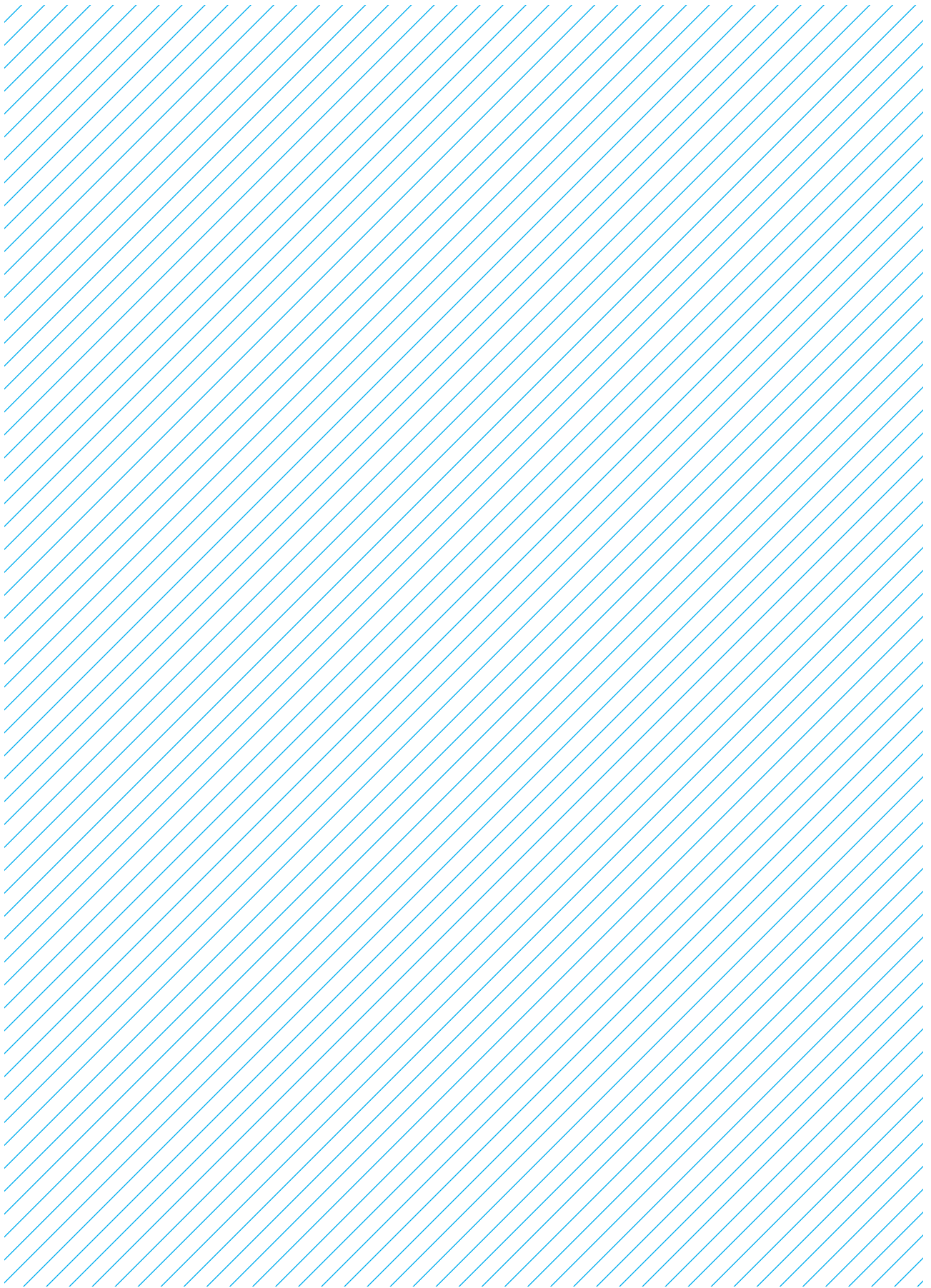


The Ancillary Copyright for Press Publishers in Germany

Background information
and answers to key questions



Debating the ancillary copyright for press publishers with objective arguments

The European Commission launched a public consultation on the role of publishers in the copyright value chain at the end of March 2016. In September 2016, the European Commissioners Andrus Ansip and Günther Oettinger presented their proposals for reforming EU copyright.

