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Defining Legal Boundaries to Combat Unfair Competition: An Analysis of Eu Law and International Practice

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Abstract: This article examines the issue of combating unfair competition within both international and national legal frameworks. The author explores the scope and limitations of exclusive rights in relation to intellectual property, particularly focusing on the newly introduced neighboring rights of press publishers as outlined in Directive (EU) 2019/790. Using France's legal and judicial response to Google's behavior as a case study, the paper analyzes how competition authorities have intervened to protect press publishers from abuse of dominant market position by digital platforms. The article also considers the lack of clear legal boundaries in digital environments and the importance of adapting national antitrust policies to reflect evolving international standards. In doing so, it proposes a framework for legal harmonization and balanced rights enforcement in the digital economy.

Keywords: Unfair competition, intellectual property, exclusive rights, antitrust law, digital economy, Directive 2019/790, news aggregators, legal boundaries, French law, Google, competition authorities, abuse of rights.

Introduction: The necessity of establishing legal norms regulating intellectual property rights on the Internet arises from the need to strike a balance between the interests of rights holders of intellectual property objects and users, who, in accordance with the Constitution of the Russian Federation and the constitutions of other countries, have the right to access and disseminate information. However, defining clear boundaries and limits of exclusive rights to specific intellectual property objects proves to be quite difficult, as various conflicting factors influence the scope of such protection in each individual case.

The Russian scholar S.A. Belyatskin accurately noted: "The author's exclusive and inalienable right to the products of intellectual creation, recognized and widely protected with respect to third parties, meets its limits where the rights of society represented by its individual members to access works of art begin, a right which is also recognized and affirmed by law".

One of the most current and complex issues related to the limits of exclusive rights concerns the boundaries and scope of the newly introduced European press publishers' right to control the use of their publications in the online environment. The EU Directive on Copyright and Related Rights in the Digital Single Market outlines the general provisions of this right, while leaving the details of its implementation to the discretion of individual EU Member States.

According to the provisions of the Civil Code, there may also be cases in which the use of the results of intellectual activity is allowed without the authorization of the right holder, while still preserving their right to receive income, since this entitlement is considered an integral part of the exclusive right.

N.V. Buzova distinguishes two groups of such limitations:

1. Free use of works without the author's consent and without payment of remuneration.

2. Use under a compulsory license without the author's consent, but with payment of remuneration.

A.G. Matveev, in defining the limitations of exclusive copyright, observes:

"The copyright institution, which includes rules that restrict exclusive rights and allow the public to freely

use protected works, is referred to in various ways across different legal systems and legal doctrines. In foreign legislation, the terms limitations on copyright or limitations on exclusive rights are most commonly used. This tradition is followed, for example, by the United States, Germany, the Netherlands, Switzerland, and Japan. Less frequently used are terms such as Acts permitted in relation to copyright-protected works (United Kingdom) or Exceptions to the author's proprietary rights (Belgium). In general, one can agree with the conclusion of J.A.L. Sterling that what is referred to as 'limitations' in one legal system may be called 'exceptions' in another".

V.P. Gribanov believed that any subjective right, as a measure of the right holder's permissible conduct, has defined boundaries in terms of its content[2]. The boundaries of a right represent a sphere of control within a specific legal framework accessible to the right holder. Accordingly, it can be concluded that the exclusive rights granted to press publishers under the EU Directive on Copyright and Related Rights in the Digital Single Market may be subject to the following types of limitations:

Temporal boundaries. It is worth noting that during the discussion of Directive 2019/790, proposals were made to set the duration of the exclusive right to use press publications at varying lengths—from one year to twenty years. A consensus was ultimately reached on a two-year term for the validity of such exclusive rights. The establishment of temporal boundaries helps strike a balance between the interests of press publishers and news aggregators.

Territorial boundaries. Given that the Internet is a global communication environment, defining "the territory within which the right holder controls the use of the intellectual property object" is particularly challenging. In practice, the determination of territorial boundaries of exclusive rights is carried out through the national legislation of the country in which the publisher is registered as a legal entity.

