Kluwer Copyright Blog

Germany’s publishers take on Google

Jan Bernd Nordemann (NORDEMANN) · Tuesday, August 30th, 2016

The legal issues surrounding the publication of Internet search results is a topic of great interest for copyright experts. In this interview, originally published in German in the journal Neue Juristische Wochenschrift, and reproduced here with the kind permission of Verlag C.H. Beck, Professor Jan Bernd Nordemann discusses a recent German case on this topic.

It seems they will not be friends, Germany’s publishers and Google. In February, they met before the Regional Court of Berlin. Market abuse is the accusation made by 41 publishers against the search engine operator. At the end of the day, the publishers were on the losing side – and that despite the legislator equipping them with an ancillary copyright three years ago. The question is, however: how effective is that right if they are up against an enormously powerful search engine operator which is virtually able to dictate its conditions to publishers for the use of their journalistic content? That is what NJW wanted to know from Prof. Dr. Jan Bernd Nordemann, attorney at law specialising in, amongst other fields, copyright law and media law, who without representing publishers in court wrote an expert opinion for the small and medium-sized publishers involved in the proceedings before the Regional Court of Berlin.

NJW: *Prof. Nordemann, press publishers have had an ancillary copyright for almost three years now. What does this right cover?*

Nordemann: The ancillary copyright affords press publishers the exclusive right “to decide how, when and by whom the press content they produce is made available to the public”. This concerns primarily a use of press content on the internet. One group which the legislator had in mind in this respect was aggregators of news content, especially internet search engines. Internet search engines regularly make press content available to the public on the internet in that they display press content in their search results, at least in the form of extracts or thumbnails. The only exceptions are where “individual words” or “the smallest text extracts” are used, in which case the ancillary copyright would not apply. What precisely that means is a topic of much debate amongst us lawyers. The Board of Arbitration at the German Patent and Trade Mark Office was of the opinion, in a first landmark decision in September 2015, that the relevant threshold was seven words. This threshold would mean, for example, that Google’s search results would be covered by the ancillary copyright and Google would thus require authorisation to use the respective content, in particular insofar as the normal display of text extracts and thumbnails in the list of search results returned by

Google are concerned.

NJW: *Why do publishers need an additional protection right in addition to copyright?*

Nordemann: Digitalisation has led to massive upheaval in the media industry. Press publishers are a good example of this. In the digital world, they have had to adapt their traditional business model. New opportunities for using, exploiting and monetising press content have emerged. When introducing the ancillary copyright, the German legislator wanted to protect press publishers against systematic access to publishers' output free of charge, especially by search engines. Copyright would possibly not quite suffice in this context: according to the opinion of the Board of Arbitration, the ancillary copyright ensures, for example, that all press content which does not fall below the "seven word threshold" is protected. In the case of copyright, ascertaining what is protected is much more complex: a clear, quantitative threshold cannot be used as a basis, instead a distinction is drawn along qualitative lines as per Sec. 2 (2) German Copyright Act. Only personal intellectual creations are protected as text under copyright law. The CJEU once stated, in its Infopaq decision, that even just eleven words could be protected by copyright. However, that is only a "could" decision, which is further dependent on whether those eleven words also constitute a personal intellectual creation. The ancillary copyright has therefore created a much more reliable threshold above which any relevant use is said to begin. This in turn means that the ancillary copyright lends itself much more readily to mass monetisation, for example through a collecting society.

NJW: *Nevertheless, Germany's publishers recently lost a case against Google which concerned, amongst other things, precisely this ancillary copyright. What was that case about exactly?*

Nordemann: The situation regarding the assertion of ancillary copyrights by press publishers is somewhat complicated. Many press publishers placed their rights with the collecting society, VG Media. VG Media set tariffs for the use of ancillary copyrights in the area of digital media, in particular by search engines. Those tariffs were then checked by the board of arbitration. The relevant decision is the one I mentioned earlier. As Google correctly assumed – as the board of arbitration later confirmed – that continuing to display search results would constitute a relevant use of the ancillary copyright and that consequently payment would be due to VG Media, Google approached the press publishers as the original rightholders. Google first demanded that the press publishers who had placed their rights with VG Media declare that they consented to their content being included in Google News free of charge (so-called "opt-in system level 1"). However, Google apparently did not pursue that system any further. Instead, Google later sent additional letters to the VG Media press publishers demanding that they declare their consent to snippets and preview images being made available to the public in Google search results for free. If consent was not forthcoming, Google announced, the press publishers' content would not be completely removed from the search results but that they would at least completely refrain from displaying snippets and preview images (so-called "opt-in system level 2"), whilst the content of other press publishers would continue to be displayed, as before, with snippets and preview images in the search results. Faced with a potentially serious loss of traffic, all press publishers for whom VG Media administers the respective ancillary copyrights ultimately granted consent not only to "opt-in system level 1" but also to "opt-in system level 2".

