

Ancillary Copyright for press publishers

Background and key issues

Dr. Till Kreutzer, IGEL –
Initiative against an Ancillary
Copyright

IGEL
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LEISTUNGSSCHUTZRECHT

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IGEL - Initiative gegen
Leistungsschutzrecht
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„Pressenverleger“ dar.

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Das Leistungsschutzrecht für Presseverleger wurde am 1.3.2013 im Deutschen
Bundestag beschlossen. Das Gesetz wurde am 14.5.2013 im Bundesgesetzblatt ...

FAQ zum Leistungsschutzrecht für Presseverleger (für ...
rechtsanwalt-schwenke.de/faq-zum-presse-leistungsschutzrecht/ ▶
11.03.2013 - Das Leistungsschutzrecht für Presseverleger (ich nenne es nachfolgend
kurz "Leistungsschutzrecht") ist ein handwerklich schlechtes und ...

BDZV: Leistungsschutzrecht

www.bdzv.de/medienpolitik/leistungsschutzrecht-fakten/ ▶
Diese Rechtliche soll das Leistungsschutzrecht für Presseverleger schließen.
Informationen zum Leistungsschutzrecht finden Sie in den Fragen und Antworten ...

Leistungsschutzrecht: Presseverleger haben zu hoch ...
www.zeit.de | Start | Digital
24.09.2015 - Leistungsschutzrecht: Presseverleger haben zu hoch gesteuert. Das
Patentamt hat entschieden: Google und andere Suchmaschinen müssen ...

Leistungsschutzrecht für Presseverleger - Deutscher ...
https://www.bundestag.de/presse/2015_09-16/2015_09-16/2015_09-16 ▶
04.03.2013 - Berlin (Nichtakt.) Das in der vergangenen Legislaturperiode in das
Urheberrecht eingefügte Leistungsschutzrecht für Presseverleger ...

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save the  link



Overview

In 2009, under the pretext that they needed their own exclusive copyright to be adequately protected against piracy, German press publishers turned to politics for help. In fact, the ‘ancillary copyright’ these publishers were asking for was about realizing something which publishers had not managed to achieve in the 25 years since the origin of the World Wide Web: a business model for online newspapers and magazines.

Of course, a law cannot create a business model, but it can – as is the general idea – generate revenue through an ingenious construction. Ancillary Copyright for press publishers (hereafter AC) should, as the publishers believed, ensure that press publishers are paid for being linked to and listed in search engines and news aggregators. In other words, the law should provide them with a secure source of income by prohibiting activities, which had previously been legal and free of

charge all over the world, or alternatively it should only allow them alongside the payment of a new fee.

The ulterior motive is easy to spot: the German press publishers, especially large entities like Axel Springer and Burda, wanted a share in Google's revenue, and that of other large Internet companies, such as Deutsche Telekom or United Internet. Now, who would not want that kind of income?

What is surprising is not that publishers would like to have such a source of income, but rather that the German legislator actually implemented it. Despite the fact that during the debate on AC nearly every independent observer, expert, and a wide range of different organizations were against its introduction, it entered into force in 2013.

Following this, what happened was exactly what the critics had predicted: huge expense – no recompense. The introduction of AC only boosted lawyers' fees and litigation costs, however, on the balance that no money can possibly be made for websites with AC. In particular, search engines will not pay to link to publishers' websites in the foreseeable future, as search and aggregation is a free service that provides millions of readers with access to publishers' content.

Only lawyers rejoice about the numerous disputes that have been initiated, and which will take years to resolve. The search industry, by contrast, is highly confused. New developments in this area will certainly not come from Germany any time soon as the legal uncertainty stifles innovation.

Now, everyone would think that facing these catastrophic consequences, AC would be abolished as soon as possible, but exactly the opposite is the case. In fact, the powerful publishers' associations have taken their request to Brussels. There, they should have been received with a "thumbs down" and rejected with the words: "We know from the experience gained in Germany and Spain (where there has also been an unsuccessful attempt to introduce AC) that AC does not work, but only causes harm."

Despite the fact that during the debate on ancillary copyright nearly every independent observer, expert, and a wide range of different organizations were against its introduction, it entered into force in 2013.