Object-based boundaries. It should be noted that the identification of object-based boundaries within the scope of exclusive rights is a subject of debate, since the definition and criteria for the protectability of an object are established within the framework of relatively autonomous regulatory systems. Nevertheless, referring to object-based boundaries of exclusive rights is practically convenient.

According to Paragraph 33 of the preamble to Directive 2019/790, press publications primarily contain literary works but may also include photographs and videos. The exclusive right of an author arises from the uniqueness of the form in which their thoughts are expressed—this form being an extension of the author's consciousness and psychological world.

This gives rise to the question of what forms of press publications may be lawfully used. In order to define the object-related boundaries of permissible use, it is necessary to determine which characteristics of a press publication fall under the control of the right holder, as well as to assess the extent to which elements of the object are being used, so as to avoid infringement when third parties use press content.

When creating press publications, authors resort to specific literary genres. The genre of a press article involves a unique form of interpreting facts and its own internal logic of presenting material. The "picture of the day" is shaped by the entire spectrum of journalistic genres and the individual creativity of the author. During the formulation of rights for press publishers in Directive (EU) 2019/790, the issue was raised concerning the use of hyperlinks, single words, and very short excerpts by news aggregators on their websites.

However, the preamble to Directive 2019/790 clarifies that "the use of individual words or very short extracts should not adversely affect the rights of press publishers".

As of today, no EU Member State has proposed a quantitative threshold defining the exact number of words or characters that may be freely used. Member States implementing the provisions of the Directive often refer in their explanatory notes to Recital 58 of the preamble to Directive 2019/790, which clarifies that the use of excerpts from press publications should not undermine the effectiveness of the right—namely, such excerpts should not substitute the original publication or discourage users from accessing it via a proper link.

Content-related boundaries. In 1996, the WIPO Copyright Treaty established a new exclusive right for rights holders: the right to make a work available to the public. The use of the new neighboring right introduced by Directive 2019/790 is limited by the modes and conditions set out in the Directive itself. For example, when a press publication is transferred to a publisher for further publication on their website, this involves making the content available to the public from any place and at any time at their discretion. Accordingly, the Directive's provisions on the use of press publications owned by publishers stipulate that reproduction and communication of such publications to the public require the publisher's authorization.

When analyzing the right to make works available to the public, it should be noted that legislators have not defined clear content-related boundaries for this right. As a result, it can be difficult in certain cases to

determine the limits of permitted use of press publications. The permitted use of intellectual property in some jurisdictions is framed under the concept of Panoramafreiheit (German for "freedom of panorama"). For instance, in 2016, the French Parliament adopted a law introducing limitations on freedom of panorama, which restricts the use of publicly accessible intellectual property objects. This limitation applies to private individuals and only for non-commercial purposes. These provisions were incorporated into Article L.122-5 of the French Intellectual Property Code.

Thus, it is assumed that establishing clear limits on the exercise of exclusive rights by news publishers over the online use of their publications by news aggregators will, on the one hand, support the generation of revenue for press publishers, and on the other hand, serve as an incentive for creative development.

Considering that France was the first EU Member State to implement the provisions of Directive (EU) 2019/790 into its national legislation, it is worthwhile to examine judicial practice concerning the abuse of rights by news aggregators in their use of press publications.

In 2019, France incorporated into its legislation the provisions of Article 15 of Directive 2019/790, which established a framework for regulating interactions between press publishers and news aggregators through licensing arrangements. Following the adoption of this provision, Google announced that, starting from the date the law came into effect, it would no longer make available to the public content published by press publishers—unless those publishers granted Google express authorization.

Given that the display of short excerpts by a news aggregator may indirectly contribute to increased readership on the press publisher's website, many publishers accepted Google's conditions. Out of concern for losing the potential increase in website traffic and the corresponding revenue, they granted Google the right to use their content free of charge.

The act of granting a free license to news aggregators may be interpreted as a waiver of rights by press publishers. It should be noted that, although the legislation provides for fair remuneration, it does not explicitly prohibit the granting of free licenses or the possibility of waiving the new right. As such, Google's actions appear to be fully consistent with the letter of the law.

