Opinion on the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market of 14th September 2016

COM (2016) 593 / F1

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On Article 11 DSM-Proposal – the ancillary copyright for press publishers

A. Introductory remarks

Since the beginning of the debate on the ancillary copyright law for press publishers (AC) in Germany, almost all independent experts and observers have rejected this regulatory proposal. In the German debate, only the lobbyists of a few large publishing houses and other representatives of the same interest group supported it. This impression has largely been confirmed by the European Commission's *Public consultation on the role of publishers in the copyright value chain*.[1] In this context, the most recognized copyright experts have–again–opposed the AC. We need only look to the opinion of the Max Planck Institute for Innovation and Competition in Munich[2] and that of the European Copyright Society[3] to see examples of this opposition.

B. Remarks on the topic

I. There is no justification for an ancillary copyright for press publishers

As the European Copyright Society (ECS) and Max Planck Institute (MPI) rightly point out, there is no reason and no justification to introduce an ancillary copyright for press publishers. In particular, there is no market failure in the relationship between search providers and publishers which would have to be counterbalanced by such an instrument.

In fact, the organisations that the law is intended to address–search technology providers–have a symbiotic relationship with the publishers, benefitting both parties through the provided services of search and aggregation. Should publishers wish it, this relationship can be brought to an end at any time through simple technical measures (robots.txt). By modifying this file, publishers can easily prevent their pages from being indexed, or if they would prefer to be indexed, can modify it to prevent snippets and/or thumbnails from being displayed with the search results. The robots.txt technology allows for very granular settings for every content provider, including press publishers.[4]

Publishers' associations frequently assert that search engines and aggregators exploit their property leading to a loss of readers. If this were true, they could and would make use of the means to prohibit such a damaging use of their copyrighted content. However, the opposite is true. Publishers use Search Engine Optimization (SEO) measures on a large scale in order to ensure their content is displayed in search engines and aggregators as often and as prominently as possible, in order to be

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[1] See the summary and evaluation oft he Commission under http://ec.europa.eu/information_society/newsroom/image/document/2016-41/synopsis_report_-_publishers_-de_17953.pdf.

[2] Http://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/MPI_Position_statement_15_6_2016_def.pdf.

[3] Https://europeancopyrightsocietydotorg.files.wordpress.com/2016/06/ecs-answer-to-ec-consultation-publishers-role-june16.pdf.

[4] See http://www.stefan-niggemeier.de/blog/13633/luegen-fuers-leistungsschutzrecht-1/.

found and clicked. Actually, publishers benefit to a great extent from search services which are offered to them free of charge.

Against this background, the Commission's approach in bringing in a new exclusive right for publishers must be rejected entirely.

II. Not a suitable means to promote media pluralism

The Commission's reasoning for Article 11 (see especially recital 31, as well as the explanatory memorandum, p. 2 of the proposal)[5] is that the creation of an ancillary copyright for press publishers would protect the business models of the publishers as well as quality journalism and media pluralism. This would, for instance, be due to an improved legal enforcement and new sources of revenue for press publishers.

As will be outlined below, the protagonists of the proposal–a small number of very large publishing houses backed up by the Commission–are in fact only interested in getting shares of revenue streams generated by search engines, aggregators and social networks. To say it loud and clear: they are looking to be paid by Google and Facebook. The intended means to establish such a claim is an exclusive right, namely in tiny snippets and thumbnail images that accompany the results displayed by search providers.

In any case, this goal will not be reached with an ancillary copyright. Instead, the approach leads to serious side effects and collateral damage–in particular to great legal uncertainty and the resulting negative consequences for communication, fundamental freedoms and innovation.

The obvious negative effects after the introduction of the ancillary copyright for press publishers in Germany and Spain is completely ignored by the impact assessment of the Commission. This wilful ignorance is justified by the argument that the effects of an EU regulation would be entirely different in previous iterations of the policy. Commissioner Oettinger, arguably the Commission's most vocal proponent of the ancillary copyright, assumed that the large American Internet companies would be able to oppose such a right due to their market power in individual Member States, but not at European level.[6]

However, there are no indications that would confirm this assumption. Large search providers, such as Yahoo or Deutsche Telekom, immediately stopped linking to the publishers who invoked the AC in Germany, or reduced the display of their contents to mere hyperlinks with no accompanying snippets.[7] Google has always emphasized that it would not obtain any rights for showing snippets or linking to digital content, nor pay any licensing fees. In the Spanish implementation of the AC, when the company was forced to do so, Google simply discontinued its Google News service within the country. Attempts to force the company to do otherwise will not work at the European level any more than it did in Spain. As the German Federal Antitrust Authority (Bundeskartellamt) has already made very clear, even a company in a dominant position cannot be forced with antitrust measures to

[5] Https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF.

