

The „Ancillary Right“ for Press Publishers: The Present German and Spanish legislation and the EU Proposal

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Abstract:

Germany and Spain have introduced a special right against the exploitation of press publishers` investment by (other) commercial services like Google News. The EU Commission, in September 2016, proposed a directive that includes legislation about an “ancillary right” for press publishers that would allow them to prohibit even noncommercial uses. This article discusses the reasons for this new layer of IP rights and its possible impacts on research and education.

Keywords: copyright, press publisher, related rights, EU directive

1. Introduction

Germany and Spain have introduced a special right against the exploitation of press publishers` investment by (other) commercial services like Google News. The EU Commission, in September 2016, proposed a directive that includes legislation about an “ancillary right” for press publishers that would allow them to prohibit even noncommercial uses.

What is an „ancillary copyright“ ? Ancillary rights are not an immanent part of copyright, trademark, design or other law. They are a complete “sui generis” layer of new exclusive rights, arranged in the context of copyright laws and directives. Apart of that, they relate to other subjects than the copyright holder. Ancillary rights, in some cases, arise in commercial contexts. Rightsholders are the subjects (often companies) that have “produced” the object of the ancillary right, e.g. a database or an audio recording. On EU-level, those rights are also called “related rights”. Among these are the protection of certain posthumous works, scientific editions, photographs, work performers. Privileged entities can be broadcasting organisations, producers of films, databases or audio recordings.

2. The Protection of publishers of newspapers and magazines (“Snippet Tax”)

The “Ancillary Right” for press publishers was first introduced in Germany 2013 after a discussion about the compensation of Google`s profits from it`s “Google News” –

Services, which some press publishers saw as an unrectified exploitation of their products¹. The German legislation was followed by a similar Spanish ancillary right included in Art.32 of the Intellectual Property Code (Ley de da Propiedad Intelectual²) and Art.11 of the EU Commission´s proposal for a directive on copyright in the Digital Single Market from 14/09/2016³.

a) **The German Ancillary Right**

Section 87f of the German Copyright Code (Urheberrechtsgesetz⁴), Titled “Publishers of newspapers and magazines” provides an “*exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless it consists of individual words or very short text excerpts*” to the “*producer of a press product*”. The press product is defined as “*the editorial and technical preparation of journalistic contributions in the context of a collection published periodically on any media under one title, which, following an assessment of the overall circumstances, can be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.*”

The term of the right is 1 year. Leaving the exclusive right unaffected, the making available to the public is permitted “*unless this is done by commercial operators of search engines or commercial operators of services which edit the content.*”

The exceptions of the Copyright Code for Works, e.g. citation, apply also to this ancillary right for press publishers. So, eventually, the ones affected by the “ancillary right” are commercial search engines and other commercial operators using news articles or parts of them.

One of the problematic terms in this context is “commercial”. The term is blurry and in cases of doubt one can understand company-supported research and public private partnerships as “commercial”.

The federal government, in its justification of the bill⁵, described “making available for commercial reasons” as “making available, that serves, directly or indirectly, the purpose of benefit or that takes place in professional context.”

Following the government´s reasoning, the ancillary right provides protection only from systematic access to the publisher 's product by search engines and similar

¹ Till Kreutzer, German copyright policy 2011: Introduction of a new neighbouring right for press publishers? 2011: <http://leistungsschutzrecht.info/stimmen-zum-lsr/fachpublikation/german-copyright-policy-2011-introduction-of-a-new-neighbouring-right-for-press-publishers>; David Carr, Publishers Abroad Take On Google, in NYT 2012: <http://www.nytimes.com/2012/11/05/business/media/google-news-faces-challenges-from-publishers-abroad.html?mcubz=1>

² Ley de Propiedad Intelectual: <https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930>

³ <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>

⁴ German Copyright Code (Urheberrechtsgesetz): https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0615

⁵ German Federal Government´s Reasoning (Gesetzentwurf der Bundesregierung): <http://dip21.bundestag.de/dip21/btd/17/114/1711470.pdf>

services on the net. With respect to the government's reasoning, these businesses, in particular, are focused on gaining revenue by providing access to the publisher's product. Therefore, other users, as there are bloggers, companies of other sectors, associations, law firms, private users or welfare focused measures should not be affected by the press publisher's ancillary right. Pure linking also is not subject to the ancillary right. For the understanding of "search engine", following the government's reasoning, these only cover services which search all internet pages as well as those which search through only parts of it, like news aggregators, as long as they technically operate as search engines. That means, that services where news publisher's content is selected intellectually, are not affected. Also, internal search engines (e.g. in a company network) are not affected.