The press publishers within VG Media aim to contribute to an objective debate about publishers' intellectual property rights at both the national and the European level. In view of this, the press publishers within VG Media have compiled the key arguments, facts and background information at www.LSR-Aktuell.de and in this brochure.

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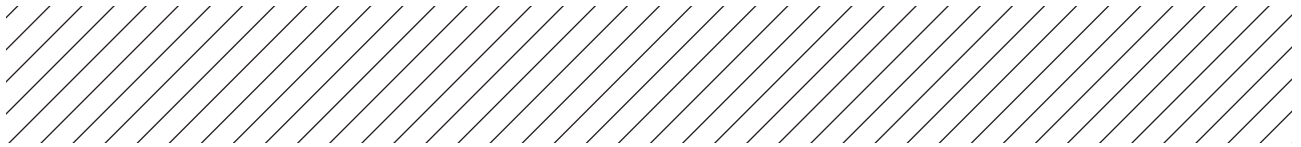
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Assuming responsibility in digital media markets

In a democratic constitutional state, an independent and diverse media landscape is essential for the free formation of opinions. This needs to be protected by a robust regulatory framework, which should allow for the fair balance of interests within digital media markets too.

The media have a responsibility. They are a constituent part of our democracy as they allow for the free formation of opinions. This is just one of the reasons why the independence of the press is so valuable. Within our democratic system, the press plays an important role in keeping the government and the business world in check: the media often act as whistle-blowers, spotlighting and criticising the conduct of politicians or business leaders. Matters are thoroughly researched, different points of view are compared and dialogue about positions and opinions is engaged in. The media have to be editorially diverse and independent—this is the only way in which they can live up to their important responsibility. Press reporting enables broad sections of the population to engage in society and politics. It's not just the national press, but also and in particular the local and regional press, that communicates events which are relevant to society, thereby also contributing to preserving regional and local identities. Freedom, plurality of opinions and

Background information regarding the ancillary copyright for press publishers



diversity of providers require a robust legal framework that can actually be enforced.

DIGITISATION HAS HAD A VIRTUALLY UNPARALLELED IMPACT ON THE MEDIA

Information opportunities and habits are changing. The Internet knows no bounds and the technical processing of information happens automatically in a matter of seconds. Search engines and news aggregators take on the job of sorting and channeling information and making it easy to find. This is one of their most important jobs. They act as ‘gatekeepers’ to all the different sites that are available online.

At the same time, search engines and news aggregators are reliant on the content provided by press publishers, because it’s precisely this content that makes their search services interesting to users in the first place and that boosts their advertising revenues as user numbers grow. In addition, it’s precisely this content that allows conclusions to be drawn regard-

ing users’ interests, enabling targeted and lucrative advertising. The idea is that publishers should enjoy a share of this revenue on the basis of ancillary copyright. This guarantees the fair reconciliation of both parties’ interests and helps to safeguard the quality, diversity and independence of the media landscape.



Background information regarding the
ancillary copyright for press publishers

Clear rules for a fair balance of interests

Copyrights and ancillary copyrights are intellectual property rights that unalterably number among the fundamentally guaranteed rights of freedom. They form an integral part of the framework that guarantees freedom and plurality of media and the press. With the ancillary copyright for press publishers, the regulatory framework is being adjusted to the requirements of digital media markets.

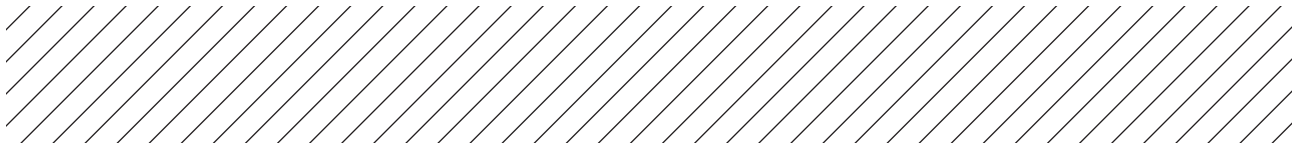
The German economic system adheres, inter alia, to the principles of the social market economy. The state defines the regulatory framework for fair competition, innovations, and freedom.