[6] See e.g. here: http://www.zeit.de/digital/internet/2016-09/leistungsschutzrecht-eu-urheberrechtsreform-kommentar.

[7] See http://www.stefan-niggemeier.de/blog/19058/leistungsschutzrecht-wirkt-mehrere-suchmaschinen-zeigen-verlagsseiten-nicht-mehr-an/.

provide free-of-charge services to third-parties, if this would mean that–due to an AC–they would have to pay for the provision of said services themselves.

In other words, no search provider is obliged to list publisher's web pages in a way–with thumbnail and snippet–that would trigger a use according to the ancillary copyright for press publishers. As it currently stands, no search provider can be forced to expose itself to remuneration claims by publishers.

This fact is not altered by a European ancillary copyright for press publishers. Instead of new revenue streams, there will be years of legal disputes in various Member States. These will most probably end up in front of the European Court of Justice, which will have to clarify how long and how extensive snippets may be when displayed in search technologies without triggering the ancillary copyright. In other words, the Court would have to determine the scope of the AC. Until the conclusion of these disputes, Google–but not any other provider–will profit from gratuitous licenses, since the publishers cannot afford to stop being listed or only for that matter being listed by "naked hyperlinks", as was the case in Germany.[8]

If after years of disputes, it will finally be settled which types of use do not fall under the AC, Google and most probably all other search providers and aggregation services–including social networks such as Facebook–will adapt their preview content in such a way that it does not fall under the scope of the law. As such, license fees will only be paid by small providers, which: a) are dependent on the display of commercial publications, including previews, and b) are unable to afford longstanding legal disputes. It is more likely then that–as in Spain and Germany–many smaller information services will be discontinued or outsourced to non-European countries.[9]

In this scenario, too, no revenue would be generated. On the contrary, new business models and innovation would be prevented or pushed out of Europe. Regarding these foreseeable consequences, the question whether there will be any financial support for journalists themselves as foreseen in the German law, but not in the Commission's draft remains rather academic. In any case, nobody will draw any financial benefits from the AC.

III. AC at a European level will take on an excessive dimension

A European approach to the AC will not diminish the problems that arose in Germany and Spain, but will aggravate them. This is especially true in light of the fact that the Commission's proposal lacks any safeguards, which were, for instance, foreseen in Germany for the avoidance of immense collateral damage. Additionally, the scope of its application and protection, and the extent of protection and duration of the European AC as put forward by the Commission go far beyond the role models of the ancillary copyright for press publishers in both Germany and Spain.

[8] See the Axel-Springer-Experiment, http://leistungsschutzrecht.info/stimmen-zum-lsr/presseartikel/axel-springer-willigt-ein.

[9] In this respect see the sobering conclusion of the BITKOM: https://www.bitkom.org/Publikationen/2015/Positionspapiere/Leistungsschutzrecht-fuer-Presseverleger-eine-Bestandsaufnahme/BITKOM-Bestandsaufnahme-Leistungsschutzrecht-03-2015.pdf.

IV. Misguided intention

The draft text suggests the Commission's primary aim is to provide the press with a better legal position, in particular with regard to licensing and infringement. See recital 31: "Unless publishers are acknowledged as the right holders of press releases, the licensing and enforcement of their rights in the digital environment is often complex and inefficient." On the one hand, this argument is overstated, as elaborated see below, since this is by no means the main objective of the proposal. On the other hand, as has already become clear in the German debate, there is no need for an ancillary copyright for press publishers to facilitate enforcement. Instead, all it takes is a presumption for an entitlement to enforce rights against infringements on press publishers' contents. Such a rule can already be found in Article 5b of the Enforcement Directive 2004/48/EC.[10] Indeed Article 5b does not yet apply to press publishers but they could, by a simple amendment, be inserted as beneficiaries.[11] A concrete wording could read:

> *(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter* ***and press publishers with regard to their licensed works or other subject matter.***

Such an approach avoids nearly all the collateral effects of an ancillary copyright law for press publishers, and at the same time achieves the stated goal of more effective enforcement. The Commission is well advised to introduce this approach into the European legal policy discourse and evaluate it as an alternative solution.

