The long-awaited judgment of the CJEU in the Svensson case, judgment of 13 February 2013 in C-466/12 and C-93/11, has the legal definition of internet links has been a widely-discussed subject in recent times, calling those who consider links as an act of communication to the public within the meaning of article 3, paragraph 1, of the Information Society Directive (Directive of the Information Society) against those who, on equally justifiable grounds, argue that the creation of internet links does not, strictly speaking, constitute an act of communication to the public.

The dispute is such that it is arguably that if it has permitted conflicting decisions by court and administrative bodies (specifically before two of the Intellectual Property Commission), the latter ensuring that linking to protected content is neither an act of public communication, while on the same day the page of a criminal court proceeded to believe a crime having an extent completely the opposite. However, the expert level rating respects for having received the disputed internet links to protected works do indeed constitute an act of communication to the public.

It is in line with the case law of decisions such as those issued by the same Court on 6 October 2011 (Futball Association Premier league C-466/12 and 1 March 2013 (ITV Broadcasting; C-607/11)), the concepts of communication and public, are interpreted in a manner which can assist public communication can exist only by making available the work or service to an indeterminate number of potential users, in such a way that the said users may access the content via the links. The Court thus concludes that in view of the fact that there is no such new communication, irrespective of the type of link (the judgment makes no distinctions) users may have before them.

The judgment of the CJEU is of great relevance, for at least three reasons:

(i) Firstly, because the activity of linking third party works on the internet is described as an act of public communication, irrespective of the type of link (the judgment makes no distinctions) users may have before them.

(ii) Secondly, because it introduces the concept of “new public” and it defines it in a negative manner: as the public, the communication must be directed at a new public. According to the judgment, a new public is a public that was not taken into account by the copyright holders at the time the initial communication was authorised.

(iii) And, thirdly, because, as the Court states, pursuant to the said Directive, EU Member States do not have to be that it is directed to a new public and that, as a result, unauthorised communication to the public are to be interpreted in a broad manner, inasmuch as public communication can exist solely by making available the work or service to an indeterminate number of potential users in such a way that the said users may access it, even if they do not make use of that possibility. Hence, the creation of a link that can be clicked and that can redirect a user to a protected work or service constitutes an act of making available to an indeterminate number of potential users in such a way that said users may access it. The Court states that such an act, the communication to a new public, the inclusion of the links cannot be considered a new act of communication to the public.

The dispute is such that in countries like Spain it has prompted conflicting decisions by court and administrative bodies (specifically Section Two of the Intellectual Property Commission), the latter arguing that linking to protected content is indeed an act of public communication, while on the same day the page of a criminal court proceeded to believe a crime having an extent completely the opposite. However, this eagerly awaited ruling appears to have resolved the dispute: internet links to protected works do indeed constitute an act of communication to the public.