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## ECJ to decide on online linking to content without copyright holder's consent

The Dutch Supreme Court recently delivered its ruling in the *GeenStijl/Sanoma* case. The ruling has two noteworthy aspects. First, the Supreme Court stated that copyright and freedom of speech are both equal fundamental rights that should be weighed against each other. Second, the Supreme Court referred preliminary questions to the European Court of Justice, and the answers may have a major impact on the internet landscape. The questions relate to linking to a source that is freely accessible online, but communicates to the public without the copyright holder's consent. The Supreme Court has submitted additional questions should this linking not be considered a copyright infringement and has asked whether this would be different if the source were not easy to find for the average internet user. The ECJ's answers to these questions will shape how the backbone of the internet is defined in legal terms. As the Supreme Court itself has already noted, this would mean that a website host would always have to check if the content that a hyperlink refers to is placed with the copyright holder's consent.

In 2012, the Dutch news and entertainment blog *Geen Stijl* (GS) published a post regarding as yet unpublished pictures of Dutch reality star Britt Dekker for *Playboy*, a magazine published by Sanoma. In the post, GS provided a hyperlink to an Australian site where some of the pictures could be seen in a zip-file, and it also posted a cut-out from a single picture. Sanoma lodged proceedings against GS. On appeal, the Amsterdam Court of Appeal ruled that GS did not infringe Sanoma's copyright- since the pictures were already freely accessible on the Australian website - but that the publication of the link did constitute a tort because GS had induced the public to view the pictures. Both GS and Sanoma lodged an appeal to the Dutch Supreme Court, which recently delivered its decision.

GS had argued that the Court of Appeal misapplied the "right to quote" exception in copyright law - in respect of the cut out - as it had ruled that the freedom of speech could only outweigh copyright in exceptional circumstances. The Supreme Court followed GS's reasoning and ruled that both freedom of speech and copyright are fundamental rights and thus should be considered on equal footing. When applying the "right to quote" exception, all relevant circumstances have to be considered.

However, Sanoma lodged a cross-appeal against the Court of Appeal's ruling that publication of the hyperlink did not constitute a "communication to the public" and therefore did not infringe Sanoma's copyright. The Supreme Court found that, although the relevant case law of the ECJ (*Svensson* and *Bestwater*) mentions the publication of a work

without the consent of the copyright holder, it is unclear whether linking to a work that was placed on the internet without permission of the rightsholder, constitutes a “communication to the public”. Before referring questions to the ECJ, the Supreme Court noted that a lot of works published without the copyright holder’s consent can be found on the Internet. It will be difficult for a website host to determine whether the work is published with the consent of the rightsholder when that host refers to a work through a hyperlink.

In its first preliminary question, the Supreme Court asked the ECJ whether a copyright is infringed (that is, that a “communication to the public” takes place) when a person refers, through a hyperlink, to a website where the work is placed without the copyright holder’s consent. In its two subsequent questions, the Supreme Court asked whether it makes a difference in this context if the work has already been communicated to the public in a different manner and if there is an obligation for the “hyperlinker” to investigate. Furthermore, the Supreme Court wanted to know whether – if the answer to the first question is negative – a person can still infringe a copyright when hyperlinking to a website that is not easily traceable so that placing the hyperlink greatly facilitates finding the work.

The ECJ’s answers to the questions of the Supreme Court in *Geen Stijl/Sanoma* will shape how the backbone of the internet is defined in legal terms, especially if the answer to the first preliminary question is positive. As the Supreme Court itself has already noted, this would mean that a website owner will in each instance have to check if the content to which a hyperlink refers is placed with the copyright holder’s consent.