Kluwer Copyright Blog

[Updated] As had long been suspected: The proposed Press Publishers Right is meant as a lex Google after all (Germany)

John Weitzmann (iRights.info) · Monday, August 27th, 2012

"Some said this would be like an Opera House charging the taxi drivers for taking the audience to the venue."

It has been more than three years now since the infamous idea of a new neighbouring right for press publishers appeared in the coalition agreement of the second Merkel government out of thin air. On the face of it, the approach seemed somewhat reasonable: To give press publishers a neighbouring right just like the ones enjoyed by other key players of content production, f.e. film and phonogram producers.

First ideas for an implementation circled around a kind of online press levy, to be payed by any commercial or public entity. There were reports about the respective collecting society already being established and calculations were made as to how much companies would need to invest in order to filter their online traffic and lawfully evade the levy payments. Estimates were in the billions. Proponents had a hard time explaining what exactly the scope of the new right would be and felt the need to assure everyone that hyperlinks would remain free of charge (except maybe the descriptive ones generated automatically). A wide range of critics – legal scholars, bloggers, industry groups, authors, tech companies and notably even journalists and some press publishers – warned about establishing a harmful new monopoly for non-creative contributions and an unprecedented online bureaucracy coming with it. This would have chilling effects on free speech, online innovation and the internet in Germany, they said.

The main argument in favour of the approach has always been to save "quality journalism" (and those who make it happen) from a parasitic business model allegedly abundant on the internet, piggybacking on the great achievements of publishing houses. According to this view, snippets of news and articles are to be turned into a commodity, fankly ignoring the facts that a) they are made available free of charge

online and that b) publishers already are in fact in charge of indexing through robots.txt. To derive the copyright in press articles from their journalists in order to enforce legitimate claims in court, the publishers said, is insufficient for saving the old publishing industry and, of course, democracy as a whole and the world as we know it. Something always denied by the press publishers, namely by the Springer Corporation, was the counter allegation made by those opposing the new neighbouring right, saying it was only about carving a share from Google's revenues, no matter what the cost for everyone else. At the same time, those who pointed out that close to 90% of all press content in Germany is in fact behind pay-walls while the rest would hardly be accessible without search engines were publicly framed as being the fifth column of Google.

After a series of papers and vague announcements mostly lacking a definitive explanation as to how this new neighbouring right could be implemented without causing unforeseeable collateral damage, some half-baked concepts have emerged since late 2011. In the eyes of the interested public in Germany the whole operation looked more like a stale mate between the publisher's lobby on the one side, trying to dictate their terms, and government officials on the other, regretting they had allowed the proposal into the coalition agreement in the first place. Behind the scenes ministerial experts tried hard to find a workable solution as a face-saving compromise.

Then last month, the federal elections only just over a year ahead, a proper draft for a bill leaked from the ministerial level, introducing new sections 87f, 87g and 87h for the copyright code (Urheberrechtsgesetz). Without touching on the citation right the draft declared "small parts of press products" to be the object of the new right. According to the explanatory notes this would include even single sentences and headlines being protected. For one year after first publication only press publishers were to have the exclusive right to make this content available to the public commercially. Even such basics as the definition of "publisher" in the meaning of the draft was problematic. By the letters of the proposed new s. 87f ss. 2, every person showing ads on their blog could be regarded as a publisher, turning most bloggers into holders of the new neighbouring right and at the same time making them liable to license every link and snippet they include from other such "publishers".

Thus, this first draft was heavily criticised by the quite broad opposition that developed in the meantime and is pushing against the new neighbouring right. As a response the draft was revised and the scope of the proposed right was drastically reduced by a new provision in s. 87g ss. 4's first sentence:

> "(4) Zulässig ist die öffentliche Zugänglichmachung von Presseerzeugnissen, soweit sie nicht durch die Anbieter von Suchmaschinen erfolgt."

translating into

> "(4) Making press products available to the public is permissible as far as

> it is not done by the providers of search engines."

So, in order to get rid of the absurdities of forcing half the web into being publishers and licensors/licensees regarding any content that comes close to a "press product", the proposed law has been stripped down to what it was always only meant to be: A shortcut for publishers to participate in the revenues of search engine providers and related industries that shift around links and snippets (think f.e. facebook recommendations). Keeping in mind the tremendous importance search engines and recommendation services have for sending web users to press publisher's websites, the new draft is hardly less absurd than the first one. Some said this would be like an Opera House charging the taxi drivers for taking the audience to the venue.

Even Christoph Keese, chief lobbyist of the Springer Corporation and protagonist of the proponents of the new press publishers right, seems to have realised how telling the developments are. He tweeted that the draft as it stands now would be "inacceptable". The Federal Ministry of Justice, on the other hand, has never been quite enthusiastic about the idea of a new press publishers right and is known for its well-wrought drafts – honi soit qui mal y pense. It remains to be seen whether the bill will actually be introduced by the government and what the parliamentary process will make of it. Even if it was to be passed as proposed now, Google, Bing and other serach engines will probably rather delete major German press publishers from their indexes than pay for licensing freely available content.

Update Aug 29th:

In its session this morning the German government has passed a new version of the draft to be introduced into the parliamentary process. The most notable changes compared to the previous draft are twofold:

The proposed new section 87g in its subsection 4, first sentence now reads

> "(4) Making press products available to the public is permissible as far as it is not done by commercial providers of search engines or commercial providers of services processing content in a similar way." (non-official translation by the author)

It was now added that only commercial search engine providers need a license for snippets of press products and the provision has been rounded out by encompassing services similar to those of search engines.

Some irritation has been stirred by certain new lines in the explanatory notes, saying

> "Protection is necessary only against systematic access to publisher's content by commercial providers of search engines and commercial providers of such online services that process content in a way similar to a search engine. The reason being that, for generating their own added

> value, their business model is specifically also aiming at publisher's content." (non-official translation by the author)

Some commentators are now interpreting the proposed law its present form to apply to specific news aggregation only, because only news aggregators' business model is specifically relying on content provided by news media. In that case, regular web search would not be touched. But it is highly doubtful that this is really what the new draft is meant to say. All statements by politicians and lobbyists involved see Google's business as a whole to be subject to possible licensing requirements, not only Google News.

Draft (PDF, in German) on the Federal Ministry of Justice's website

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