[FR] Neighbouring rights: publishers secure initial victory against Google before competition authority

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With the adoption of the Act of 24 July 2019 creating a neighbouring right for press publishers and agencies, France became the first country to transpose the EU Copyright Directive's provisions on neighbouring rights. Under the Act, a search engine's use of article excerpts ('snippets') may be negotiated in the form of a licence agreement with the relevant publishers, in return for payment, if the excerpts are read rather than the original article (see IRIS 2019-9:1/17).

However, on the day the new provisions entered into force, 24 October 2019, Google announced its intention to "make changes in the way news-related search results are displayed." The American company unilaterally decided to stop posting article excerpts, photographs and videos within its various services unless publishers allowed it to do so free of charge. In practice, the vast majority of press publishers therefore granted free licences to Google, allowing it to use and display their protected content without any negotiation with or payment from Google. Under the licences granted to it by press publishers and agencies, Google could now use more content than before the Act had entered into force.

Unhappy with the way the Act was being implemented, which they considered an abuse of a dominant position contrary to Articles L. 420-2 of the Commercial Code and 102 of the TFEU, as well as an abuse of economic dependence, representatives of a large number of press publishers and the Agence France-Presse referred the matter to the French competition authority in mid-November. In parallel with their main action, they also requested provisional measures aimed at ordering Google to negotiate with them in good faith.

Under the terms of its decision of 9 April 2020, the competition authority considered that, given the state of the investigation, Google was likely to hold a dominant position in the French general search engine market. Its market share in terms of the number of monthly searches had been around 90% at the end of 2019. It also thought that Google could have abused its dominant position in order to circumvent the Act on neighbouring rights, in particular (i) by exploiting the possibility for press publishers and agencies to grant free licences in order to systematically impose the principle of non-remuneration for displaying protected content within its services without any possibility to negotiate; (ii) by refusing to communicate the information required to determine the level of remuneration;

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and (iii) by displaying article titles in full on the assumption that they were not subject to the Act on neighbouring rights.

The competition authority therefore believed that press publishers and agencies had been placed in a situation in which they had no choice but to comply with Google's policy without receiving any financial reward.

The authority therefore held that Google's behaviour caused a serious and immediate threat to the press sector. It imposed provisional measures enabling press publishers and agencies, if they so wished, to negotiate with Google in good faith with a view to discussing both the arrangements for capturing and displaying their protected content and the remuneration that might be paid. These negotiations would need to be conducted within three months of the date of the press publisher's or agency's request, and should cover the period since 24 October 2019 as far as remuneration was concerned. These provisional measures will remain in force until the competition authority publishes its decision on the merits. Meanwhile, Google will be required to submit regular reports to the authority on how this decision is being implemented.

Décision 20-MC-01 du 09 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse

https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-04/20mc01.pdf

Decision 20-MC-01 of 9 April 2020 concerning the requests for provisional measures submitted by the Union of Magazine Publishers, the General Newspapers' Alliance and the French Press Agency

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