V. Excessive subjective scope

Article 11 of the Commission's Directive on copyright in the Digital Single Market does not contain any restrictions regarding the online platforms that will be addressed by this new right. As such, private individuals and non-profit institutions also fall under its scope. To refer to the applicable copyright exceptions to counterbalance this–even in view of the proposed aim–such an excessive scope of application misses the point.

Typical online uses as hyperlinking or miscellaneous referencing to other sources, where small sections of the target publication are used, are generally not covered by any applicable copyright exceptions.

Pointing to–in other words linking to–another online-source is not "quoting" in terms of copyright law. Also, if a hyperlink and/or the accompanying text snippet contains copyright protected material, this material is made publicly available and the private copy exception and other rules do not apply. The limitations neither allow the users nor search engine nor social network providers to share protected material online. The fact that such activities are currently permissible is not due to copyright exceptions, but the restricted scope of copyright law. Small snippets or simple headlines do not pass

[10] Http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:EN:PDF.

[11] See for more details of this proposal: http://ancillarycopyright.eu/news/2016-11-23/how-solve-only-specific-problem-press-publishers-copyright-without-ancillary-copyright.

the originality test of copyright and are therefore public domain. If the new AC is implemented the way the Commission intends, it would eliminate this very important part of the public domain.

VI. Misguided goal

The AC in the draft proposal aims primarily at the commercial interest policy goal of forcing search engines, social media providers and aggregators to conclude licensing agreements with European press publishers and pay them royalties. This can, among other things, be seen from the fact that it does not contain a restriction on the scope of protection in form of a *de minimis* exemption–such as the exclusion of individual words and smallest parts as envisaged by § 87 f (1) German Copyright Act.[12] There is neither indication in the legal text or the explanatory memorandum, nor in the recitals that answers the essential question of when the AC shall be triggered. In other words it fails to explain how long a snippet must be to be considered protected and can only be used under a license.

Accordingly, if the draft was adopted the way it is currently proposed, the question of the threshold of protection would have to be determined by the courts, resulting in years of legal disputes. The impact of such lawsuits in Europe would be much greater than the accompanying legal battles in Germany, since they would initially be conducted in the Member States before being settled by European institutions.

The possible outcome of these can be seen in the “Metall auf Metall”-jurisprudence of the German Federal Court of Justice (BGH),[13] according to which even the smallest parts of a work protected by an ancillary copyright, or neighbouring right, can fall under the scope of the respective law.

VII. Hyperlinking will be affected

The attempt to define press publishers in recital 33 of the proposed directive does not resolve the problem described above. Although the last sentence reads as follows:

> *This protection does not extend to acts of hyperlinking which do not constitute communication to the public.*

As a matter of fact, this claim is based on circular reasoning. It states that "acts of hyperlinking" do not fall under the ancillary copyright for press publishers, if they do not constitute a communication to the public. In other words: hyperlinking is not prohibited, unless it is prohibited.

It is, however, known that according to the latest ECJ jurisprudence the mere displaying of a hyperlink can constitute a communication to the public, if an illegal source is linked.[14] More importantly, however, for the current AC proposal is that linking as it is currently practiced by search engines and aggregators–as well as by Internet users–includes the use of text snippets, and quite often thumbnails, too. Sometimes, as with Facebook, references in the form of hyperlinks are

[12] See https://www.gesetze-im-internet.de/englisch_urhg/.

[13] Urt. v. 13.12.2012, Az. I ZR 182/11.

[14] EuGH - G.S.-Media, Az. C-160/15 v. 8.9.23016: http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=696970.

generated automatically in this way. Even if one could ignore the circular reasoning, these activities will not be covered by the recital as currently written, and thus, not excluded.