However, nothing of the sort happened. Instead, we increasingly hear arguments from the responsible EU Commissioner, Günther Oettinger, that match those of the publishing lobby. Apparently he considers AC, for the time being, a promising approach and announced the Commission's intent to examine possible implementation strategies.

Anyone, who takes an interest in innovative online journalism, the (European) Internet economy or technical innovations as such, should stand up against these proposals.

The same applies to those, who simply do not want to accept that press publishers can exert undue influence on legislators and make them implement obviously detrimental legislation.

One possible method would be to join us, the Initiative against an Ancillary Copyright (IGEL) or the Save the Link network at savethelink.org/join.

This brochure is designed to explain the complex topic "Ancillary Copyright for press publishers," where the devil lies in the details. After giving some background information, we provide a question and answer list, in which we clarify the myths surrounding AC.



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1

Background

Since 2009 politicians have discussed whether to introduce an “ancillary copyright for press publishers” (AC). The idea came from a small group of major German press publishers, most notably Axel Springer and Burda Verlag

After the German legislator gave in to the massive lobbying of the large publishers and their associations in 2013 and introduced an AC into the German Copyright Act (UrhG), the powerful publishers’ associations are now trying to achieve the same at the European level. Among their arguments is the point that AC is necessary to preserve “quality journalism” in the digital world.

In particular, they argue that AC is necessary for both journalists and press publishers to protect the traditional press publishing industry against “competitors” from the online sector. The latter predominantly include search engines and news aggregators, social networks and other valued-added information services.

The great German press publishers want a law by which they can claim parts of Google’s revenue.

These arguments are based on specious grounds and merely serve to mislead the public. Indeed, neither the public interest in “quality journalism,” nor the interests of (all) press publishers or journalists are at stake. Rather, it is about enforcing a law that seeks to reallocate the revenue of online platforms to the publishing industry.

To put it bluntly, one could say: The great German press publishers want a law by which they can claim parts of Google’s revenue. To enforce this economically unjustifiable demand by any means seems to justify the ends. The journalistic influence of major newspapers and magazines

was also exploited; if there had been any news on the “causa AC” (the debate around ancillary copyright) at all, it had almost exclusively been presented as pro-AC. Critics were, almost without exception, excluded from the public discourse, despite the fact that over time an unprecedented broad opposition from business, academia and civil society formed against AC.

Difficulties of press publishers in the online environment

It goes without saying that journalism faces fundamental changes in the digital world. These especially concern the publishing industry. Sales of newspapers and magazines continuously decrease and with them the amount of advertising revenue that can be achieved by such publications. It is obvious that the future of journalism lies in the Internet. However, whether and how the losses of revenue in the print sector can be compensated by online press products, is still unclear – even 25 years after the emergence of the World Wide Web.

To finance high quality online press products, and make a profit with them, is still difficult. Sources of income, apart from the conventional online advertising, have been tested for several years; standardized models with guaranteed success however, have not been found so far. This was predictable. Over twenty years readers got used to the fact that online newspapers and magazines were available for free. To reverse this practice, and convince customers after such a long time that access to journalistic content costs money, is inherently difficult and requires time.

New players

The power over opinions, debates and information has shifted fundamentally in the digital world. The Internet has democratized knowledge, information and communication –instead of having to rely on a few sources, people can

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access information from an unlimited number of publications and services. New players challenge the traditional media formats, press and radio, in their power over information and opinions. This includes primarily social networks, blogs, search engines, news aggregators, video platforms or short message services. The focus of these offerings is not on disseminating their own information, but rather in referring to other sources and opening the possibility of sharing popular content. However, they do have a significant influence on the selection and prioritization of messages and information, and thus on the shaping of public opinion. This so-called gatekeeper function was formerly largely reserved to mass media, which were in the hands of publishers and broadcasters.

The idea of the publishers: cross-financing by other actors or simply “legally Paid Content”

In light of these fundamental changes in the “media landscape” and in journalism itself, it may be understandable why the demand for an “Ancillary Copyright for press publishers” (AC) emerged in the political debate about six years ago. It started in Germany in the preliminary stages of the new legislative period in 2009. Without any public debate and to the surprise of everyone, the respective passage appeared in the coalition contract of the newly elected yellow-black government coalition. It stated:

“Publishers should not be treated worse than any other producers of works in the online environment. We therefore strive to create an ancillary copyright for press publishers to improve the protection of press products on the Internet.”