One of the key issues is, that press publishers, as they are rightholders, can claim licenses or sue violators on their own account instead of depending on the authors of the articles used by the commercial search engines, including proving the chain of rights that allows them to ask for remuneration.

Considering the legislator's justification, also bloggers shall fall under the ancillary right and can claim remuneration, if their blogs consist of press-typical edited articles, that are published periodically under one title. On the other hand, a commercial blogger himself can be in duty of payment to press publishers, if he uses even small portions of their product.

b) The Spanish Ancillary right (Art.32, par2 L.P.I.)

In Spain, for the use of non-significant fragments, publishers can claim a "reasonable compensation" via collective societies from commercial search engines or news aggregators, legally defined as commercial services which facilitate search by individual words that are part of the contents of articles and show results that include hyperlinks to the original article. Other than the German "Leistungsschutzrecht", the right is "irrenunciabile" (unwaivable).

c) Proposed EU Directive⁶

In Art.11 of the proposal for an EU directive on copyright in the digital single market ("Protection of press publications concerning digital uses"), the ancillary right of the press publisher has an even broader scope of application than the Spanish and German legislation. With respect to the EU Commissions plans, the ancillary right will enable publishers even to prohibit private or pure educational uses. It shall have a protection term of 20 years, Art.11 Par.4.

To clarify the necessity of the "link tax", EU commission refers to the function of quality journalism as essential for the public debate and functioning of a

⁶ Proposal for a directive on copyright in the Digital Single Market Brussels (CDSM), 14.9.2016 , COM(2016) 593 final , 2016/0280(COD): <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN>

democratic society⁷ and the publisher's problems in licensing and recouping their investments in the digital environment. By introducing an EU – wide “related” right to copyright, the EU Commission wants to recognize and encourage the “organisational and financial contribution of publishers⁸. The definition of press publications is similar to the one of the German law: Recital 33 of the EU proposal expressively takes scientific publications out of the scope of the ancillary right. While the German and Spanish “link tax” statutes only can be claimed against commercial search engines and certain other commercial providers, the EU commission seems to plan a more comprehensive right for the press publishers: Their related right shall have the same scope as copyright, as far as digital use is concerned⁹. That means, that also noncommercial websites that collect information which might affect the press publisher's product can infringe their right.

But how probable is it, that this proposal will be adopted by the EU Parliament and the Council ? While the information from the council is scarce, the publicly available draft report¹⁰ of the leading committee of the EU Parliament proposes an amendment to Art.11: The Rapporteur, to protect the press publisher's interests, instead of a new ancillary right, aims for a provision of a right of the press publishers to claim author's rights in their own name:... “a presumption of representation of authors of literary works contained in those publications and the legal capacity to sue in their own name when defending the rights of such authors for the digital use of their press publications.” The rapporteur justifies this proposed amendment with the interest of other industries, that should not be disrupted.

Other Committees of the EU Parliament support the proposed ancillary right or even go further¹¹, but the votes of the leading legal affairs committee will have a huge weight for the votes of the plenary, which is expected by the end of 2017 or beginning of 2018. In the ongoing legislative process, the Council's position

⁷ CDSM Recital 31

⁸ CDSM Recital 32

⁹ CDSM Recital 34

¹⁰ „Comodini-Report“ for the committee on Legal Affairs (DRAFT REPORT : PE601.094v01-00) ; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-601.094%2b01%2bDOC%2bPDF%2bV0%2f%2fEN> ; however, there is some chance that the largest group in the EP (EPP) will vote in favour of the ancillary right: <http://leistungsschutzrecht.info/news/2017-07-09/parliaments-largest-group-to-fully-endorse-commissions-proposal-for-a-link-tax>)

¹¹Opinion ITRE (Committee on Industry, Research and Energy: PE592.363v03-00): Extended to academic journals (Recital 33) and offline publications, with the exception of noncommercial uses (Recital 33a) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-592.363%2b03%2bDOC%2bPDF%2bV0%2f%2fEN> ; Opinion IMCO (Committee on the Internal Market and Consumer Protection: PE599.682v02-00): Extended to print publications, Recital 32 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.682%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>

(consisting of the member states's governments) is essential. If the council does not agree with parliament's decision, the legislative organs have to negotiate about the language of Art.11.

