CNMC - COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA
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At its 21 May 2014 meeting, the Assembly of the National Commission on Markets and Competition (CNMC - *Comisión Nacional de los Mercados y la Competencia*) approved this report on the amendment of article 32 in the Bill Amending the Recast Intellectual Property Act (*Proyecto te Ley por el que se modifica el Texto Refundido de la Ley de Propiedad Intelectual*) approved by legislative decree No. 1/1996 of 12 April, and Civil Procedure Code No. 1/2000 of 7 January. In this report, its implications are analysed from the standpoint of effective market competition and efficient economic regulation.

This report was approved on the CNMC's own initiative in exercising of the Commission's competences, as set forth in article 5.1 of Act No. 3/2013 of 4 June establishing the National Commission on Markets and Competition.

I. BACKGROUND

I.1 General Framework

Legislation to protect intellectual property would be justified based on the need to create a system of incentives to dynamically foster the creation of artistic, literary and scientific works to a greater extent than the market would on its own. It is commonly held that both Competition Law and Intellectual Property Law pursue the same objective by promoting both competition and innovation, in addition to furthering wellbeing and efficiently allocating resources.

Nonetheless, in designing regulation of protection systems, account should be taken not only of rights holders' interests in obtaining protection and maximising their income, but also of minimizing the negative externalities that could stem from such protection, for instance diminishing competitive tension leading to higher prices, lower quality, and lesser innovation.

From the standpoint of seeking economic efficiency, a proper balance must be stricken between all of these factors, and the general principles of efficient economic regulation (i.e. need, proportionality, minimum restriction) must be adjusted to in order to facilitate the benefits of the regulation.

The Spanish Competition Authority has had the occasion to pronounce itself on activities related to intellectual property rights, basically as regards entities that

collectively manage these rights, both from the standpoint of disciplinary proceedings and from the point of view of promoting competition.[1]

I.2 Amendments in the Bill

The CNMC has become aware of article 32 of the Bill currently in Parliament[2] including a new paragraph on publishers' and other rights holders' **unrelinquishable right** to **receive 'fair compensation'** for content aggregation service providers who provide the public with **content or non-significant fragments** of content disseminated in periodically updated news websites, or those which generate public opinion or provide entertainment.

This provision would, in principle, affect content aggregation companies[3] and press clipping companies that must mandatorily compensate publishers for reproducing non-significant content fragments of content when reproducing in their searches or content summaries.

This new obligation has arisen after **certain EU member States have proceeded to establish similar mechanisms** to compensate publishers or other rights holders.

In this regard, attention can be drawn to the German Federal Copyright Act[4] which obliges licences to be obtained from publishers of the German press to disseminate their news content, and that only permits brief mentions to be made without a licence[5]. Along the same lines, in France, according to a recent contract signed between the French government and Google, Google will have to create a 60 million euro fund to help the French press to accelerate the transition from analogue to digital.[6]

These initiatives are set forth in articles 2 and 3 of the **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**. However, it is important to be mindful that article 5.3 of this

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[1] 2009 Report on the collective management of intellectual property rights and IPN 102/13 draft bill on the amendment of the Recast Intellectual Property Act and the Civil Procedure Code.

[2] There is a link to the text published in the BOCG. Its potential application to Google News search engine is the most paradigmatic case and lends its name to the popular name of the amendment, the 'Google tax', although this is far from the only such case.
http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?_piref73_2148295_73_1335437_1335437.next_page=wc/servidorCGI&CMD=VERLST&BASE=IW10&FMT=INITXDSS.fmt&DOCS=11&DOCORDER=FIFO&OPDEF=ADJ&QUERY=%28121%2F000081*.NDOC.%29.

[3] News aggregation on the internet is normally usually done through i) internet portals (for instance Google News, Huffington Post), ii) feed readers on formats such as RSS Atom, etc.) on web portals (for instance Feedspot, News360, My Yahoo!) and iii) feed reader applications such as Flipboard and Prismatic).

[4] http://dipbt.bundestag.de/dip21/btd/17/114/1711470.pdf

[5] In any event, this legislation has only affected large companies and allows individuals, bloggers and associations to link and show content without having to pay. Small news aggregators have changed their practices to meet the German legislation, although most publishing groups have authorized Google News to continue to use their content free of charge.

[6] www.elysee.fr/communiques-de-presse/article/accord-avec-google/

Directive[7] enables member states to set exceptions or limitations on the rights referred to in articles 2 and 3, specifically, although not exclusively, making press articles available to the public in certain circumstances. [8]

This paragraph was included in the Bill after the Spanish Competition Authority had approved and published the previously mentioned IPN 102/13 on the draft bill to amend the Recast text of the Intellectual Property Act and the Civil Procedure Code.

In this regard, neither this nor in principle any other consultative body of the General State Administration has had the chance to pronounce itself on the right to fair compensation regulated in article 32.2 to the extent that this paragraph was introduced after the version submitted.

