, according to this view, everything that is placed on a website that has no limitations in place as regards accessibility (e.g. firewalls etc.), reaches the same public as any other website without such limitations in place. It is evident that the case law of the Court should not be interpreted like this. Almost every website reaches a distinctive public that can be discerned from the public that other websites reach. In any case it is never exactly the same. The mere possibility to view or listen to the relevant content elsewhere should not matter as also becomes apparent from the case law of the Court. When a TV-show is transmitted in a bar, the visitor of the bar will generally also be able to watch the content elsewhere (at home for instance), but that does not mean that the visitors of the bar cannot be considered as a new, different and distinctive public.[25]

An important factor in this regard is that by framing and/or embedding content a 'new audiovisual product' is often created. This criterion was also used by the Court in its *Airfield* judgment to determine whether the relevant communication in fact reached a new public or not.[26] In the examples that have been given concerning embedded and framed content, individual files are bundled, categorized and offered to the consumer in an easily accessible manner. In such a case

[23] CJEU, 7 March 2013, case C-607/11 (ITV), par. 35
[24] See for instance the opinion of the European Copyright Society on the questions for preliminary ruling, par. 55, available via: http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf
[25] CJEU, 13 October 2011, joined cases C-431/09 and C-432/09 (*Airfield*), par. 198
[26] CJEU, 13 October 2011, joined cases C-431/09 and C-432/09 (*Airfield*), par. 81 and 82

there is no doubt that the audiovisual product that is offered is new, and consequently also reaches a different and new public.

Suffice it to say that the above is primarily important in the situation where the links refer to a legal source. If a DSP provides embedded or framed links to protected works that have not been made available with the permission of the author, it is evident that a new public is reached with the communication. The rights holders in that case never intended the protected works to be communicated to the public at the source which is linked to. Therefore embedding or framing content which originates from such a source evidently also reaches a new public.

Aim of making a profit

The Court has repeatedly stated that it is not irrelevant that a communication to the public is of a profit making nature, but it is not necessarily an essential condition.[27] In any case, sites that present content within the context of their website often clearly do that to derive profit from it. The profits will most often be gained from advertising and the sale of market data. The question whether there is an aim of making a profit depends heavily on the specific circumstances of the case. But in a lot of cases it is evident. Often embedded and or framed links are the only thing that a DSP offers on his website. Logically this should then usually lead to the conclusion that it is done with the aim of making a profit. In other cases the answer might be less clear. In this context it is probably worth to note that the Court seems to indicate in some of its judgments that the link between the communication of protected works and the profits that are actually made, does not have to be very direct. When a TV-set is offered in a hotel room and television programs are provided through it, this usually will not be the only reason for a customer to stay in that hotel, but it is definitely a factor that makes the hotel more appealing.[28] A comparison can perhaps be made to a lot of websites that embed or frame protected works next to other types of content. It might not be the only product they offer, but it surely enhances the profitability of their website.

Normal hyperlinks

It is generally assumed that a normal hyperlink usually does not constitute a communication to the public.[29] Looking at the case law of the court, and some of the criteria developed therein, it could however be argued that a normal hyperlink should in some cases be seen as more than a mere 'digital reference' and as a communication to the public. Support for this proposition can be found in national case law.[30] The (main) criteria that follow from the case law of the Court, as described above, will be analyzed here with regard to normal hyperlinks also. However, reiteration of what has been stated before, will be avoided as much as possible. The analysis will focus on the type of business models and situations most relevant for the music industry.

[27] CJEU, 7 March 2013, case C-607/11 (ITV), par. 42 and 43
[28] CJEU, 7 December 2006, Case C-306/05 (*Rafael Hoteles*) par. 44
[29] See for instance Bundesgerichthof, 17 July 2003, I ZR 259/00 (*Paperboy)* and Court of Appeals Arnhem, 4 July 2006, *AMI* 2007/3 (*Zoekallehuizen)*
[30] District Court Amsterdam, 12 September 2012, 507119 / HA ZA 11-2896 (*Sanoma/Geenstijl*)

