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RELATED RIGHT FOR PRESS PUBLISHERS – EU PROPOSAL AND GERMAN COPYRIGHT ACT

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PROPOSAL FOR A DIRECTIVE ON COPYRIGHT IN THE DSM COM(2016) 593 FINAL – ARTICLES 11, 12 – I

- Title IV: „Measures to achieve a well-functioning marketplace for copyright“
- Chapter 1: „Rights in Publications“, containing Art. 11, 12
- Art. 11: „Protection of press publications concerning digital uses“
- *“(1) Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC [Copyright Directive] for the digital use of their press publications.”*
- Art. 2 Copyright Directive: reproduction right
- Art. 3 (2) Copyright Directive: right to authorise or prohibit the making available to the public

PROPOSAL FOR A DIRECTIVE ON COPYRIGHT IN THE DSM COM(2016) 593 FINAL – ARTICLES 11, 12 – II

- *“(2) The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. [...]”*
- *„(3) Articles 5 to 8 of Directive 2001/29/EC [Copyright Directive] and Directive 2012/28/EU [Orphan Works Directive] shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.”*
- Provisions of Copyright Directive referred to:
 - Art. 5: Exceptions and limitations
 - Art. 6: Obligations as to technological measures
 - Art. 7: Obligations concerning rights-management information
 - Art. 8: Sanctions and remedies

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- *“(4) The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.”*
- Art. 12: „Claims to fair compensation“
- *“Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.”*
- Terminology: “related right” (“*verwandt*”), “neighbouring right” (French “*droit voisin*”) => same meaning (“*Leistungsschutzrechte*”)

REASONS FOR PROPOSED PROVISIONS I (EXPLANATORY MEMORANDUM, P. 3)

- “A fair sharing of value is also necessary to **ensure the sustainability of the press publications sector**. Press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate. This could ultimately affect **citizens' access to information**. This proposal provides for a new right for press publishers aiming at **facilitating online licensing** of their publications, the **recoupment of their investment** and the **enforcement of their rights**.”
- “It also addresses existing legal uncertainty as regards the **possibility for all publishers to receive a share in the compensation** for uses of works under an exception. Finally, **authors and performers often have a weak bargaining position** in their contractual relationships, when licensing their rights. [...] This proposal includes measures to **improve transparency and better balanced contractual relationships** between authors and performers and those to whom they assign their rights.”

REASONS FOR PROPOSED PROVISIONS II (EXPLANATORY MEMORANDUM, P. 5, 6)

- **Subsidiarity:** „Only mechanisms decided at European level could ensure a **well-functioning marketplace for the distribution of works and other subject-matter** and to **ensure the sustainability of the publishing sector** in the face of the challenges of the digital environment. Finally, authors and performers should enjoy in all Member States the **high level of protection established by EU legislation.**”
- **Proportionality:** „The introduction of a related right for press publishers would improve **legal certainty and their bargaining position**, which is the pursued objective. The proposal is proportionate as it **only covers press publications and digital uses.**”

RELATED RIGHT FOR PRESS PUBLISHERS IN GERMAN COPYRIGHT ACT (URHG) I

- In 2013 German Copyright Act (Gesetz über Urheberrecht und verwandte Schutzrechte – UrhG) has been amended by §§ 87f, 87g, 87h
- § 87f (1) UrhG provides press publishers with a *sui generis* exclusive right over their news content, by exception of snippets (“*einzelne Wörter oder kleinste Textausschnitte*”): right to authorise or prohibit the making available to the public (cf. Art. 3 (2) Copyright Directive, § 19a UrhG); commercial exploitation of the contents, thus preventing third parties (including search engines and news aggregators) from displaying excerpts from newspaper articles without obtaining a licence; not only compensation claim (cf. Spain)
- § 87f (2) UrhG provides definitions of (sentence 1) “press product” and (sentence 2) “journalistic contributions”

RELATED RIGHT FOR PRESS PUBLISHERS IN GERMAN COPYRIGHT ACT (URHG) II

- § 87g UrhG specifies the related right:
 - (1) right of exploitation is transferable;
 - (2) protection period one year after publication;
 - (3) related rights cannot be claimed to the detriment of author or other persons holding rights to the press product;
 - (4) limitation: making available to the public of press products as far as it is not performed by commercial search engine providers is permitted (“lex Google”)
- § 87h UrhG: authors are entitled to get a fair participation of the press publisher’s considerations

CRITICISM ON GERMAN PROVISIONS OF RELATED RIGHT I

- Legal policy criticism:
 - Factually no impacts: in order to not get delisted, German press publishers grant licenses to Google and other search engine operators for free
 - In general unclear whether press publishers suffer losses by online activities
 - Why only press publishers and not ALL publishers?
 - News content is monopolized => disadvantage to Freedom of Information
 - Cf. Spain: since 2015 „Google tax“, Google stopped his news service, which caused losses of traffic

CRITICISM ON GERMAN PROVISIONS OF RELATED RIGHT II

- „Crafmanship“ criticism:
 - Definitions unclear: How many words a „snippet“ may contain? 10/11 words? ECJ – Infopaq decision; cf. music quotations, BGH
 - Metall auf Metall decision
 - Lacking notification to EU Commission pursuant to Directive 93/34/EC? Is it applicable?
- Compliance with German Constitution *Grundgesetz*: Freedom of Information, Art. 5 Para. 1 Sentence 2 GG; Freedom of Profession, Art. 12 Para. 1 GG
- No obligation to be enforced by a copyright collecting society, however several press publishers (Springer, Burda etc.) have entitled VG Media to claim

CRITICISM ON EU PROPOSAL AND LESSONS TO LEARN I

- Pars pro toto:
 - Rosati, Neighbouring Rights for Publishers, IIC 2016, 569
 - Geiger et al., Opinion of the CEIPI
[http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/CEIPI Opinion on the introduction of neighbouring rights for press publishers in EU final.pdf](http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/CEIPI%20Opinion%20on%20the%20introduction%20of%20neighbouring%20rights%20for%20press%20publishers%20in%20EU%20final.pdf)
- Additional layer of 28 national rights delivers DSM harder to reach
- Authors' share of remuneration will inevitably decrease
- Negative impact on small publishers, while news aggregators might have a positive effect on online news sites

CRITICISM ON EU PROPOSAL AND LESSONS TO LEARN II

- No limits of the subject matter to publications presently protected by authors' rights
- Proposal grants rights to any publication, even those that do not involve any substantive investment: Overbroad scope of protection!
- Too long term of protection: 20 years!



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