II. CONTENT

Article 32.2 of the Bill amending the Recast text of the Intellectual Property Act approved by Royal Decree No. 1/1996 of 12 April and Civil Procedure Code No. 1/2000 of 7 January, currently in Parliament, establishes that

" (…) 2. Electronic content aggregation providers' provision of non-significant fragments of contents to the public through periodic publications or on periodically updated news and information websites, or those which generate public opinion or provide entertainment, shall not require authorization, without prejudice to the rights of publishers or, when applicable, those of other rights holders, to perceive fair compensation. This ***right shall be unrelinquishable and make effective through*** *intellectual property rights* ***management entities.*** *In any event, third parties' making available any image, photographic work, or mere photograph to the public through the dissemination in periodic publications or on periodically updated Websites shall be subject to authorization.*

Without prejudice to what is set forth in the previous paragraph, when service providers that facilitate search tools using isolated words included in the content referred to in the previous paragraph make this available for the public, they shall not be subject to authorization or fair compensation provided that it is made available to the public without any commercial ends on its part and that it is made available strictly circumscribed to what is imperative to offer search results in response to search engine user consultations, and provided it is made available to the public with a link to the website with the original content".

III. EVALUATION

This measure generates several impacts on the conditions for effective economic competition and efficient economic regulation that cannot be analysed without

[7] At the time that Directive 2001/29/EC was approved in May 2001, there were roughly 460 million Internet users. In March 2014, the estimated number is 2.9 billion, which is an increase of 630%. Source www.internetworldstats.com

[8] Vid. Article 5.3.c): (*textual*)

taking proper account of certain principles of intellectual property rights and the inherent fast pace of innovation in information technology.

III.1. Competition between original sites and news aggregation service providers and press-clipping companies

The main grounds cited for substantiating 'fair compensation' is direct competition[9] between the original web site and the news aggregators or press-clipping companies in accessing certain information without sharing the cost of the creative effort involved.

However, there are certain concurring elements that call this into question, i.e.: i) whether this direct competition actually exists; ii) the need for compensation, and iii) the direction that this compensation would eventually take in the marketplace.

Firstly, in order to analyse potential financial compensation, one would base oneself on the positive external effect of the publication of content that was not sufficiently compensated by the market. This would mean that the aggregators would be benefitting from the creative effort made by the original publishers without appropriately paying for it, which would therefore lead to a diminishing of the overall socially desirable content and run against the general interest.

This argument does not hold because there are simple technical solutions that, free of charge, would prevent this externality from occurring if it ran against the publisher's interests. The intellectual property rights holder could reserve the right to have the content aggregated or not. For instance, with a standardized robots.txt file, each website owner could, easily and free of charge, prevent or circumscribe the trawling of any single search engine or news aggregator[10] or all of them to the degree of detail it chooses. To the extent that publishers do not include these simple measures to prevent news aggregation, there is an indication that these publishers have an interest in this type of activity continuing, and are implicitly showing that they deem this practice to be in their interest.

In short, without showing that there is any market failure, competition between companies and the parties' freely entering into contractual agreements would suffice for generating efficient results in this market[11]. It would therefore be unnecessary and disproportionate to arbitrate a system for financial compensation

[9] Recent references to economic literature that can be cited are M. Calín, C. Dellarocas, E. Palme and J. Sutanto's research dated 16 February 2013 entitled *Attention Allocation in Information-Rich Environments: The case of News Aggregators*", as well as research published by C. Dellarocas, Z. Katona and W. Rand on 30 September 2010 entitled "*Media, Aggregators and the Link Economy: Strategic Hyperlink Formation in Content Networks*."
[10] Any web site can configure a standard robot exclusion (robots.txt file) to prevent search engine trawling and appearing in results.
[11] With all of the additional guarantees provided by the potential *ex-post* application of articles 1, 2 and 3 of the Defence of Competition Act No. 15/2007 of 3 July.

that is more costly, would distort competition, and which in no event would be more efficient[12].

Secondly, it is also questionable that all publishers consider news aggregators to be competitors given that the original media can gain in hits on their website through aggregation since access to the full content would require access to the publisher's website. In this sense, in addition to refraining from using the robots.txt file, the large investments made by various content publishers in improving their positions on search engines stands as another indication that, at least for certain publishers, the aggregator is complementary and not a competitor of its product or service.

In this instance would also be unjustified to contend that competition and the parties' freely entering into contractual agreements would produce inefficient results in the marketplace. Therefore, it would be unnecessary and disproportionate for the public sector to introduce ad hoc mechanisms to distribute the revenue generated by this extra traffic.

Thirdly, even assuming that there should be compensation, **it would be inefficient to determine both the amount and the direction** of the payments between the content generators and news aggregators ***a priori*** **on a general basis**. Such a practice would be counterproductive because the interests of the news publishers themselves may vary not only vis-à-vis other publishers, but also, in all likelihood, within a given company itself over time depending on the novelty of its website, its reputation, user knowledge, its sales policy, and so forth.