FURTHER DEVELOPING PROVEN LEGAL FRAMEWORKS

There is a clear, constitutional legal framework for the treatment of property, regardless of whether said property is material or immaterial. Copyright law has applied to intellectual property since 1965. For 50 years copyright law has also proven to be successful: Thus, there have been ancillary copyrights, which protect the services and investments of media companies, the manufacturers of recording media, radio companies, film production companies and many more, for decades.

The ancillary copyright for press publishers merely fills a gap in German copyright law that opened up because digital technology has made possible so much

Background information regarding the ancillary copyright for press publishers



that was previously unthinkable. Search engines and news aggregators compile and categorize publishers' content and use it to enhance their own offers. While they profit from value added to their own offerings by using press products and, thus, increase their ad revenue by doing so, publishers are not involved in this process. Yet it is them who shoulder the enormous investments necessary to create media content and innovations. It is the publishers who hire countless journalists, editors and freelancers.

The German legislator identified this gap and, by passing the ancillary copyright for press publishers in 2013, made a contribution to a fair balance between right holders and users. The ancillary copyright grants press publishers the exclusive right to decide on the usage of their products, or extracts thereof, by commercial providers such as search engine operators or news aggregators. It is the declared intention of the legislator to enable publishers to request reasonable compensation for each usage. In this way it is ensured

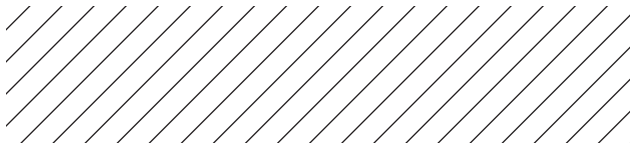
that there is a fair balance of interests between the creators and the users of press products in the digital media markets. The principle of copyright, which is to establish a balance between right holders and user, thereby also applies to the digital world of media. ■

A law for fair compensation and distributive justice

[After intense debates in the German Bundestag, the ancillary copyright for press publishers came into effect on 1 August 2013 and was confirmed again by Parliament on 11 June 2015. What does the text of the law say? And what is actually being regulated?](#)

The German Bundestag incorporated the ancillary copyright for press publishers into the existing body of German copyright law (UrhG) with the three new paragraphs 87f to 87h. The creators of press products, press publishers, are thus guaranteed the exclusive right to make the press product or extracts thereof publicly accessible for commercial purposes. This especially applies when it comes to operators of search engines and news aggregators. In case press products are commercially used by such services, the provider of the service has to obtain a license from the press publishers to do so since 1 August 2013. The explanatory memorandum for this law stipulates explicitly that this right shall enable publishers to link the issuing of licenses to the payment of reasonable compensation. The German ancillary copyright for press publishers has thus been deliberately structured in such a way that both sides negotiate the adequate compensation. In Spain, for instance, legislators took a different route and stipulated a compulsory, fixed

Background information regarding the ancillary copyright for press publishers



compensation for all usage in the so-called news services, but not for utilization by search engines.

THE LAW IN DETAIL

§ 87f UrhG defines the press product as the technical, editorial determination of journalistic pieces that periodically appear under a title and which are overall typical press publications. By this definition, articles and images that serve to convey information, form an opinion or entertain are generally protected as part of a press product. Individual words or very short text extracts may be made publicly accessible without consent from the press publisher. In particular it shall be permitted to quickly and briefly name the linked content in search engines and news aggregators without having to obtain consent. In an attempt to define this legal exception further, the arbitration board at the German Patent and Trademark Office, suggested that the ancillary copyright shall be applicable if more than seven words (not incl. search

term(s)) are displayed. As a cogent procedural prerequisite the case had to be brought before the arbitration board as a first instance. It has issued its settlement proposal on 24 September 2015. Only if the display of press products exceeds this limit consent for usage in accordance with ancillary copyright for press publishers is required, according to the arbitration board. The authors' claim to participation