At first, it was rather unclear what the stakeholders, led by Axel Springer Verlag and the newspaper and magazine associations BDZV and VDZ, were aiming at.

A first “draft bill” brought light into the darkness. It had been negotiated informally by the publishers and journalists’ associations, but had then been leaked on the Internet. Apparently the press publishers aimed to have their online press products cross-subsidized by search engine providers and the German economy. This would be realized by two types of levies: on the one hand, search engines and

news aggregators would have to pay for linking to publishers' products. On the other hand, any "commercial user" would have to pay if they gathered information and read texts for professional purposes, on these free and openly accessible publishing websites.

Clearly, the true intent was to compensate press publishers for their lack of ideas for new business models and new approaches, by introducing a law imposing compulsory payments – in line with the maxim: "We do not dare to charge for our online content after all these years, but we do not have any ideas for other business models either. Just create a statute that obliges readers to pay by law." The publisher Hubert Burda, one of the main actors in the demand for AC, made this clear by stating that AC was a model to "to introduce a Paid Content by law."

The introduction of an Ancillary Copyright for press publishers – ultimately a "Google tax?"

The proposal on charging for allowing commercial users to read news sites (unsurprisingly) did not make it into the law. The questionable compulsory levy for search engines and news aggregators on the other hand did make it in, although a broad range of independent experts and stakeholders opposed it.

Under the new paragraph 87g-87h of the German Copyright Law, search engine providers, and service providers that make information retrievable by linking to it, shall obtain licenses and, if need be, pay fees for the "snippets" and "thumbnails" shown in the search results.

AC does not apply to other users. For instance, it may not be invoked against pirated copies of articles that are made available on illegal websites. AC does thus not protect against the much-implored "piracy" on the Internet, but is a mechanism that paves the way for cross-subsidizing of press publishing websites by Internet companies. The focus is, of course, predominantly on Google, which has by far the strongest financial and market power in the search sector.

The consequences of an Ancillary Copyright: legal uncertainty and collateral damage

The consequences of this decision of the legislator have overall been negative ones. To date, no profits have been made with AC and none can be expected. Instead, there is extensive litigation between publishers and a number of search providers, which will take years to complete. The legal uncertainty about the

question of what AC is, who will be affected by it, and what the consequences are, is huge.

Only Google has so far succeeded in obtaining a free license for displaying snippets and previews. For the other search providers, it is completely unforeseeable, what financial consequences, AC will have.

By granting a free license the publishers admitted that it is much more rewarding and important to have their content indexed by Google, than to insist on payments from AC. Many other publishers had realized that from the beginning and never exercised their rights under AC. Google, in turn, made it clear that it was not going to pay for snippets or thumbnails. That the company cannot be forced to, was later explicitly determined by the German Competition Authority and the Regional Court (Landesgericht) in Berlin. Due to their privileged treatment in terms of licensing, the market power of the US company is strengthened and the position of smaller companies and new entrants made considerably more difficult.

Despite this unexceptionally negative experience, the German example is already setting precedents. For instance, in Spain a form of AC was introduced in 2014. The local rules provide that news aggregators have to pay levies for linking to press products. Unlike in Germany, the obligation to pay is mandatory, i.e. publishers cannot renounce it. Nor is it possible for aggregators to avoid the compulsory fee by no longer showing snippets.

The consequences were severe: In Spain, Google took down its news aggregator (Google News) from the net without further notice. As a consequence, traffic to news sites collapsed by an average of 6%. Thereupon the publishers association AEDE (which had singled-handedly lobbied for the introduction of AC) turned to the Spanish government and to the EU for help. Google should be forced to re-activate the service, they argued. This, of course, did not happen. How should governments force a company to reactivate a service that had become unprofitable due to innovation-averse new legislation, which they themselves had enforced by powerful lobbying?

To date, no profits have been made with AC and none can be expected.

All in all, the history of AC is a disaster. Many independent experts had seen it coming,

and worse, it is not foreseeable that this negative interim balance can be turned around.

On the contrary: the EU Commissioner for the Digital Economy, Günther Oettinger, has been thinking about introducing an AC at European level. Thus the catastrophic consequences would be extended to the European Union as a whole.

