Kluwer Copyright Blog

The German press publishers' right before the CJEU – will it survive? The AG's opinion in VG Media/Google (C?299/17) and some background from Germany

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Just a few days before Christmas, Advocate General Hogan published his opinion that the German related right (neighbouring right) in favour of press publishers is unenforceable for formal reasons. In his view, it should have been notified to the European Commission before the law was passed in Germany. The final word is now with the CJEU. What is the background to the pending CJEU case VG Media/Google (C?299/17)?

The new related right in favour of press publishers in Germany

On 1 August 2013, a new related right in favour of press publishers was introduced in Germany. Sections 87f-h of the German Act on Copyright and Related Rights (UrhG) grant press publishers a new related right. See here for an English translation. The aim of the new provisions is to give press publishers control over unlicensed online use of their content by third parties, in particular search engines. It was intended to provide press publishers with additional sources of income from the internet, because revenue streams for press publishers have diminished in the digital era.

Generally speaking, the right is owned by the publisher of the relevant press product. The neighbouring right provides the press publisher with an exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless the use consists of individual words or very short text excerpts. There is a specific exception that makes it permissible to make press products or parts thereof available to the public, unless this is done by commercial

operators of search engines or commercial operators of services which edit the content. So the right was specifically tailored to invoke this e.g. vis-à-vis search engines if they use the press content and the use goes beyond individual words or very short text excerpts. Additionally, the right is subject to the usual exceptions and limitations for genuine copyright, e.g. the quotation right. The German term of protection is one year after publication of the press product.

The case between VG Media and Google

Against this background, it is of no surprise that one of the first cases saw Google, the world's major search engine, being sued by VG Media, a collecting society acting for press publishers. VG Media brought an action for damages and information against Google with regard to Google's use of text excerpts, images and videos from press and media content without authorization and in particular without paying a licence fee. The use in dispute was not only Google News, but also the main search engine service provided by Google as far as it displayed the content at issue.

In the proceedings, the question arose whether the provisions were unenforceable because the German Government had failed to notify the EU Commission of the legislative proposal. Art. 8 (1) of Directive 98/34 (which was subsequently repealed and replaced by Directive (EU) 2015/1535) requires Member States to immediately communicate to the Commission any draft "technical regulation". If there was no notification where there should have been, the consequence would be that the provisions of Sections 87f-h UrhG may not be enforced against individuals, according to the case law of the CJEU.

The Landgericht (District Court, first level court) Berlin considered VG Media's action to be well founded, at least in part. So the outcome of the proceedings depended on the question of whether the new provisions of the UrhG were enforceable. In May 2017, the court decided to refer two questions to the Court of Justice in order to determine whether the new provisions of the UrhG fell within Directive 98/34.

The case is interesting, as the draft Directive on Copyright in the Digital Single Market also aims at introducing a new related right in favour of press publishers at the EU level, in Art. 11. This has the same aim of providing press publishers with additional income for certain internet uses.

The case referred

Article 1 (2), (5) and (11) of Directive 98/34 provide:

'For the purposes of this Directive, the following meanings shall apply: …

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. …

5. "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point. …

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its operative provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner; …

11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.'

Advocate General Hogan's opinion

The relevant issue is whether the new provisions of the UrhG constitute a 'rule on services' in accordance with Art. 1 (5) of Directive 98/34, and thus a requirement of a general nature relating to the taking-up and pursuit of Information Society services. To answer the questions of the Landgericht Berlin, an interpretation of the term 'technical regulation' pursuant to Art. 1 (11) of Directive 98/34 is also required.

The opinion of Advocate General Hogan was delivered on 13 December 2018. He advised the Court of Justice to rule that the new provisions should indeed have been notified to the Commission.

He was of the opinion that Paragraph 87g (4) UrhG was the critical provision of the new law because this provision effectively curtailed or restricted the provision of these services by internet search engine providers by providing that such services amounted to (related) rights infringement and exposed the service provider to the possibility of an injunction or a monetary claim.