Fourthly, **the traffic obtained thanks to aggregation generates or may generate revenue other than that from subscriptions, mainly advertising revenue.** Here again, no market failure can be seen that would lead one to believe that the marketplace is not an efficient mechanism to distribute between private companies additional advertising revenue that could be obtained from appearing on search engines or aggregators. No reason can therefore be found for the public sector to force mechanisms setting financial obligations outside the marketplace.

Lastly, the Competition Authority is aware of **publishers who, without ambiguity, consider aggregation to be beneficial for their interests, or whose distribution licences include no financial compensation.** Therefore, in addition to the arguments put forward in the previous paragraphs, **'fair compensation' should never be established as unrelinquishable.**

III.2. Competition between news aggregation service providers

Given that article 32.2 would oblige electronic content aggregation service providers to pay fair compensation to the publisher and other rights holders, the measure would jeopardize the entry of new operators on the market. **The new**

[12] Vid Arrow, K.J; Debreu, G. (1954). "Existence of an equilibrium for a competitive economy". Econometrica 22 (3): 265-290 and McKenzie, Lionel W. (1959). "On the Existence of General Equilibrium for a Competitive Economy". Econometrica 27 (1): 54-71.

compensation would raise an access barrier that current consolidated incumbents have not had.

In this light, it should be borne in mind that incumbent operators have been operating over the last several years without having to pay 'fair compensation' and have therefore been able to develop and consolidate from the very outset without facing the cost that new operators would have to face. Furthermore, new operators might not have the financial wherewithal that incumbents on the news aggregation market have.

Without knowing exactly how the fair compensation included in the Bill would materialise,[13] it is difficult to evaluate the static and dynamic effects the measure would have on new operators and innovation in the marketplace. Nevertheless, the higher the compensation required, the greater the impact would logically be. This impact would certainly run against consumer interests because competitive tension, variety in supply and in technological innovation would be diminished.

A 'Fair Compensation' measure would dis-incentivize new electronic aggregation services from accessing the market, and the greater the compensation required, the more this would hold true. Requiring only major operators and not newcomers or small-scale operators to pay fair compensation could prevent this access barrier, but it would be difficult to defend from a non-discrimination standpoint.

Furthermore, the Bill **opens the door to consolidated major news aggregators to require explicit consent from news publishers in the robots.txt file in order to be indexed in their aggregation services.** Both in the event that this express consent were sufficient for that purpose and in the event that remuneration from the publisher to the aggregator were also required through free agreement between the parties, this would provide an additional, non-replicable advantage to consolidated aggregators of non-representative news excerpts. This hypothetical situation would i) lead the amended text to have the opposite results from what is sought and ii) would make it additionally difficult for new operators on the market to put out new and potentially better services.

III.3 Reservation of activity for intellectual property rights managers

Lastly, the Bill obliges the 'fair compensation' to be make through intellectual property management entities. This provision, in principle, reserves this activity for these entities without substantiating why other types of entities or the rights holders' themselves would not be allowed to engage in it.

The Competition Authority deems **it to be possible for there to be a more favourable regulatory framework for competition[14]** where entities face greater

[13] It would be complicated to stake out the revenue basis on which to apply compensation because in most cases, these content aggregation activities do not have directly associated revenue. This therefore poses a risk of discretion in setting the revenue basis.

[14] As stated in the 2009 report, "in order to introduce competition, there must be free management, in other words rights holders must have greater contractual freedom regarding the mandate they assign to the management entity, and greater freedom to choose who should manage their rights and under what legal

competitive pressure so that entrance barriers for new operators can be removed. This would add incentives for the entities to provide their services efficiently and would reduce the chances of them exercising their power in the marketplace when it comes to rates.

Other entities, such as press or publishing associations, could be provided for and would compete with the entities in the Bill for the management of the rights of publishers and other rights holders and for making payment of fair compensation.

IV. CONCLUSION

Without prejudice to the preliminary nature of this analysis and the need to evaluate the proposed legislation's potential development, bearing in mind that the CNMC was unable to pronounce itself properly on this measure because it had not yet been included in the Bill sent to the Committee to produce its report, and given the previously mentioned potential effects on competition and efficient economic regulation, **the Committee recommends that the provision be reconsidered in order for an in-depth analysis to be made of the legislation that would reduce the regulation's potential negative impact.**

However, should it be decided to carry the measure forward, it is recommended that at least i) the unrelinquishable nature of the compensation be modified and ii) the reservation of the activity to intellectual property management entities be eliminated.

form. At the same time, government interventionism, which for all of these years, may have thwarted or prevented market mechanisms from operating in organizing the collective management of intellectual property rights, must imperatively be eradicated".