2

Questions and answers on Ancillary Copyright for press publishers

In the debate about AC a variety of arguments were exchanged, assertions made and alleged truths proclaimed.

Below, the main aspects of AC will be briefly explained. On the one hand, this shall shed some light on this complex issue, and on the other, serve to dispel a number of common myths about AC.

1

What is an ancillary copyright?

An ancillary right is a kind of copyright, which falls into the category of “related or neighbouring rights.” Unlike copyright, it does not protect innovative creations, but usually services and investments, which lie in the procurement or production of such arrangements by companies.

Film and music producers and broadcasters all have ancillary copyrights. These rights primarily serve investment protection purposes. Akin to copyright, ancillary copyrights provide exclusive rights to the right holder. Anyone wanting to use a protected product needs to obtain a permission, or a license, to do so. This is usually only granted in return for payment, in the form of licensing fees. Anyone who does not obtain permission to use these rights, risks being sued for damages and injunctive relief, or may even be prosecuted.

What is an Ancillary Copyright for press publishers?

What exactly ancillary copyright for press publishers protects is still unclear.

All former ancillary copyrights refer to a clearly defined subject matter. This is crucial, because otherwise it is not clear which “performance” is covered by the right, nor who will have to clear rights with the copyright owner, and for what specifically.

Unlike recordings, film productions or databases, it is completely unclear to what kind of “performance” Ancillary Copyright for press publishers relates to. Of course, publishers, like any other website operators, provide services. They publish articles and pictures, select messages and other contributions, proofread, organize and prioritize this content, they program websites and upload content. However, all these services are not part of AC.

These snippets of text, however, only fall under AC, once they have reached an *uncertain* length.

According to the German wording of the law, press publishers have exclusive rights over their “press products.” However, what is meant by that is not defined. AC does not protect the articles and pictures on the publishers’ websites, as these are already covered by copyright law. Nor does it refer to the compilation of content on a web page, as this could be covered by database rights. Nor does AC apply to the source code of the website, which could be protected by copyright law as a computer program.

Even after a thorough analysis of the law, the question of what AC protects cannot be answered precisely. What AC is, can only be assessed from a different perspective, namely by asking which acts of utilization are covered. Although many questions concerning this matter remain open, there is at least a general answer: only operators of search engines and online aggregators (which distinguishes Ancillary Copyright for press publishers from all other ancillary copyrights) can violate the German AC. They now have to clear rights and pay royalties, if they choose to show short extracts of texts as part of a link.

These snippets of text, however, only fall under AC, once they have reached an *uncertain* length. If it just uses “single words or smallest text snippets” to briefly

describe the linked content, AC does not apply and rights do not have to be cleared or payments to be made. In addition, it is still entirely unresolved as to whether the displaying of thumbnails falls under AC.

3

Which countries have introduced an AC?

The German AC was the first law of its kind worldwide. After Germany, Spain is the only other country to introduce a similar law.

4

Why do press publishers want an AC?

We can only speculate about the reasons press publishers have advocated for ancillary copyright. At first it seems as though the publishers were mainly motivated by money (especially acquiring money from Google). The stubborn clinging to the idea of an ancillary copyright by some powerful press publishers, however, indicates that it is also about something else: i.e. about power or rather a demonstration of their own power, most notably by Axel Springer.

However, there can be no question of the “press publishers” supporting AC as a collective. In fact, very few major publishers, and the organizations that own them, actively promote AC. On the contrary, many German publishers reject AC and did not take it up when given the opportunity. These include such important houses as “Die Zeit”, “Süddeutsche Zeitung”, “FAZ” or “Der Spiegel”. Also, Spanish, Polish, French and Italian associations of independent publishers have contacted the European Commission and spoken out against a European AC and national initiatives in this direction.

In fact, very few major publishers, and the organizations that own them, actively promote AC. On the contrary, many German publishers reject AC and did not take it up when given the opportunity.

Does AC serve to preserve or to promote “quality journalism”, press or media diversity in the Internet. is it even necessary?

No. An AC creates no market and also no new demand, nor does it turn an unsuccessful business model into a successful one. Ironically, it is precisely those publishers who demand AC most vehemently (especially the Axel Springer Verlag) which have changed their business model some time ago, and are now very successful with their new digital strategies. Furthermore, to date ACs, both in Germany and Spain, have only incurred costs.