One special feature of the ancillary copyright for press publishers is the authors' claim to participate in any remuneration paid to the publishers. § 87h Copyright Law states: "The author must be reasonably involved in compensation." The ancillary copyright for press publishers thus not only compensates the service and investment provided by the publisher, but also ensures reasonable involvement by authors, such as text and photo journalists as well as freelance editors in compensation for the usage of press products online. ■

Background information regarding the
ancillary copyright for press publishers

The legal enforcement of the ancillary copyright for press publishers

[VG Media currently represents the ancillary copyright for press publishers of more than 230 publications vis-à-vis operators of search engines and news aggregators who use these published products.](#)

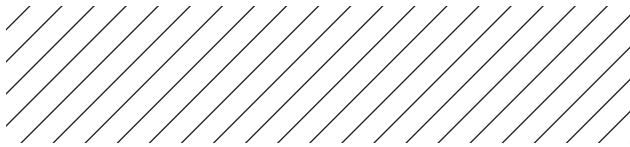
With the ancillary copyright for press publishers, publishers have the exclusive right to make press products or extracts thereof publicly available for commercial purposes. This right applies vis-à-vis operators of search engines and news aggregators. This includes the right to grant authorization to use the publications upon payment of compensation.

After establishing a tariff for the usage of extracts of digital press products and its publication in the German Federal Gazette, VG Media offered the operators of search engines and news aggregators to negotiate license agreements based on the published tariff. However, some large search engine operators, incl. the quasi-monopolist Google, neither recognize the applicability of the law nor the appropriateness of the tariff set up by VG Media.

ANSWERING FURTHER QUESTIONS ABOUT THE LEGAL PROCEEDINGS

The arbitration board of the German Patent and

Background information regarding the ancillary copyright for press publishers



Trademark Office (GPTO) in Munich acts as a first instance authority responsible for settling disputes of this type. Questions on the applicability and appropriateness of the tariffs set by collecting societies must be brought before the arbitration board. This is as a cogent procedural prerequisite. Only after the arbitration board has considered the case and issued a settlement proposal, the case can be brought before the courts. The arbitration board submitted its decision to the parties on 24 September 2015. The arbitration board confirmed the applicability of the press publishers' tariff. The arbitration board, however, has stated that the calculation method of the tariff should be improved. Furthermore, the arbitration board prompted the parties to settle the case amicably. The arbitration board's proposal was rejected by all parties involved in the dispute. Therefore the ancillary copyright for press publishers is now enforced before the Landgericht Berlin (district court).

ABUSE OF MARKET POSITION CANNOT PREVENT IMPLEMENTATION OF THE LAW

Google uses its overwhelming market share of about 95 % of the search engine market to circumvent the ancillary copyright for press publishers. Due to its market position Google has been able to extort free-of-charge licenses from the press publications represented by VG Media in order to use text extracts in its own services free of charge. Google threatens to restrict the display of the press products of such publishers, who insist on the enforcement of the ancillary copyright granted by German law, in Google's various products.

Because Google—due to its market share—effectively determines whether press products may be found on the internet or not, this results in severe competitive disadvantages for those publishers, who insist on the enforcement of their ancillary copyright, compared to the publishers who abstain from doing so out of their intimidation by Google's threats.

The Federal Cartel Office has been very reticent in the application and implementation of German cartel law against internationally active internet companies. Several publishers have thus filed a lawsuit before the Landgericht Berlin (district court) directed against Google's anti-competitive behaviour. ■

Concerning the ancillary copyright for press publishers in Germany

Answers to key questions

Who is addressee of the ancillary copyright for press publishers?

As per § 87g para. 4 of German Copyright Law, the addressees of the ancillary copyright for press publishers are solely "commercial providers of search engines or commercial providers of services that condition the content accordingly". The latter are so-called news aggregators. All other uses of a press product, e.g. by other businesses, associations, attorney offices, bloggers or private users are thus explicitly exempted from the scope of the ancillary copyright for press publishers.

Why do press publishers require their own ancillary copyright?