Advocate General Hogan considered that Paragraphs 87f (1) and 87g (4) of the UrhG amount to a technical regulation within the meaning of Article 1(11) of Directive 98/34. He agreed with the Landgericht Berlin that the effect of the amendment to the UrhG was that it was unlawful to make press products or certain parts thereof available to the public only where they were made available to the public by a commercial provider of search engines, but it was still permissible where this is done by other users, including other commercial users. The effect in practice was making the provision of the service subject to either a form of prohibitory order or a monetary claim at the instance of the publisher of newspapers, magazines or other press product. So the provisions in question could have the effect of significantly affecting the nature or marketing of these internet services by exposing the operators of search engines to either a prohibitory order or a claim for damages where the internet search enabled the reader to access more than a few words or a very short excerpt from the press product in question.

The Advocate General stated that Article 1 (2) of Directive 98/34 provided that the term 'technical regulation' applied to regulations relating to what was described as information society services, i.e., services provided for remuneration at a distance by electronic means and at the individual request of a recipient of services. He stated briefly that this requirement was satisfied as far as press services – supplied by means of internet search engines – were concerned.

Furthermore he affirmed that the provision of Paragraph 87g (4), read in conjunction with Paragraph 87f (1) UrhG, is ‘specifically’ aimed at information society services. According to Art. 1 (5) of Directive 98/34 a national measure should be considered to be specifically aimed at such services in this sense if the specific aim and object of at least some of its individual provisions is ‘to regulate such services in an explicit and targeted manner’. He pointed out that the principal aim and object of the legislative changes was to address the impact of internet search engines given that media content is increasingly read and accessed online, and to provide for a special copyright rule in respect of the provision of online services in relation to press products by the operators of such search engines.

Background and Outlook

The case before the Landgericht Berlin is the test for the new German related right, as to whether it will serve its purpose to provide additional income for press publishers. So far, the related right for press publishers has not generated relevant income for press publishers in Germany. This is mainly because the world’s most important search engine, which is also very strong in Germany, refuses to pay for its use. Google even approached German press publishers and first threatened them with de-listing and later with no longer using snippets and thumbnails where they would not grant free usage rights to Google. The behaviour of Google has made them the subject of another court case, which concerns their possible abuse of a dominant position. This case is currently pending before the Kammergericht (Court of Appeal) Berlin after the Landgericht Berlin denied an abuse by Google (LG Berlin, Zeitschrift fuer Urheber- und Medienrecht (ZUM) 2016, 879; favourable comment by Kersting/Dworschak ZUM 2016, 840; critical comment by J.B. Nordemann/Wolters ZUM 2016, 846, 848).

It would be frustrating, not only for press publishers, to see the Landgericht Berlin case (now pending before the CJEU) lost due to formal mistakes made during the German legislative process. In particular, it will be interesting to see how the competition law case concerning abuse of Google’s dominant position progresses. Probably, Google cannot be forced into taking a licence and to use the new related press publishers right. But does Google violate competition law if it forces press publishers into free licences? There are arguments against and in favour (see again Kersting/Dworschak, op cit., on the one hand and J.B. Nordemann/Wolters, op cit., on the other). The “Google scenario” at issue in this German case could occur in the same way for the planned EU related right. Also, for the planned EU right, it may impact on the crucial question of whether the right will ever gain practical importance. Let’s hope that the German cases will provide initial answers here and that they do not have to be terminated for mere formal reasons.

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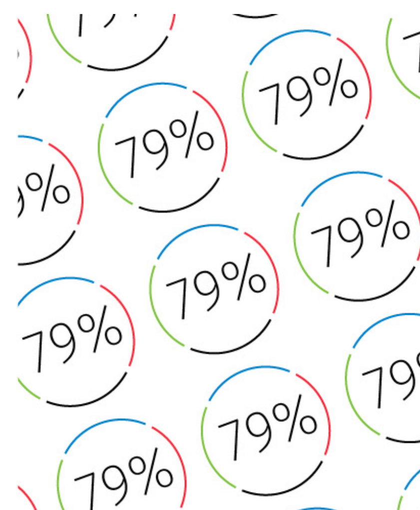

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