The Commission clearly did not intend to exclude snippets from the scope of the protection offered in the its proposal as it would jeopardize the main goal: to shift revenues from Internet companies to European publishers. Search and aggregation services do not “pirate” entire sites or copy full articles but rather display nothing but hyperlinks by way of snippets. In order to achieve this illegitimate goal of shifting revenue favourably for publishers (see sec. I. above), even the smallest parts of these press publications must be protected by the AC.

The fact that such “enriched hyperlinks” have become the de facto standard–both for private users and for search and aggregation technologies–lies in the nature of the online reference. Bare hyperlinks, which do not contain a description or a preview of the linked source, are mostly meaningless as they do not allow any conclusions to be drawn about the relevance of the referenced target. Accordingly, they are almost never clicked on, which thwarts the purpose of the reference. To this extent, it is in the interests of the publishers above all that snippets and previews are displayed in search engines and aggregators, or for that matter in social media links, as the Axel Springer experiment from 2014 convincingly demonstrated.[15] That this kind of “use” reduces publishers’ revenues is a total myth.

VIII. Excessive objective scope

Protected subject matter under Article 11 of the DSM Directive are press publications. The term, as defined by Article 2 (4) and recital 33, is conceivably broad. Journalistic publications, which are published according to Article 2 (4) may also contain “other works and subject matter”. Websites, which incorporate to a large extent video and image contents, are also included. The same applies according to recital 33 for “daily newspapers or weekly or monthly magazines of general or special interest as well as news websites”. Thus, contrary to the leaked, preliminary draft,[16] it is no longer just a matter of news content, but of every piece of content, audio, visual, or text that follows certain journalistic principles–which will most likely be interpreted broadly.

The new ancillary copyright for press publishers would therefore, in principle, also cover food and erotic blogs, websites of car magazines (and the printed magazines themselves) and much more. The proposal does not contain any additional requirements on the part of the rightsholder, such as a possible restriction to the offerings of press publishers in the actual sense. According to Article 2 (4), even any "service provider" can be a rightsholder.

[15] See http://leistungsschutzrecht.info/stimmen-zum-lsr/presseartikel/axel-springer-willigt-ein.

[16] See http://ancillarycopyright.eu/news/2016-09-14/draft-copyright-directive-out-and-slap-face-internet.

IX. Excessive extent of protection

The scope of Article 11 of the DSM Directive also extends significantly beyond the German approach, as it does not only grant a right of making available/communication to the public, but also a right of reproduction. As such, it does not only affect online, but also offline uses. In addition, it is conceivable that this extension will not only cover the display of snippets in search results, but also the indexing or other storage activities that precede the linking in search technologies. For search providers, this would mean that they would have to stop linking to the rightsholders' contents altogether if they wanted to avoid infringement. Limiting search results to "naked" hyperlinks–without displaying previews–would no longer suffice. The result would be a general licensing obligation for search providers, even if it were to simply index publishers' websites.

X. Excessive term of protection and retroactive effect

The proposed protection period of 20 years for news publications is obviously excessive. However, even more serious is the regulation regarding the retroactive scope of the new ancillary copyright law in light of Article 18 (2). Accordingly, all press publications will be protected retroactively, irrespective of their date of publication. Even if, which remains unclear, one assumes that the retroactive effect applies "only" for such publications which would still be protected upon enactment of the directive–that is, if they had been published at maximum 20 years previously–millions and millions of publications, particularly Internet publications, would fall under its scope. The effect on press archives, link lists, social media, online archives or Wikipedia and similar information offers would be incalculable.

XI. No reference to the Reprobel-/Vogel Decision

The proposal in Article 12 will not be discussed here. At this point, it suffices to say that in order to correct the abovementioned jurisprudence–if this was considered necessary–there is no need for an ancillary copyright for press publishers.

C. About us

The Initiative against an Ancillary Copyright for Press Publishers ("Initiative gegen ein Leistungsschutzrecht" = IGEL) is a private initiative established by the German copyright lawyer Dr. Till Kreutzer. Currently, it unites over 140 supporters of various types including blogs, associations of journalists, publishers, internet companies, such as search engines and aggregators, NGOs and foundations. IGEL opposes the ancillary copyright for press publishers, because it obstructs innovation and limits freedom of information and communication. IGEL informs the public about the political processes concerning the ancillary copyright for press publishers–which often take place behind closed doors–and takes part in the political discourse as a civil society initiative campaigning against its adoption.