Through their work, press publishers lay the organizational, technical and economic foundations for maintaining a diverse press landscape. In order to ensure that the publishers will still be able to play a crucial role in the age of digitalization, the ancillary copyright for press publishers was introduced on 1 August 2013 by the German legislator. Until then the existing law did not provide sufficient protection for publishers with regard to the online use of their press products. Press products, or extracts thereof, could be used and copied indefinitely without the user having to obtain a license beforehand. It is the explicit aim of the legislator to ensure that press publishers are able to protect and—if desired, monetize—their products by means of an ancillary copyright for press publishers. Thus, press publishers were to benefit from a further means of refinancing. Therefore, both diversity of products and competition between publishers, are ensured.

Answers to key questions

But publishers do benefit from the usage of their products in search engines. Why should search engines pay for it?

Right holders are entitled to receive their fair share from the exploitation of their rights by users. This constitutes a basic principle of copyright. There are numerous examples where usages of intellectual property rights benefit both, user and rights holder alike. For example, record labels benefit, when music performed by musicians which they have under contract, is played on the radio. But this does not exempt the radio station from an obligation to pay for usage of the music itself. The same applies to the usage of press products by search engines or news aggregators. Both very much like radio stations - benefit greatly from the improved attractiveness of their product, which is generated by press products. In addition, many users stop short of reading a news publisher's own website, when they are able to gain some information about a certain topic only by skimming the search engine result page. As a consequence, the publishers lose immense scope and ad revenue.

How far has German ancillary copyright legislation for press publishers progressed?

In Germany a law was passed in 2013 establishing an ancillary copyright for press publishers. Since then, publishers have the exclusive right to make press content, or parts thereof, available to the public. This right applies to their relationship with the operators of search engines and news aggregators. Publishers can make the release of their content for commercial purposes subject to the payment of a fee. VG Media has drawn up a tariff, which has been published in the German Federal Gazette. The arbitration body responsible for disputes between users and collecting societies recently cleared the way for this ancillary copyright and the tariff to be implemented. The system entitles the press publisher to claim remuneration for any usage exceeding seven words (excl. search terms). The amount charged is still to be established. This paves the way for the enforcement of the ancillary copyright for press publishers in Germany.

Answers to key questions

Does the ancillary copyright for press publishers not affect the wrong entities, such as small search engine operators or start-ups?

The compensation from the ancillary copyright for press publishers takes into account the revenue of the platform operator achieved by using the content. This can happen either in the way stipulated in the tariff published by VG Media, or through other possible calculation methods, such as suggested by the arbitration board. The ancillary copyright for press publishers thus ensures equity and fair competition: Small search engines with lower yields automatically pay less than large search engines.

Is the ancillary copyright for press publishers an impediment to structural change in the media landscape?

The ancillary copyright helps publishers with the complex transformation process. The various publishers have very different business models. For example, more than 100 publishers are now offering paid content online since the introduction of the ancillary copyright for press publishers in Germany. This has been well received by their readers. The ancillary copyright ensures that paywalls are not bypassed by news aggregators. As a result, press publishers are also less dependent on the advertising market, which is susceptible to economic ups and downs.

Answers to key questions

How does the ancillary copyright for press publishers help with the establishment of paid content models?

The introduction of paid content models and the investments involved in this call for legal certainty. Without dedicated intellectual property rights, publishers could not defend themselves effectively against the bypassing of paywalls and the misuse of content which is only protected by technology. This has already been evidenced by a number of court cases. In the case of freelance authors in particular, publishers would have to ask writers to grant them exclusive rights of use that would preclude secondary publication by the author, which would not be in line with the interests of publishers and journalists. The ancillary copyright for press publishers therefore offers the right legal framework for paid content models and enables publishers to come up with new business models.

Why do some publishers not back the ancillary copyright for press publishers or choose not to be represented by VG Media?

VG Media already represents a large part of German publishers. They stand for much of the media diversity and plurality of opinions in Germany, from the much-loved local paper to the national daily press, special-interest magazines and the digital news services of well-known TV channels and radio stations. There are, however, initially costs and risks involved in enforcing a new law, and some press publishers may be reluctant to incur these due to the current transformation process.

Is there evidence that search engines turn a profit from the display of press products?