This development shows that the future of online journalism lies in new products and marketing methods. Their success does not depend on the existence of an AC, nor is it promoted by an AC. It also does not help to protect journalists from infringement on the Internet. As previously stated, this protection is already fully ensured by traditional copyright law.

Furthermore, AC does not protect - unlike other related/neighborhood rights - against acts affecting the interests of the publishers. It does not protect against “piracy” nor against “pirates”, but only against uses by search technologies. These uses, however, serve the interests of the publishers and were hitherto taken for granted and completely legal. Against this background the approach seems to be to declare hitherto legal actions of search engines and aggregators to be illegal, in order to be able to proceed against this “piracy”.

AC does not stimulate innovation, in fact it stifles it. It is based on protectionist considerations that have been developed for business and utilization models in “analogue” times.

What is remarkable is that the smaller publishers were hit particularly hard: their traffic rates decreased by an average of 14%.

It attempts to consolidate traditional, increasingly less successful, business models. That this is what is intended, illustrates the statement made by Hubert Burda quoted above. As a statutory “quasi-subsidy” for conventional publishing strategies, AC counteracts innovation in the journalistic sector, instead of promoting it. It is true that the journalistic success of press products is defined by their range of distribution, coverage and publicity. In the digital world, coverage specifically means

how often a post is shared, liked and clicked on. AC counteracts that success by interfering with distribution methods.

Not only has, so far, no publisher or journalist profited from AC in Germany or Spain, it has even been demonstrated that, especially the Spanish approach has led to significant losses of coverage and traffic. After the introduction of the new AC compulsory fee or “Google Tax”, Google News was taken off the net and traffic to news sources fell by an average of 6%. What is remarkable is that the smaller publishers were hit particularly hard: their traffic rates decreased by an average of 14%. This shows that AC harms media plurality and puts smaller publishers and less well-known publications at a particular disadvantage.

6

Do press publishers have a right to be put on par with other holders of related/neighbouring rights?

No. Firstly, there is no general entitlement to be granted an ancillary copyright. Whether, and under what circumstances, it is granted is in the discretion of the legislator. Furthermore, the publishers are not interested in being put on par with other holders of related/neighbouring rights, they want to obtain a right that goes much further.

Many companies provide “services” by disseminating cultural content for which they do not obtain an ancillary copyright. These are in the online sector, for example; the search engines, news aggregators or other value-added service providers, as well as online stores (like iTunes) and streaming services. Although they invest heavily in infrastructure and the procurement of works and content, and these investments significantly contribute to the commercialization of intellectual creations, they are not entitled to an ancillary copyright.

Secondly, the ancillary copyrights of other producers are not comparable with AC. Unlike press publishers, the phonogram, film or database companies provide services which are derived from the underlying or “procured” works (which are already protected by copyright) and can easily be distinguished from them. The record companies have rights over the sound recordings. Sound recordings are different from the singing, music or composition, on which the recording is based. The same applies to the production of a film in relation to the performance of the actors or the director.

In short, all other holders of ancillary copyrights create something that is not identical to the underlying content or its sum, but something that can be

viewed and protected on its own. Their performance results in an independently protected subject matter. The copyrights to the works contained therein are not affected by these ancillary copyrights. Hence, there is no difficulty in drawing a line between the one and the other, nor are there any overlaps with traditional copyright law.

With the press products of publishers it is different. A text is a text. The fact that it is placed on a web page, does not create anything new that would have to be covered by a new law, in addition to the existing copyright law in the respective text.

Only the preparation of the texts by the publishers, could (like a soundtrack) be distinguished from the individual performance of the author and be subject to an own intellectual property right. However, such “layout protection” or protection against the use of the edited work is not what the publishers want. Rather, they demand a right that extends to the individual content by imparting protection against the take-over of copyrighted texts, images and other works which newspaper and publishing sites are made up of. But if that was not enough: the protection extends to small parts of this content, such as single sentences from their texts. Such ancillary copyright inevitably overlaps with traditional copyright in these components. It thus goes far beyond what other holders of related/ neighbouring rights are entitled to.

No such thing exists so far. The rights of phonogram producers do not extend to the composition or the performances of the artists, nor does the database right cover the content and data contained in the database.