Having determined that Google had effectively compelled press publishers to grant free licenses, the publishers attempted to rectify this perceived unfairness by filing a complaint with the French Competition Authority, alleging abuse of a dominant market position. In 2020, the authority issued a provisional decision favoring the French press publishers[3]. The authority found that Google held a dominant position in the market for online services and therefore had the capacity to abuse that position by pressuring publishers into accepting free licenses that were less favorable to them. In the view of the authority, Google was a "crucial and indispensable player in ensuring the economic viability of press publishers." As such, the potential loss of traffic from Google was considered sufficient to create an imbalance that could result in abuse of dominance.

From a formal legal perspective, however, Google had not violated any legislative provisions, since the French implementation of Directive (EU) 2019/790 did not prohibit free licenses. Nonetheless, the Competition Authority's ruling filled this regulatory gap by requiring that Google pay remuneration for the use of press publications. To more clearly define the boundaries of permissible use, the authority established the following obligations for Google:

1. Google must conduct negotiations in good faith concerning the duration, conditions, and amount of remuneration;

2. Google must provide press publishers with the necessary information to allow a fair assessment of compensation;

3. Google must maintain the display of content in the format chosen by the publisher.

Thus, through the Competition Authority's intervention, more precise boundaries for the use of press publications were established, aimed at ensuring a fair balance of rights between publishers and news aggregators.

Subsequently, the Paris Court of Appeal upheld the fairness of the Competition Authority's decision. The court affirmed the relevance of Google's dominant position and emphasized that while the publishers' rights do not automatically create a right to remuneration, they do require fair and balanced negotiations. Google's conduct was found to undermine the "useful effect" of the publishers' rights. However, according to the publishers, Google failed to comply with the measures prescribed by the Competition Authority and confirmed by the Paris Court of Appeal.

These allegations were substantiated in August 2021 following an investigation by the Competition Authority initiated in response to the 2020 complaint. As a result, the authority imposed a €500 million fine. Specifically, it found that Google had not fulfilled its obligation to negotiate in good faith. The company had effectively

refused to clearly define the press publisher's right as the legal basis for the license, instead attempting to impose global negotiations unrelated to Article 15 of Directive 2019/790.

Furthermore, Google sought to exclude or limit the scope of the right by excluding publishers who reused content, those without a certificate of political and general information (PGI), and by narrowly interpreting revenues arising from Article 15 of the Directive. Notably, in defining the boundaries of press publication use, the Competition Authority also took into account the indirect revenue generated through the attractiveness of Google's search engine.

This legal dispute was resolved in 2022. Google agreed to the following commitments:

1. Google pledged not to restrict negotiations with publishers holding a PGI (Political and General Information) certificate, and not to limit the rights of press agencies to content integrated into third-party publications.

2. Google committed to negotiating in good faith, which includes explicitly referencing Article 15 of Directive (EU) 2019/790 during negotiations and recognizing the newly granted right as a valid basis for licensing and remuneration.

3. Google agreed to provide relevant information necessary for determining the amount of remuneration owed to press publishers. Notably, this process is to be overseen by an independent monitoring trustee. The purpose of this arrangement is to strike a balance between Google's legitimate interest in protecting its commercial secrets and the publishers' direct or indirect need for access to information essential to evaluating their compensation.

4. Google will make an offer regarding remuneration, and if an agreement cannot be reached, the amount may be determined by arbitral proceedings. This process will also be supervised by an independent administrator, tasked with resolving any disputes. Interestingly, Google is obligated to comply with the decisions of the arbitration administrator, although this obligation does not necessarily extend to the press publishers.

A key aspect of these commitments lies in the inclusion of a third, neutral party to ensure fairness in the negotiation process.

CONCLUSION

In conclusion, the establishment of limits on the exercise of exclusive rights is rooted in the need to avoid conflicts of interest. Achieving a proper balance of interests requires the definition of specific methods for using the results of intellectual activity, which together constitute the content of the relevant subjective right. It is important to emphasize that, when determining the limits of exclusive rights, the decisive factor is not the goals pursued by the right holder, but rather the characteristics of the protected object and the goals pursued by the legislature in granting legal protection.

This conclusion stems from the understanding that the primary function of exclusive rights to the results of intellectual activity—including press publications—is to support the economic, social, and cultural development of society.

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