There are several studies that confirm the significance of press products for search engines. According to these, users rely on quality content for their search and expect to find press products among the results of search engines.

Answers to key questions

Is the ancillary copyright for press publishers also of benefit to authors?

Yes, the ancillary copyright for press publishers is also of benefit to authors! While its primary purpose is to enable publishers to control the use of their digital publishing products online, it also recognises the contribution of writers on the basis of the right of participation of the author as formulated in Section 87h of Germany's Copyright Act (UrhG).

Does the ancillary copyright for press publishers not create new and unnecessary bureaucratic structures?

Right holders and users can keep their bureaucratic workload to an absolute minimum by pooling the management of their rights within VG Media. The enforcement of the ancillary copyright for press publishers does not involve any more bureaucracy than enforcing the ancillary copyrights of other producers of work. Besides that, a degree of additional work is hardly a strong argument against the enforcement of legitimate legal claims.

Is the German ancillary copyright for press publishers compliant with EU law, even though no notification has been conducted under Directive 98/34/EC?

The German Federal Government did not see an obligation to conduct a notification of the ancillary copyright for press publishers under Directive 98/34/EC. The corresponding law does not specifically target information society services in terms of Directive 98/34/EC. The aim of the ancillary copyright for press publishers is to establish an exclusive right for publishers granting them the same right as other right holders in the online sphere. As an exclusive right, the German ancillary copyright acts towards everyone and is therefore not a special rule in terms of the directive. This understanding has been confirmed by the Arbitration Board of the German Patent and Trademark Office in its settlement proposal of 24 September 2015.

Answers to key questions

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What will the European Court of Justice decide on in its ruling?

