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CEDRO vs. GOOGLE DISCOVER: Is GOOGLE DISCOVER a news aggregator?

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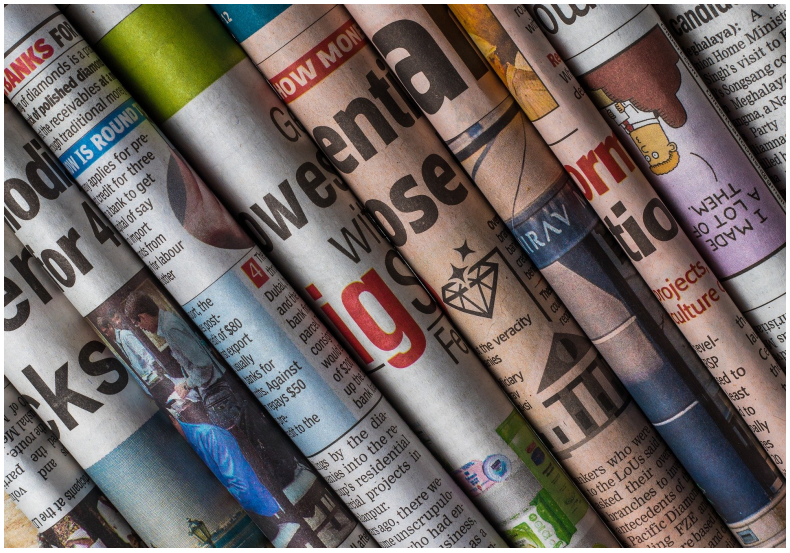
Judgment nº208/2021 of Madrid Commercial Court nº16 (December 20th, 2021)



Context and facts

This case concerns a dispute between the collecting management organisation CEDRO[1] and GOOGLE DISCOVER for non-payment of fair compensation for the limitation established in article 32.2 (now abrogated by the implementation of the CDSM Directive[2]) of the Spanish Copyright Act (SCA) between 6 December 2016 and 31 October 2020.

Former article 32.2 SCA established an **unwaivable fair compensation** for publishers and, where applicable, other rightholders accrued by content aggregation online service providers "*making available to the public non-significant content fragments, disclosed in periodicals or on regularly updated websites and for the purpose of information, creating public opinion or entertainment*". Thus, this article established a limitation, which entailed fair compensation, and subject to compulsory collective management. This exception did not affect the making available to the public by third parties of any image, photographic work or mere photograph published in periodicals or on periodically updated websites, which still had to be individually authorised.

CEDRO considered that the activity carried out by GOOGLE DISCOVER was covered

by this provision, and therefore claimed from it the amounts corresponding to the fair compensation (from the beginning of the provision of the GOOGLE DISCOVER service in December 2016 until October 2020), in a total amount of above 1 million Euro.

Meanwhile, GOOGLE DISCOVER maintained that it was not covered by article 32.2 SCA due to its technical characteristics. According to GOOGLE DISCOVER, its activity could only be classified as a mere functionality of the "GOOGLE SEARCH" search engine or the "GOOGLE CHROME" application. Moreover, GOOGLE DISCOVER argued that the article 32.2 SCA limitation was contrary to international, European and national copyright law and that it should have been notified to the European Commission as a "technical regulation". Finally, the provider also raised the issue of the inequity of the tariffs established by CEDRO.

Findings of the judgment

This case is interesting due to the way in which the judgment addresses the issues raised. We will focus essentially on the two issues that the judgment develops in greater depth and which we consider to be more substantive[3]: the legal nature of the activity conducted by GOOGLE DISCOVER and the unfairness of the tariffs applied by the collecting society.

Regarding the **qualification of GOOGLE DISCOVER** as a content aggregator within the meaning of article 32.2 SCA, the judgment, on the basis of the documentation provided by the parties, established as a premise that "*the GOOGLE DISCOVER service is presented as a "complement" to the GOOGLE CHROME web browser or to the GOOGLE SEARCH application on Android mobile devices*" and stated that:

- the number of words reproduced within the sentence in which the hyperlink provided by GOOGLE DISCOVER is embedded are very similar to those added to the same hyperlink in the Google search engine when a query is formulated.
- the simple inclusion of hyperlinks leading to press websites (which is what, according to the evidence, constitutes the essential activity of the GOOGLE DISCOVER service), is absolutely free and cannot be subsumed under the activity of "*aggregation of non-significant fragments*".
- the addition of two lines of text (ranging from a minimum of 79 to a maximum of 87 characters with spaces), cannot be considered to be "*aggregation of fragments*" of the protected journalistic works, "*but of individual words, considering their minimal length and lack of informative content*" and it cannot even be classified as a "snippet" (CJEU VG Media, case C-299/17). Therefore, the judgment affirms that "*it has not been established that these lines have been extracted from the text of the article*" and that "*it is a widespread practice by GOOGLE DISCOVER on all platforms*".

Consequently, the judgment ruled that the GOOGLE DISCOVER service could not be considered as an aggregation online service provider "*making available to the public non-significant content fragments*".

Regarding the question of the **unfairness of the tariffs**, the judgment addressed the issue, although it would not have been necessary due to the determination of the non-

application of the compensation to GOOGLE DISCOVER for lack of subjective justification. The judgment considered that CEDRO's tariff (0.00029203€ per click) was neither clear nor transparent and its calculation did not comply with the criteria of article 164.3 SCA. Such criteria include the effective use, the economic income obtained by the user from the commercial exploitation of the repertoire, and the fees established by homologous collecting societies in other Member States of the European Union.

Concluding remarks

The relevance of this case lies in the determination of the legal nature of services such as those offered by GOOGLE DISCOVER, especially regarding their potential applicability of article 15 CDSM Directive to them. Taking into account the conclusion reached by the judgment, this type of service could not be covered by article 15 CDSM Directive as it just "use[s] individual words". In our opinion, this interpretation is surprising. Firstly, because we consider that GOOGLE DISCOVER is not a mere complement to GOOGLE CHROME or GOOGLE SEARCH, since it offers a differentiated service with an added value for the user, namely a personalised selection of information and news according to the preferences detected on the basis of the user's searches. Secondly, because it is noticeable that the (alleged) "individual words" used by GOOGLE DISCOVER generally are, in fact, significant fragments of the title of the article in question or even the whole title of the article.

Furthermore, the judgment finding concerning the "unfairness" of CEDRO's tariff is also quite surprising, especially due to the determination of the inapplicability of article 32.3 SCA to GOOGLE DISCOVER. In our opinion, the judgment should be more rigorous in establishing the existence of inequity due to the consequences that this implies for other users, especially if we take into account that the parties had not provided specific data to refute or confirm the method of calculation and that there was no possible comparison with tariffs of homologous collecting societies because this equitable compensation was not recognised in other countries. A more exhaustive approach would have been desirable and, also, in case of confirmation of the inequity of the tariff, the establishment of an alternative fair tariff by the judge.

Nevertheless, this is not the last episode of this interesting case since this judgment was appealed last January by CEDRO before the Court of Appeals of Madrid. *Affaire à suivre …*

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[1] CEDRO is a collecting management organization for the rights of authors and publishers of books, periodicals and other publications.

[2] Royal Decree-Act 24/2021 of November 2 (art.80.2).

[3] The arguments concerning the contradiction between article 32.2 SCA and the copyright rules and the need of notification of article 32.2 SCA as a technical regulation were dismissed as groundless.

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