Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Case C-299/17
VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC, successor in law to Google Inc.

Advocate General Hogan: the Court should rule that the new German rules prohibiting search engines from providing excerpts of press products without prior authorisation by the publisher must not be applied

Those rules should have been notified to the Commission as they constitute a technical regulation specifically aimed at a particular information society service, namely, the provision of press products through the use of internet search engines

In 2013, Germany introduced a right related to copyright for press publishers, without notifying the draft legislation to the Commission. The new provisions provide that – in contrast to other users, including commercial users – commercial operators of an internet search engine (as well as commercial service providers which edit content) are not entitled without appropriate authorisation to provide excerpts – other than individual words or very short text excerpts – of certain text, images and video content provided by press publishers.

VG Media is a German collective management organisation managing copyright and rights related to copyright on behalf, among others, of press publishers. VG Media brought an action for damages on behalf of its members, against Google before the Landgericht Berlin (the Berlin Regional Court) in respect of Google's[1] use from 1 August 2013 onwards, of text excerpts, images and videos from press and media content produced by VG Media's members without paying a fee.

The Berlin Regional Court considers that as VG Media's action before it is well founded, at least in part, **the outcome of the proceedings** before it **depends on whether the new German rules could be considered as a technical regulation specifically aimed at a particular information society service and therefore one that required notification to the Commission according to Directive 98/34[2] in order to be applicable.** It therefore asks the Court of Justice to interpret the directive in this respect.

In today's opinion, Advocate General Gerard Hogan considers that the new German provisions in question on the right related to copyright for press publishers amount to a technical regulation within the meaning of Directive 98/34.

They cannot be regarded as simply the equivalent of a condition governing the exercise of a business activity such as a prior authorisation requirement. Their effect in practice is to make the provision of the service subject to either a form of a prohibitory order or a monetary claim at the instance of the publisher of newspapers or magazines. It is true, of course, that the search engine operator may avail of the copyright exception, but only if the publication is confined either to a few words or a very short excerpt.

[1] By means of the search engine Google search under the domains www.google.de and www.google.com and the Google News service, which can be accessed separately in Germany under news.google.de or news.google.com.
[2] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Council Directive 2006/96/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 81).

The Advocate General is further of the opinion that the German rules in question are specifically aimed at information society services.

Their principal aim and object is to address the impact of internet search engines given that media content is increasingly read and accessed on-line and to provide for a special copyright rule in respect of the provision of online services in relation to press products by the operators of such search engines.

Advocate General Hogan accepts that the rules in question were enacted in order to strengthen the intellectual property rights of press publishers and, by extension, to promote both media diversity and press freedom. The ubiquitous presence of the internet and the widespread access to personal computers and smartphones has meant that in the course of a half a generation heretofore long established consumer practices with regard to the consumption of media products – not least the actual purchase of newspapers – have changed dramatically.

The legislators in each of the Member States were, accordingly, in principle entitled to respond to these changing consumer habits. A free and vibrant press is part of the lifeblood of democracy, which is the very foundation stone of the EU and its Member States. It is quite unrealistic to expect high quality and diverse journalism which adheres to the highest standards of media ethics and respect for the truth unless newspapers and other media outlets enjoy a sustainable income stream. It would be foolish and naïve not to recognise that the traditional commercial model of newspapers right throughout the EU – sales and advertising – has been undermined within the last twenty years by on-line reading of newspapers by consumers, which practice has in turn been facilitated by the advent of powerful search engines such as that operated by Google.

None of this means, however, that a Member State is entitled to by-pass the notification requirements of Directive 98/34. Nor does the fact that notification of such a legislative proposal is required by the Directive in itself mean that the draft legislation is necessarily defective or objectionable from the standpoint of the internal market. Rather, **what the directive seeks to attain is that the Commission (and, by extension, the other Member States) becomes aware of the proposal and at an early stage consider its possible implications for the operation of the internal market.**

The Advocate General proposes therefore that the Court should rule that national provisions such as those at issue, which prohibit only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute rules specifically aimed at information society services. Further, national provisions such as those at issue constitute a technical regulation, subject to the notification obligation under that Directive.

It follows therefore, that in the absence of notification of these national provisions to the Commission, these new German copyright rules cannot be applied by the German courts.

The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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