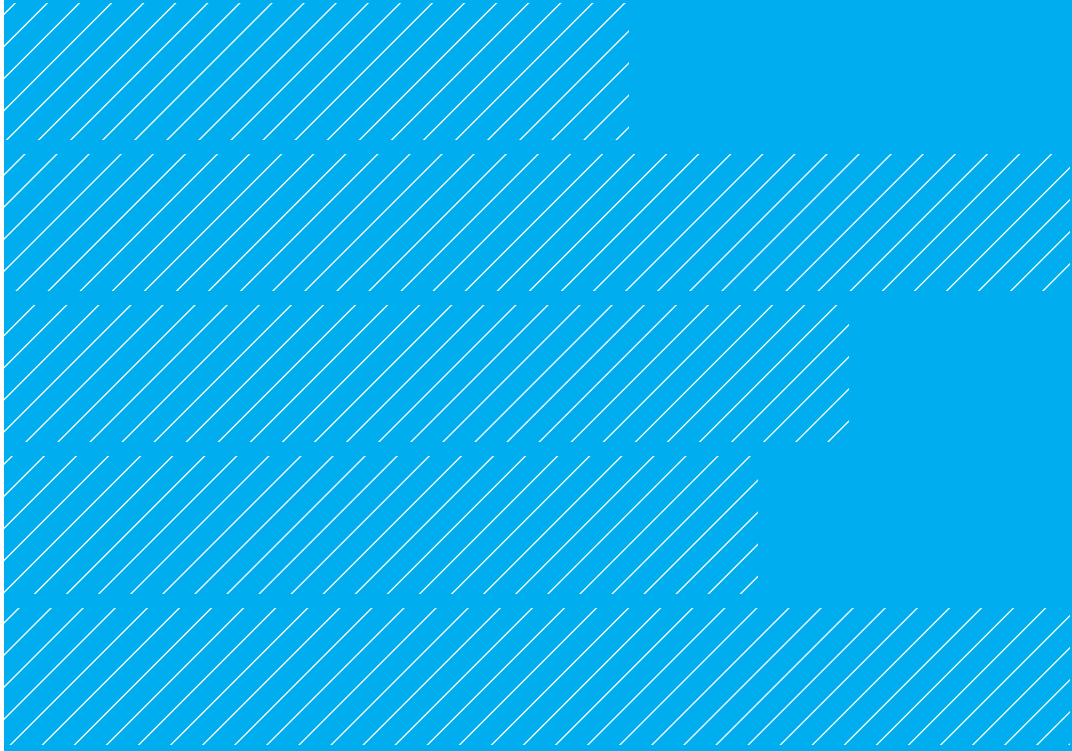
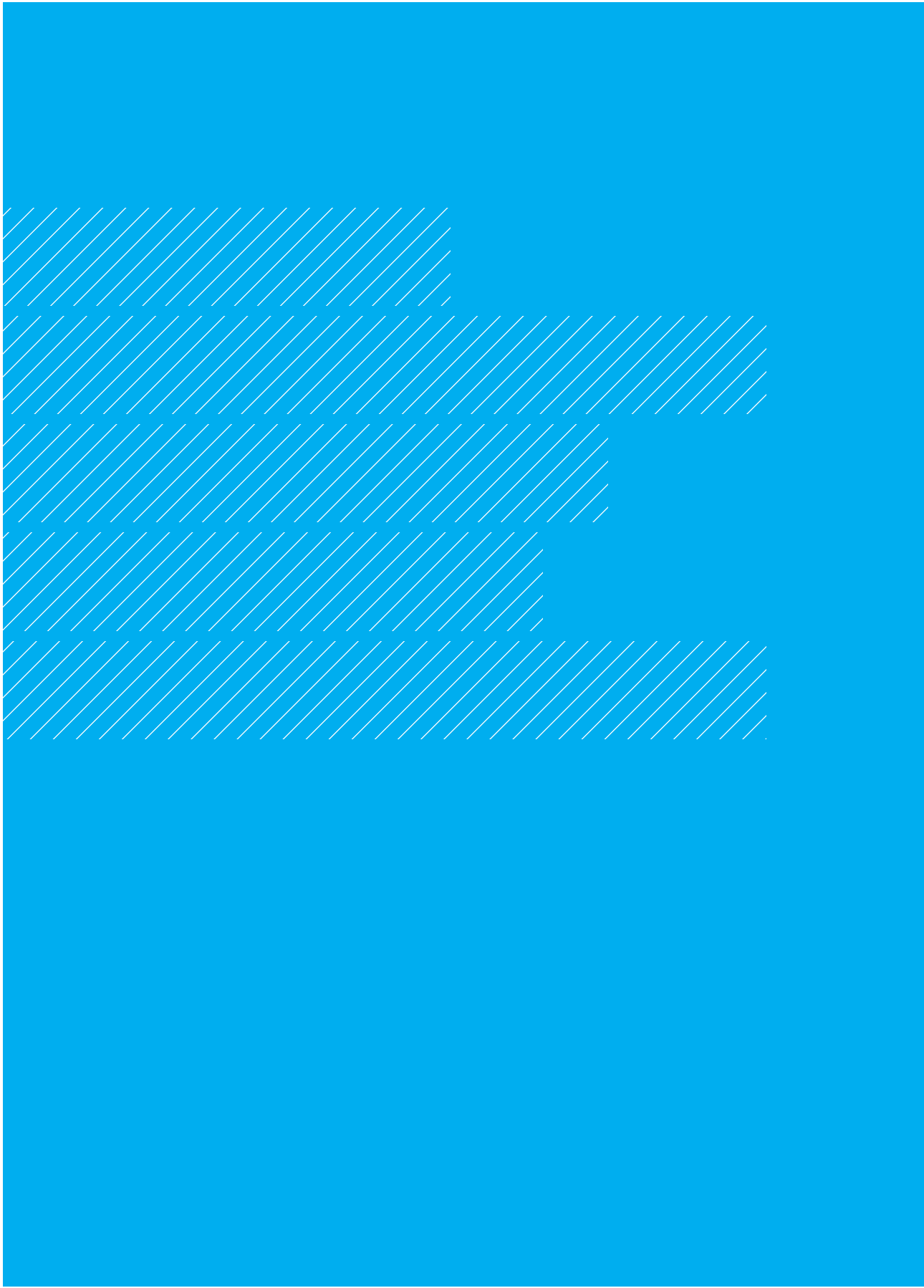
The Berlin Regional Court initiated a preliminary ruling procedure before the European Court of Justice on 9 May 2017 as to whether the notification requirement applies to the ancillary copyright for press publishers. The Berlin court stated explicitly that it considers the VG Media press publishers' lawsuit against Google Inc. to be at least partially justified. It further maintained, however, that the question of whether – contrary to the view of the Federal Government – the European Commission should have been notified of the law before its enactment in 2013, must still be examined.