An intellectual property right, as demanded by the publishers, is therefore not comparable with the existing ancillary copyrights. As such, these rights cannot be used to justify the demands of the press publishers.

7

Do the interests of press publishers have to be protected by an AC against piracy in the digital world; is there a protection gap for (online) press products?

No. All components of online press products are already substantially protected by copyright. Only the smallest extracts of texts - such as those required for the snippets displayed in search engines – are, consciously and deliberately,

not protected by copyright law. They do not reach the required threshold of creativity (Schöpfungshöhe).

Journalists grant press publishers comprehensive rights to their works, be it by author or employment contracts, general conditions, e.g. author and publication conditions or collective agreements, etc. They thus have far-reaching rights over the contents of their websites and print-products and can proceed freely against their illegal use.

In fact, for the publishers it is not about closing a protection gap, but rather about obtaining a protection that goes far beyond the previously existing rights. This applies particularly to short excerpts from texts (snippets) as well as headlines or single sentences, as displayed in the search engines. The fact that these are not protected is no accidental “protection gap” but a conscious decision that is based on a balancing of fundamental rights. The means of expression (in this case: the language) need to remain free. The (copyright) law therefore protects expressions only above a certain level of creative quality (texts of a certain length and complexity).

In fact, for the publishers it is not about closing a protection gap, but rather about obtaining a protection that goes far beyond the previously existing rights.

8

Do press publishers require AC to pursue legal claims more effectively?

No. To facilitate the pursuit of legal claims, only the procedural rules, regarding the capacity to bring proceedings (locus standi) need to be simplified. To counter this alleged problem by using AC would be like using “a sledgehammer to crack a nut”.

The publishing lobby claims that AC was necessary to facilitate the pursuit of legal claims. Since they had so many different contractors (journalists), the rights management and thus the enforcement of rights in front of the courts was very difficult. Allegedly the contracts management was so hard, that there were enormous difficulties in proving in front of a court that they possessed all necessary rights to be able to bring a claim.

It remains to be seen whether this statement is true. In any case, ancillary copyrights are not required to solve this problem, but a simplification of legal rules

regarding the capacity of publishers to start proceedings (locus standi) would do the job. In addition, the focus of AC on search engines and news aggregators (not on “pirates”) indicates that the argument of facilitated litigation is only a sham one. Because, as previously said, AC is not about combating piracy, but about obtaining money from search providers.

9

Do press publishers have to be protected from search engines and aggregators?

No. Publishers benefit rather significantly from search engines.

AC could only be justified, if a protection against the hereby affected parties, i.e. search engines and aggregators, was required.

Ancillary copyrights interfere with various fundamental rights (for instance, in this case with the entrepreneurial freedom of search providers to conduct a business). There

has to be a practical necessity to be able to justify introducing them.

Ancillary copyrights are generally used to compensate for cases of market failure. In the present arrangement, however, there are no circumstances that would require such an ancillary copyright.

Providers of search services do not exploit the services of publishers and do not compete against them. The truth is that search technology

services and publishers complement and depend on each other. Search engine providers

and aggregators benefit from being able to refer to content and from generating advertising revenues in this context. Publishers benefit from this symbiosis too, as search engines and aggregators provide them with millions of readers. Readers mean clicks, clicks mean coverage and advertising revenue.

During a study, websites, such as Welt.de or Sportbild.de, were shown... without snippets and thumbnails. Springer reported that the traffic from these search services collapsed by 40% (search) or 80% (news).

The proof that search engines and aggregators are very important for press publishers, is shown in the fact that all publishers deliberately choose to be listed therein. Publishers who do not want to be found through search technologies can easily avoid it.

There is a simple technical function (robots.txt) that needs to be configured, and after that is complete, no more linking can take place. Of course, no publisher does that. On the contrary, large publishers employ massive amounts of search engine optimization (SEO) in order to be found, particularly on search engines and aggregators. There are good reasons for this:

If they are not found, or the search results are only displayed in an abbreviated form (e.g. by reducing the snippets or removing thumbnails), the traffic numbers collapse, and with it the advertising revenue. As such, there can be no question of market failure stemming from the use of search engines.

