Kluwer Copyright Blog

The Svensson case and the act of communication to a new public

Patricia Mariscal (Elzaburu) · Friday, February 21st, 2014

"In other words, the initial communication by the copyright holder already encompassed the potential public that subsequently accessed the content via the links"

The long-awaited judgment of the CJEU in the Svensson case, judgment of 13 February 2013 in (C-466/12).

The legal definition of internet links has been a widely-discussed subject in recent times, pitting those who consider links an act of communication to the public within the meaning of article 3.1 of Directive 2011/29/EC (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 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 judge of a criminal court proceeded to shelve a case, having argued 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.

In line with the case law of decisions such as those issued by the same Court on 4 October 2011 (Football Association Premier league; C-403/08) and on 7 March 2013 (ITV Broadcasting; C-607/11), the concepts of communication and 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 they 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 the internet public and,

as such, an act of communication to the public.

But the matter does not rest there. After making these statements, the CJEU points out that for a specific act (i.e. the creation of a hyperlink) to be considered an act of communication to the public within the meaning of article 3, paragraph 1, of the said Directive, the communication must be directed at a new public. According to the Court, a new public is a public that was not taken into account by the copyright holders at the time the initial communication was authorised.

In the case at hand, the defendant operated a website that contained a list of clickable links that redirected users to articles previously published by the plaintiffs on the website of the Stockholm newspaper Göteborgs-Posten. In the Court's opinion, these links were not directed at a new public, in that the press articles were previously freely available to the public on the original website. In other words, the understanding is that the initial communication by the copyright holder already encompassed the potential public that subsequently accessed the content via the links. The Court thus concludes that in view of the fact that there is no such new public, the inclusion of the links cannot be considered a new act of communication to the public.

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

(i) Firstly, because the activity of linking to 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 judgment states, there is no communication to a new public when the work or service has already been made available to the public without any access restrictions. On the other hand, when the work is already protected by access control measures and the link allows users to circumvent those measures, the conclusion would have to be that it is directed to a new public and that, as a result, unauthorised communication to the public exists. It follows that communication to a new public would also exist when the work or service is no longer available on the internet.

(iii) And, thirdly, because, as the Court states, pursuant to the said Directive, EU Member States do not have the right to give wider protection to copyright holders by broadening the concept of communication to the public to include acts different from those provided for under article 3, paragraph 1.

Although the judgment is, in some ways, questionable (because, among other things, it does not examine the activity of linking from a technical standpoint, nor does it distinguish between the different types of links), it does represent a highly positive precedent when it comes to challenging websites that direct users to unauthorised content, the illegality of which cannot now be called into question.

Patricia Mariscal

A full summary of this case will be added to the Kluwer IP Cases Database (http://www.kluweriplaw.com).

See also on this Blog: Tomasz Targosz: The Court of Justice on Links: It is Allowed to Link. At Least In Principle.

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