Why does VG Media charge a flat-fee remuneration?

The mass use of copyright-protected press products online often makes an individual, use-based assessment impossible or possible only in conjunction with disproportionate costs. In such cases, collecting societies have no option other than to make estimates, consolidate figures and use simplifications—something which they are also compelled by the law to do. This approach saves time and money, both for the press publishers and the users. It is therefore standard procedure for collecting societies to charge flat-fee remuneration in the form of general tariffs.

How does Google's Digital News Initiative (DNI) fit into all this?

The Digital News Initiative (DNI) reveals that Google values press content highly and is also prepared to pay for it. However, a system establishing the granting of payments to selected individuals cannot be a substitute for a right enjoyed by all. Alone the unconditionality of the ancillary copyright ensures the independence of the press from commercial re-users on the internet, thereby creating the basis for a level playing field for all market participants.



Answers to key questions

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Concerning the European publisher's right

Answers to key questions

What is a publisher's right?

A publisher's right is a property right like any other ancillary copyright. It protects intellectual property and the output of publishing houses. For decades, publisher's rights have existed in all member states of the European Union, e.g. for the manufacturers of audio storage devices, broadcasters and film production companies, to name but a few entities. Those ancillary copyrights have never been more important than in this era of digitisation. Search engines and news aggregators collect and classify publishing content, using it to increase the value of their offerings. The publisher's right ensures that publishers share in the revenue generated by these business models. It is the publishers that engage journalists, editors, freelancers and many other creative people and invest in media content and innovation.

How can a publisher's right help to preserve a free and independent media landscape in Europe?

An independent and multi-faceted press landscape is indispensable for the appraisal and ordering of information and the free formation of opinion in any democratic state. There is also a need for a legal framework that protects the intellectual property of press publishers and ensures that they receive a reasonable remuneration by commercial users of their content such as search engines and news aggregators.

Will the possible introduction of a European publisher's right limit the freedom of the internet?

No. The objective of a publishers' right is to secure their participation in the revenue derived from their own original content. The freedom of the internet is not linked to this issue, nor is it in any way curbed by a publisher's rights.

Answers to key questions

Will the possible introduction of a European publisher's right mean that a charge will be made for the placing of hyperlinks?

On 9th December 2015 the EU Commission made the following statement on the subject: "The Commission has no plan to tax hyperlinks. We have no intention to ask people to pay for copyright when they simply share a hyperlink to content protected by copyright. Europeans share and post hyperlinks every day and they should remain free to do so."

Does the possible introduction of a European publisher's right amount to a new tax on search engines and news aggregators?

No. Ancillary copyrights protect property and investments in the creation of value/original content. It allows an economic adjustment to take place between the creators of intellectual property and the disseminators of the material. The aim of a European ancillary copyright for press publishers is to promote fair competition under transparent conditions—for publishers and re-users alike.

Who is VG Media and which publishing houses are behind the collecting society?

VG Media exercises copyrights and ancillary copyrights of a large part of German, and several international, private TV and radio broadcasters and over 230 digital publishing houses. Companies represented by VG Media include Sat.1, ProSieben, RTL, CNBC Europe, Al Jazeera and many national and regional radio stations as well as publishers of digital content. Thus, VG Media represents media diversity and the plurality of opinion across Germany. It issues licences based on a published tariff and is subject to government regulation. The exercising of rights by a collecting society ensures that copyright is appropriately enforced and that fair competition is possible, for both the holders of copyright and the re-users of the material.



Legal notice / contact details

VG Media represents some 230 digital publishing sites (domains), known as right holders, in the legal proceedings to enforce the press publisher's ancillary copyright. It therefore represents a large proportion of German press publishers and the digital services of TV channels and radio stations.

The press publishers within VG Media provide information regarding the press publisher's ancillary copyright and the legal proceedings to enforce the law at www.LSR-aktuell.de and in this publication.

VG Media

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