This was confirmed by an experiment conducted by the German publisher Springer. During the study the search results of known websites, such as Welt.de or Sportbild.de, were shown only in an abbreviated form in Google search and Google News, i.e. without snippets and thumbnails. Springer reported afterwards that the traffic emanating from these search services had collapsed by 40% (search) or 80% (news). For each website – if the experiment had carried on – the yearly loss would have amounted to seven figures.

Even without AC, there are no grounds for concern that search providers compete against publishers. This could happen, for example, if the usual snippets were extended to replace the reading and use of the full text to which they linked. However, there is no reason to believe that search providers are planning any such thing, nor would such an extension of the preview texts - even without AC – be allowed under current copyright law.

The European Court of Justice (ECJ) stated in the “Infopaq decision” that text excerpts of eleven words can enjoy copyright protection.

10

Is protection against search providers otherwise justified?

No. Publishers benefit to a great extent from search providers. They provide a free and valuable service to them.

It is in the nature of things that, in the market, companies benefit from each other. Even if that is (which is not the case here) to the disadvantage of one side, it is not undesirable, and certainly not forbidden in a social/free market

economy. The argument for an ancillary copyright for press publishers could be turned around easily with equally good (or bad) reasons by requesting that search providers be granted an intellectual property right against press publishers. While this request is obviously preposterous, it is no more preposterous than an ancillary copyright that grants publishers claims against search engine providers.

11

What are the arguments against AC from the perspective of Internet users?

By harming media pluralism and journalism, AC harms social interests on the whole. Furthermore, use of the Internet is compromised.

If important content can no longer be found through search engines and aggregators, or are only linked to in a way that gives no orientation on the relevance of the linked information, gathering information over the web will become inefficient, and much more difficult. This is especially likely if, due to AC, major search engines disappear entirely, as happened in Spain with Google News.

In its decision in the antitrust proceedings between the German press publishers VG Media and Google, the German Competition Authority (Bundeskartellamt) determined quite rightly:

“There is also a public interest in the search engine business model. Given the billions of existing web pages, it is of great importance that users have a way of finding individual pages, as it enables them to access the information available and use the greatest knowledge potential in history: the Internet. According to the understanding of the Decision Division, up until now there is no better methodology for the distribution of this knowledge potential than a search engine. If the concept of universal linkability - which would necessarily include the ability to describe the links, even in an automated way - was prejudiced because search engine providers

Verlage, die nicht wollen, dass über Suchtechnologien auf sie verwiesen wird, können dies ohne Weiteres vermeiden.

would have to enter into business negotiations with certain website operators, or their representatives, the users would also be the ones to suffer.”

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Do journalists benefit from AC?

No. On the contrary. AC does not apply to authors (journalists), but to publishers. Journalists will not receive any revenues, but are burdened and disadvantaged by AC, in comparison to their colleagues in countries without this regulation.

Although the German Law provides that journalists should have a share in the revenue from AC, they will not benefit. Firstly, there are no revenues expected that could be shared. Secondly, especially for freelance journalists, publicity is crucial for success. If there are no longer links to their articles on publishers’ websites or only links that do not invite people to click through and read, they lose publicity.

In addition, journalists are also users. They especially depend on search technologies functioning as efficiently as possible. AC harms this sector and thus the journalists.

Many journalists associations are among the most vehement opponents of AC. By now, after a couple of smaller journalists’ associations and the association of press officers (BdP) took the initiative, the German Journalists Association (DJV), the most important European association of journalists, with nearly 40,000 members, also requested the immediate abolition of AC:

“We don’t need a law that does not benefit anyone” said DJV chairman Michael Konken. The DJV was already against ancillary copyright during the legislative process, where they called it “superfluous”. Konken now: “The legislator should draw a line under this chapter.”

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How does AC affect innovation and locations for business/innovation?

AC is a brake on innovation. Digital innovations are fast and highly dynamic. Laws that create high entry-barriers, harm competition and therefore especially small and medium sized enterprises and new entrants, such as start-ups.

It is, for instance, easy to imagine, what kind of questions an investor would have, if they were asked to invest in a German start-up in the search sector: "How does your business model relate to AC, what kind of legal risks and financial consequences will we have to expect?"

The answer would be: "No one can really estimate the exact costs in the foreseeable future. In the worst case we will have to give more than ten percent of our revenues to the publishers. The litigation risks and costs are enormous, but they cannot be estimated."

