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DPG Media et al vs. HowardsHome – A national ruling on DSM's press publishers' rights and TDM exceptions

Etienne Valk, Iris Toepoel (Institute for Information Law (IViR)) · Thursday, January 16th, 2025

Introduction

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The 2019 Copyright in the Digital Single Market (DSM) Directive is a complex legislative text that raises several questions of legal interpretation. Increasingly, these questions are making their way to national courts. A recent example is the Dutch case ruled upon by the Amsterdam District Court ("the court") on 30 October 2024. The plaintiffs are the Belgian media companies DPG Media and Mediahuis (both dominant in the Dutch online commercial news sector with a combined market share of over 90%), together with Mediahuis' Dutch newspaper NRC (together: "the Publishers"). The defendant is the company HowardsHome.

The case is particularly relevant because it is one of the first assessments by a Member State's court of the scope of the DSM Directive's press publishers right, as well as the appropriate manner of exercising opt-outs in compliance with the text and data mining ("TDM") exception in Article 4 of the DSM Directive.

Facts

The Publishers offer national and regional dailies that also include websites. The defendant, which recently stopped providing its service, offered an alert service under the name "HowardsHome Nieuws" ("HowardsHome") to public institutions and private companies, among others. HowardsHome obtains the information for its alerts mainly from Really Simple Syndication-feeds ("RSS-feeds") of news items publicly available online. RSS-feeds contain various information about an article. In its alerts to its customers, HowardsHome provides a hyperlink to the relevant post, including the title, a short description and, if publicly available, a thumbnail. HowardsHome places these alerts on a digital portal.

The alerts include news items from the Publishers. Among other things, HowardsHome allegedly offered to its customers content of the Publishers that was not obtained through purchasing, but from RSS-feeds available on the internet or obtained by scraping websites. The Publishers argue that this infringes their exclusive rights to reproduction and to making available their work to the public.

At its core, this dispute is about whether HowardsHome's alert service infringes the Publishers' press publishers right, copyright and database rights.

Press publishers right

The press publishers right is recognised in Article 15 DSM Directive. This provision grants publishers of press publications the exclusive right to authorise or prohibit the online use of their content by digital platforms. It further recognises exceptions to this right for: acts of hyperlinking *and* reuse of very short extracts of a press publication. HowardsHome claims the RSS-feed usage of the publications falls under both exceptions.

Over the last year, courts in Italy and Belgium have referred questions to the CJEU about the implementation of the press publishers right. However, those questions related to mandatory remuneration for and negotiation with press publishers. To the best of our knowledge, questions on the scope of protection of the press publishers right have so far not been decided by national courts.

In the HowardsHome case, although noting that the precise scope of protection of the press publishers right is ultimately up to the CJEU, the Dutch court carries out that legal interpretation based on the text of the provision, the explanatory memorandum accompanying the Dutch implementation thereof, and Recital 58 DSM Directive (paras. 4.7–4.9). The court emphasised that an important aspect of the test is achieving a balance: ensuring that the number of words used does not harm publishers' investments, while limiting the number does not result in publishers monopolizing factual information (para. 4.10).

The court concludes that HowardsHome's snippets of 150 characters in its alerts, amounting to approximately 20 words, fall within the "very short extracts" exception. Relying on Recital 58 DSM, the court considers that these snippets do not undermine the Publishers' investments in such a way as to harm the normal exploitation of their news content (para. 4.11).

TDM exception in Article 4 DSM Directive

The ruling is equally noteworthy for its assessment of the TDM exception under Article 15o of the Dutch 'Auteurswet' (implementing Article 4 of the DSM Directive). This is especially significant given the limited guidance available on how to properly implement an opt-out mechanism in line with Article 4. While the ruling offers only minimal guidance, it nonetheless provides valuable insight into how this exception should function in practice.

As a refresher to some, an introduction to others: the exception entails that text and data mining is allowed when (i) the miner has lawful access to the work (Article 4(1), Recital 14 DSM), and (ii) the copyright is not expressly reserved by the rights holder in a suitable manner, such as through machine-readable means when a work is made available online (Article 4(3) DSM).