NJW: *Why did the press publishers choose to take the antitrust law route?*

Nordemann: In my opinion, that is indeed the correct legal remedy. Google was only able to insist

that the publishers grant consent free of charge to the use of their ancillary copyrights because Google holds a dominant market position. In the case of an abuse of a dominant market position, however, antitrust law provides for claims, in particular claims for injunctive relief as are now being asserted in court proceedings. I cannot currently see any other grounds for action. In particular, search engines are not subject to any special regulation of market power under copyright law.

NJW: *Does this not constitute somewhat contradictory behaviour on the part of the publishers as they first granted Google the right to use their content free of charge before then attempting to prohibit that company from abusing its market power by way of an action for injunctive relief?*

Nordemann: I do not see that as being a contradiction. Google accounts for over 90% of all searches in Germany, thus it clearly has a dominant market position in respect of searches in Germany. A dominant market position is assumed, under the German Act Against Restraints of Competition (Sec. 18 (4) GWB) from as little as 40% market share – Google has over twice that. In fact, this can be described as a virtual monopoly. The virtual monopoly in search then also provides a dominant market position on the other affected markets, in particular on the relevant market for booking search related advertising and on the so-called indexing market, namely the market on which Google requests the listing of websites for its search engine. It is on this indexing market that Google encounters the press publishers who grant Google consent to use.

If they now have an unavoidable market partner in Google and that partner threatens them with restricted listing, in my opinion it is immediately understandable that the publishers would acquiesce to that request. That does not mean, however, that the request is lawful. It is precisely this which can be examined under antitrust law.

NJW: *The court did not see any abuse of market position on the part of Google. Are you convinced?*

Nordemann: The Regional Court did indeed assume a prevailing interest of Google in continuing to operate its business model in which there is no space for paying for the use of press content. According to the court, the equilibrium of the balanced system within which search engines operate would be disrupted by any obligation to pay remuneration to press publishers for indexing press content.

That may seem plausible at first glance, however it is not convincing upon further scrutiny. Google’s interest in continuing its business model of free-of-charge indexing of websites has now been pierced by the decision of the legislator only to allow that indexing generally with the consent of the proprietor of the ancillary copyright. This general decision on the part of the legislator must be afforded considerable weight when ascertaining whether an abuse of market power has occurred. No matter how controversial the ancillary copyright was politically and what one’s own political opinion of it is: the German legislator introduced the new right with the clear objective of enabling press publishers to monetise search machine use. With its introduction of the ancillary copyright, the German legislator thus specifically expressed a clear rejection of the free-of-charge display of press content in search engines.

In my opinion, one should not be allowed to deny Google the option of taking the business decision not to display any press content in search results or to reduce what is displayed so that it no longer falls within the ancillary copyright. In my opinion, however, Google cannot be permitted

simply to force the publishers to grant consent to use free of charge. That is not in the interests of competition, namely keeping markets open, a factor which is always a key criteria considered when ascertaining an abuse of market power. By forcing publishers to grant consent free of charge, Google denies its competitors the chance of licensing the ancillary copyright and using it to its fullest extent in order to obtain a competitive advantage over Google. In fact, this consent free of charge even represents a competitive disadvantage for competing search engines because Google's competitors do not possess enough market power to be able to demand free-of-charge consent from the publishers. In addition, it must be said in respect of the abuse of exploitation, that absolute rights generally may not be ceded free of charge.

NJW: *What does that say about the significance of ancillary copyright?*

Nordemann: The case before the Regional Court of Berlin shows that the German legislator has generally achieved its goal of creating an absolute right for press publishers which enables them to make the use of press content in the form of result lists or thumbnails by search engines monetisable. The fact that Google has been able to avoid this monetisation for now can only be attributed to the special market power which Google holds. In my opinion, antitrust law cannot allow the situation to continue as it is. Google's current practice will also lead – as already mentioned – to an impediment of competing search engines.

NJW: *Where do we go from here?*

Nordemann: The case is going before the antitrust senate of the Court of Appeal in Berlin ("Kammergericht"). It is expected that the losing party will then take the case to the German Federal Court of Justice. The proceedings before the Board of Arbitration already mentioned will also proceed through the various legal stages. The ancillary copyright will have to prove itself. If one wants to take the legislator's intention seriously, the result will likely be that Google will either pay the same fair amount as competing search engines or will no longer be able to use press content in a manner which has an ancillary copyright relevance. We can certainly expect an interesting few years ahead of us in clarifying the situation.

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