Business locations, where such regulations apply, suffer significant competitive disadvantages. Innovators emigrate or establish their enterprises at other locations from the outset. Such effects have already been observed in Germany and Spain. A variety of particularly small search providers closed their services or severely restricted them in response to the introduction of the new AC.

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How does AC affect competition in the publishing and search -technology sector?

Large search engine providers, such as Google or Microsoft, may be able to carry these risks. For smaller players, such as start-ups or even non-commercial initiatives, they are destructive.

AC leads to great legal uncertainty, to incalculable hazards and financial risks for search providers.

Large search engine providers, such as Google or Microsoft, may be able to carry these risks. For smaller players, such as start-ups or even non-commercial initiatives, they are destructive. Ironically, AC thus strengthens – if anyone is to benefit at all - the market power of

the big search providers. This is shown by the above mentioned and demonstrated impacts of AC on the search industry in Germany and Spain.

AC has similar effects on the press publishing industry. If there are publishers who can afford the associated uncertainties, loss of coverage and financial risks, it is the large media conglomerates. Small publishers and journalists -even more so than the large ones- depend on fruitful cooperation with search technology providers. Their publications are less known and less often accessed directly than outstandingly well-known brands such as Bild.de. Their user numbers and thus their ad-based business model largely depend on good 'findability' in search engines. The above study on the impact of AC on the Spanish media confirms this effect.

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Is AC at all enforceable?

The German AC is not enforceable, no matter how the various ongoing litigations may conclude.

The search providers will not be forced to pay for the free service they provide to the publishers.

Should it be decided that links/snippets at the usual length fall under AC and are thus prone to licensing fees, the search provider will abridge them to the minimum length- to the detriment of all concerned, particularly publishers and users.

If the law was changed and each snippet made subject to AC, they will remove them completely for those publishers who decided to invoke the right. And if legislators were to follow the Austrian example, where it was apparently planned (but discarded) to make any link from a search engine or aggregator prone to a compulsory fee, the search providers would stop listing these publishers altogether.

To force search providers to take advantage of paid services they do not want to use, is impossible. This would contradict every principle of free market economies. There is no law that could

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provide such an obligation, not even Competition law. Despite its dominant market position, not even Google, as decided by the German Competition Authority (Bundeskartellamt) and the Regional Court Berlin (Landesgericht), can be obliged to refer to websites in a way that triggers payment duties from AC. Competition law cannot thus not be invoked to compel anyone to make use-acts, which would be covered by AC.

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Is a functioning AC possible? What form would that have to take?

Firstly, there is no “good AC” because AC is inappropriate and unjustified from the outset. Secondly, already the idea is paradoxical: AC creates a prohibition against activities that are favorable to everyone and harm no one.

Should it appear necessary to financially support the press as an important institution of democratic societies, there would be a variety of ways to do so, e.g. by subsidies, tax reliefs, sponsorships from foundations, partnerships or industry agreements.

Attempts to introduce intellectual property rights such as AC as a disguised type of subsidy for a redistribution of entrepreneurially generated revenues, must inevitably fail and will always cause massive collateral damage..

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Could AC be understood as an experiment and be abolished if it does not prove to be effective?

Such an attitude is dangerous and misjudges the facts.

It has already been demonstrated that AC is a false path. Nevertheless, an application by the opposition to abolish AC in Germany was rejected by a large majority of the current government. Quite generally, it has been shown in the past that even harmful intellectual property rights are not abolished. On the one hand, this is due to legal reasons, because such rights cannot be easily removed. On the other hand, it is easy to imagine how difficult it must be for politicians to withdraw AC from powerful media companies in Germany or Spain.

In addition, legislative measures leading to corrections or potential abolitions

of existing laws are time-consuming processes. Competition on the Internet is fast and the innovation landscape extremely dynamic. Regulations, bringing years of legal uncertainty, are poison for dynamism, innovation and competition.



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 and Philipp Otto in 2010. Currently, it unites over 130 supporters of various types including Internet companies, journalistic blogs, publishers, associations of journalists, law firms, media aggregators, NGOs and foundations. IGEL opposes 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 ancillary copyright for press publishers- which often take place behind closed doors - and intervenes on a political level as an NGO.

Here you can find our key arguments and demands:

<http://leistungsschutzrecht.info/hintergrund>

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