Regarding the first criterion, the Dutch court points out that the Publishers have insufficiently demonstrated that HowardsHome's alerts include or provide access to information behind the Publishers' paywalls. Therefore, the court assumes that HowardsHome only uses publicly available information and thus – in principle – has lawful access (para. 4.32).

On the second criterion, the question arises whether the Publishers have *expressly* reserved TDM on their websites in an appropriate manner (read: at least machine-readable means). Here, it turns out that the Publishers were only focused on big AI-bots (ChatGPT-User, CCBOT, and anthropic-ai, i.a.). It is not clear from the ruling what bot HowardsHome used. According to the court, however, the bot was not appropriately denied TDM permission by the Publishers' rights reservation, (para. 4.33).

The court's judgment suggests that, for the opt-out under the TDM exception to be effective, the parties it targets must be explicitly identified. Perhaps the Publishers' reservation expressly made vis-a-vis specific TDM actors was also meant as an implicit reservation against all TDM actors. Yet, the apparent argumentation on which the court bases its judgment is that implied reservations are not sufficient given the requirement of an *expressly* made reservation. This argumentation appears to be roughly in line with the requirements developed – albeit in obiter dictum – in the recent German *LAION* case, previously covered on this blog.

Three-step test

Before the court can rule that HowardsHome does not infringe on the Publishers' *copyright*, it must lastly determine whether the statutory limitation on copyright in this case meets the requirements of the Berne three-step test of the 2001 InfoSoc Directive, which the court concludes it does. On the first step, the court rules that the Dutch implementation law's specified exceptions are sufficiently clearly defined to qualify as a certain special case (para. 4.37). On the second step, since it is not clear how signalling the Publishers' paywalled content is detrimental to their

business operations, there is no conflict with the normal exploitation of the Publishers (para. 4.38). On the third step, HowardsHome is permitted to organise its business operations within the limits of the Copyright Act, so the Publishers' legitimate interests are not unreasonably prejudiced (para. 4.38).

Not just reproduction

In short, the court rules that the TDM exception can successfully be invoked given the facts of the case. Although the court did not explicitly state it, the TDM exceptions of course only apply to the right of reproduction, not (also) to the right of making available to the public. However, HowardsHome also successfully invoked the Dutch equivalent of the Berne exception for quotation, which does enable HowardsHome to make available to the public (parts of) the Publishers' copyrighted material. Lastly, the court denies the Publishers' database infringement claim, stating that the TDM test used for copyright infringement applies mutatis mutandis.

Takeaways

This ruling appears to be the first in the EU on the scope of the DSM's press publishers right. The court rules that HowardsHome's snippets of 150 characters in its RSS-feed alerts, amounting to approximately 20 words, fall within the "very short extracts" exception of the press publishers right. It will be interesting to see if the CJEU takes a similar approach in the future.

Moreover, with the German *LAION* case and the Dutch *HowardsHome* case at hand, there are now at least two cases where the DSM's TDM exception has successfully been invoked.

If we are to rely on this Dutch national court ruling, an opt-out in line with Article 4 DSM Directive must be explicit about the actors to whom the reservation is directed. The practicality of this requirement seems questionable, since it could be understood as an obligation for parties to disclose all possible AI scraping bots in the rights reservation on their website. Of course, both *HowardsHome* and *LAION* are only national cases in first instance. An appeal by the Publishers in the Dutch case is expected, so a ruling in second instance should provide more clarity.

Although not put into question in *HowardsHome,* several entities (ranging from parts of the Polish government to legal scholars) have been critical as to whether the TDM exceptions were originally meant to have as broad of a scope as to also be invoked for commercial use, such as the mass scraping by (generative) AI systems we have seen over the past few years. It will be interesting to see how broad the scope of Article 4 DSM is according to higher courts, considering the ubiquity of GenAI tools in recent years.

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