Intervention

As noted the most important argument that has been put forward in support of the proposition that a hyperlink constitutes only in some cases a communication to the public, is that it should be regarded as a mere 'digital reference' to content which can be found elsewhere on the internet. In addition to this, it is often argued that when content is placed on the internet with the permission of rights holders, this indicates that the rights holders will not have a problem with the fact that the content will be linked to (at least insofar as it constitutes a normal hyperlink). This because normal hyperlinking is one of the basic functions of the internet. Anyone who puts content online can know that it could be linked to by someone else. If that is a problem, it should not have been put online.[31] These propositions should generally not be doubted. If normal hyperlinks would always be regarded as communications to the public, this could indeed lead to undesirable consequences.

Given the fact that the normal hyperlink can most of the times be regarded as a mere digital reference, it probably should not be regarded as an intervention whereby access is given to a protected work. But there can be circumstances which could lead to a different conclusion.

An interesting example is a Dutch case in which the publisher Sanoma sued the website Geenstijl.nl for copyright infringement because it had provided a normal hyperlink to pictures that were to be published in the next issue of Playboy. The pictures were posted on the site Filefactory.com (a cloud storage provider) without permission of the right holder. The District Court of Amsterdam stated that, even though it concerned a normal hyperlink, there was a communication to the public in this case because the relevant pictures could not be found with the use of a search engine like Google. Only if you knew the exact URL of the location on Filefactory, it was possible to find the pictures. Since only a very small group was familiar with this URL, the placement of this URL on the website of Geenstijl constituted an intervention by which the pictures were made accessible to a vast amount of people (the Geenstijl site is one of the most popular in Holland).[32] The rationale of the District Court is understandable. In this case it would be strange to say that the link referred to a source which was public, since the source in this case clearly was not. In such circumstances the link should constitute an intervention in the sense of the case law of the Court. Before the provision of the link by Geenstijl it was not possible for the general public to get access to the relevant works (the pictures). In the situation that a work is only accessible to the general public because of the placement of a normal hyperlink, and the one who placed the link did this with "full knowledge of the consequences of his action", it would be artificial to regard this as a mere referral and not as an intervention by which a work is made accessible.

It could be argued, following the argument made above, that the fact that a DSP systematically provides normal links to illegal sources, that are very hard (if not impossible) to find without the help of the DSP, also constitutes an 'intervention'. These type of DSPs often play a crucial role in making protected content available, even though (theoretically) the content could also be found through other means. In these circumstances it would also be artificial to label them as a party that merely enables a communication that takes place in another location.

[31] Dirk Visser, 'Het embedden van een Youtube filmpje op een Hyves pagina', in *Mediaforum,* 2010-1, p. 14 and Bundesgerichtshof, 17 July 2003, I ZR 259/00 (*Paperboy).*

[32] District Court Amsterdam, 12 September 2012, 507119 / HA ZA 11-2896 (*Sanoma/Geenstijl*)

When one looks at DSPs such as the many Bit Torrent websites that can be found on the internet, it is often more the other way around; the users of the service (the 'peers') enable the organizer of the network (the bit torrent website) to offer a very large catalogue of protected works. In other words, the network and the catalogue of works only exist to the extent that the DSP offers the service.[33] The content that the 'peers' offer is not accessible without the intervention of the Bit Torrent provider. Again, the fact that the protected works technically originate from another source, is irrelevant.[34] This view has also found support in case law. In the English case of *Twentieth Century Fox/Newzbin* the High Court, in short, determined that Newzbin, by indexing and referring to files (through the so called NZB facility) which could be found on Usenet, "intervened in a highly material way to make the claimants' films available to a new audience. "[35] The Court also found it important that Newzbin's customers were probably under the impression that Newzbin was the party which offered the films. The rationale and arguments of this decision were confirmed in another decision concerning the Bit torrent provider *The Pirate Bay.*[36]

As noted before, the questions posed to the Court seem to solely concern the technique of hyperlinking and, strictly speaking, probably not other technical means of referring to content online. However, it is probably good to (again) emphasize that the term 'link' can be interpreted very broadly and can encompass a lot of different types of digital indexing and referring (think of Usenet providers). At the very least, it can be assumed that the interpretation that the Court will provide in this case will very likely be applied to all types of 'linking' by national courts throughout the EU, since the object and effect of all these techniques is basically the same.