3. (Expected) effects of the ancillary copyright for press publishers

The expressed objective, to help press publishers to license and claim compensation for their investments in the digital environment¹², in Germany has not been achieved. Some press publishers, who have claimed compensation from Google for the use of snippets of articles in "Google News", have been reduced in their visibility by Google. As some publishers felt that this was even less in their interest, they allowed Google the use and resigned from compensation. In May 2017, the Berlin District Court¹³ transferred the question about a missing notification of the "Leistungsschutzrecht" - statute to the EU Commission and therefore possible nullity to the CJEU. Background was a lawsuit of German Press publisher's against Google for compensation. A different lawsuit, this time based on competition rules, had been filed by publishers. The district court ruled, that Google is not misusing its market power by reducing publishers visibility in Google news who do not grant a gratis license¹⁴. The competent collective society, VG media, had published a tariff of altogether 11 % of the search engine's revenue¹⁵, which was not accepted by Google. Thus, VG Media argues, that publishers who claim remuneration from Google get discriminated on the market because of the illegal misuse of Google's power¹⁶.

While several major news outlets publicly refrained from exercising their right and explicitly allowed online aggregators to index their content, a second group of publishers gathered in the VG Media collecting society, which is trying to enforce the right for their members. In an interesting move, Axel Springer, one of Germany's biggest publishers and the most vocal supporter of the "Leistungsschutzrecht" at first insisted on enforcing the right, but ultimately granted a gratis license to Google only with its 95% market share, but not to its smaller competitors¹⁷. Accordingly, the ancillary right has produced the inadvertent result of punishing smaller services. In Spain, Google News was shut down entirely¹⁸.

¹² CDSM Recital 31

¹³ VG Media, Press Release 2017: <https://www.vg-media.de/de/presse/2017/421-lg-berlin-haelt-klage-der-presseverleger-gegen-google-teilweise-fuer-begrundet.html>

¹⁴ Reports of News Publishers, 2016: <http://www.lsr-aktuell.de/newsroom/lg-berlin-verleger-gehen-gegen-urteil-berufung> ; <http://www.lsr-aktuell.de/verfahren/die-juristische-durchsetzung-des-presse-lsr>

¹⁵ <http://www.lsr-aktuell.de/presse-lsr/gute-leistung-faire-verg%C3%BCtung>

¹⁶ Report of News Publishers, 2015: <http://www.lsr-aktuell.de/verfahren/die-juristische-durchsetzung-des-presse-lsr>

¹⁷ CCIA, White Paper: Understanding "Ancillary Copyright" in the Global Intellectual Property Environment: <http://www.cciainet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf>, p.3

¹⁸ Tom Hirche, New tariff will kill Spanish aggregators: <http://ancillarycopyright.eu/news/2017-02-09/new-tariff-will-kill-spanish-aggregators>

4. Critical views on the “Ancillary Copyright”

Julia Reda, Member of EU Parliament, summarizes some of the troubles about the ancillary right proposed by the EU Commission¹⁹:

- information snippets added to hyperlinks are useful for readers; thus, to obstruct the use of these snippets, is an attack on linking itself.
- the ancillary right would restrict also individual persons in their freedom of expression (e.g. bloggers) and access to information, as it would even protect factual headlines.
- fake news could be boosted, because reputable news content would be shared less than propaganda on social networks
- News-related startups will get discouraged from the beginning, if they have to pay even for the smallest portion of text to link to news articles.
- an indispensable “link tax” could lead to a shutdown of online news services and, thus, affect small publishers who are dependant of the links from those services.

5. Alternatives to the “ancillary right” ?

Even as I have to admit that I am not an expert in commercial law: The commercial exploitation of other company’s investments seems to fit more in the field of competition law. Nonetheless, if for some reason the problem should be tackled with in copyright provisions, a better solution has been proposed in the Comodini report for the EU Parliament’s Legal Committee: Enable news publishers to enforce the authors` rights in their own name. Legal presumptions which entitle certain institutions to claim rights for others are usual, for example with respect to collective societies. This presumption could be included in the directive on the enforcement of intellectual property rights²⁰. Thus, the installation of a new layer of IP law with all its uncertainties and secondary effects would be completely unnecessary.

¹⁹ Julia Reda, Extra copyright for news sites: <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites/>

²⁰ DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of intellectual property rights: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0048R\(01\)&from=en](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0048R(01)&from=en)

²¹Till Kreutzer, Legal Affairs committee also demands to abolish ancillary copyright, 2017: <http://ancillarycopyright.eu/news/2017-03-08/legal-affairs-committee-also-demands-abolish-ancillary-copyright>