New public

As described above, in the case of a normal link to a legal source, there will usually not be an intervention and the question whether a new public is reached by the link is not relevant. More important is the question whether linking to an illegal source can be considered as an intervention by which a new public is reached. In the case that the relevant content was not public at all before the link is placed (as in *Sanoma/Geenstijl*) it is clear that a new public is reached. In such a case the content was never made public before it was made accessible through the link. In the other situations where the DSP (systematically) provides links to an illegal source, and the content (theoretically) could also be found elsewhere, there also is a new public. First of all, it will normally concern an 'indeterminate number of people' and, secondly, the fact that the DSP links to an illegal source (meaning a source which the rights holders did not license) necessarily means that the public that is reached by the DSP is also 'new'. So in the event that there is an 'intervention' and the sources that are linked to are illegal, will normally mean that there is a new public. Finally, it is worth

[33] J. M. B. Seignette, annotation of: District Court of the Hague, 22 March 2011, *IER* 2011/44 *(Premier League/Myp2p)*

[34] See page 5 above and CJEU, 4 October 2011, joined cases C-403/08 and C-429/08 (*Premier League*), par. 193. However, as mentioned under 11 it also goes further than normal linking because a "torrent" link enables a user to get direct access to the work contained in the file and therefore is more similar to embedded and framed links than to normal hyperlinks.

[35] England and Wales High Court, Chancery Division, 29 March 2010, Case No: HC08C03346 (*Twentieth Century Fox/Newzbin*), par. 125

[36] England and Wales High Court, Chancery Division, 20 February 2012, Case No: HC11C04518 (*Dramatico et al/ The Pirate Bay*)

to note in this context that by the systematic indexing and referring to illegal sources, these type of DSPs clearly provide a 'new audiovisual product'.

Aim of making a profit

What has been stated before about the aim of making a profit with regard to the embedded and framed links evidently also applies here and will therefore not be reiterated. Suffice it to say that a platform like *The Pirate Bay* is clearly not maintained for altruistic reasons. Its estimated revenues in the month of October 2011 alone were between US$ 1.7 and 3 million.[37]

Conclusion

This article aimed to provide an insight with regard to the issues that surround linking in the music industry. Obviously the questions that were posed to the Court resulted from a very different factual background. But the decision of the Court in this case will probably have important implications that will reach far beyond this particular background. A lot of different industries will be affected.

Needless to say, it will not be easy for the Court to provide answers which will easily fit the different appearances of linking and all the different types of business models that are out there. Therefore the Court should apply a great deal of caution when answering the questions and keep in mind the far reaching effects that its judgment will have.

The technique of (normal) hyperlinking forms an essential part of the way internet functions and there are probably very few parties that would wish the Court to state that this form of hyperlinking is always a communication to the public. This would indeed lead to undesirable situations. However, as has been described above, not every type of link results in the same effect, and the situations in which links are used often also differ considerably. Especially when it comes to embedding and framing, it is clear that this encompasses more than mere referencing.

The Court may have concerns with regard to the impact its decision could have on the free flow of information and certain fundamental rights, if it were to decide that some forms of hyperlinking constitute a copyright infringement. In this regard it is probably important to keep in mind that, as the Court has pointed out in its judgment in the case of *Scarlet/Sabam,* the national courts will always have to strike a fair balance between the protection of intellectual property rights on the one hand and other fundamental rights such as the freedom to receive or impart information and the freedom to conduct business on the other hand.[38] In the event that the Court were to come to the conclusion that certain types of links are to be regarded as a communication to the public (in particular situations), the judgment of the Court in the aforementioned case would probably prevent any excessive enforcement of intellectual property rights in this regard.

[37] England and Wales High Court, Chancery Division, 20 February 2012, Case No: HC11C04518 (*Dramatico et al/ The Pirate Bay*), par. 29
[38] Case C-70/10 (*Scarlet/Sabam),* par. 46