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The concept of “publisher” and Article 16 DSM Directive– using the example of stock image agencies

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According to Article 16 EU DSM Directive 2019/790 (“DSM Directive”), a “publisher” may have a claim to a share of the author’s statutory remuneration claims – such as fair compensation for private copies – if the author has granted the “publisher” a right in his work. But who is this “publisher”? After the adoption of Article 16 DSM Directive the answer to this question has considerable practical significance in the European Union. This post explores who should be considered a “publisher” within the meaning of that provision. For example, would stock image agencies which have been granted rights by authors qualify as “publishers”?

The authors have published a longer version of this article in the German Journal of Copyright and Media Law (ZUM), 2022, Edition 8/9, pages 645 et seq.; the article was based on an expert opinion produced by the authors for a German association of professional image agencies. The short form was prepared with the help of Elisabeth Eckhold (legal trainee, NORDEMANN) and with an English translation by Adam Ailsby, Belfast (www.ailsby.com).

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The purpose of Article 16 DSM Directive is to ensure the publisher receives a share in any financial compensation for uses of the work which are allowed under the exceptions and limitations provided by EU copyright law. For certain uses caught by exceptions and limitations, the author receives financial compensation. The restriction of copyright protection through the provision of such exceptions and limitations impacts not only the author’s but also the publisher’s ability to make sales, thus reducing their income. One such

exception provided for under the law is the permission to make private copies. These private copies could be replacing a use (such as purchasing a book) for which author and publisher would be paid. This is why Article 5(2)(a) and Article 5(2)(b) EU InfoSoc Directive 2001/29 ("InfoSoc Directive") stipulate that the author receives fair compensation. The purpose of Article 16 DSM Directive is to ensure that the "publisher" receives a share of this fair compensation, in those Member States that have implemented that Article into their copyright law

In the past, collective management organizations for authors and publishers in Germany ensured in practice that publishers received a share of the statutory remuneration for authors. However, the CJEU ruled in *Reprobel* that such arrangements for a publisher's share were incompatible with Article 5(2)(a) and (b) InfoSoc Directive. Now, in what is presumably a reaction to the *Reprobel* decision, the DSM Directive provides the possibility of a publisher's share. According to Article 16(1) DSM Directive, the Member States are allowed to create a legal basis for a claim for compensation on the part of publishers:

"Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right."

According to that provision, a right to receive a share requires (i) that the author has granted a third party a right in his work; and (ii) that the third party is indeed a "publisher" within the meaning of that provision. Hence, the definition of "publisher" in this context is of crucial importance.

I. "Publisher" according to the DSM Directive

1. "Publisher" as an autonomous concept of EU law

a) Neither Article 16 nor the accompanying Recital 60 DSM Directive provide for a concrete definition of the term "publisher". But still, a lot speaks in favour of giving the concept of publisher a pan-EU meaning. This would mean that it is an autonomous concept of EU law which only the CJEU can interpret conclusively (given an appropriate opportunity).

In particular Article 16 DSM Directive itself speaks in favour of an autonomous concept of

publisher. Under Article 16(1) DSM Directive, the Member States of the European Union are not obliged to provide for rules on compensation sharing between authors and publishers. However, if a Member State does include such rules in their national laws "this Directive should apply in a non-discriminatory way to all Member States." As such, the partial harmonisation only applies to "whether" publishers receive a share but not how this needs to happen.

b) This conclusion is supported by the uniform EU-wide interpretation of copyright law concepts in other copyright law provisions. Under Article 5(2) and (3) InfoSoc Directive, for example, certain exceptions under copyright law are not mandatory for Member States to implement. However, to the extent Member States do provide for exceptions in their national laws, the various elements of those exceptions are autonomous EU law concepts. Their definition is ultimately up to the CJEU – and national legislators and courts should try to identify that pan-EU meaning. The CJEU expressly clarified in its decision in *Deckmyn* that the requirement of uniform EU-wide interpretation also applies in the case of optional exceptions.

c) Against this background, the term "publishers" may not be found in the traditional understanding of EU Member States (like e.g., in the German Publishing Act – Verlagsgesetz). Rather, one has to look at how Article 16 DSM Directive understood the term "publisher".

2. Conditions which publishers under Article 16(1) DSM Directive must meet

a) Article 16(1) DSM Directive and the related recital 60 do not state definitively which companies are covered by the concept of publisher mentioned, rather only a few examples are given (press publications, books or scientific publications and music publications). Thus, any further interpretation depends on the meaning and purpose of Article 16(1) DSM Directive. This follows from recital 60, subparagraph 1 DSM Directive, according to which it should be possible for Member States to maintain existing "schemes for the sharing of compensation between authors and publishers", so that holders of exploitation rights may be compensated for any loss or damage suffered as a result of such copyright exceptions or limitations.

Recital 60 DSM Directive refers to various factors in relation to possible compensation mechanisms of Member States:

- Publishers must make an investment with a view to the exploitation of the works contained in their publications.
- There must be instances where they may be deprived of revenues, where these works are used under exceptions or limitations such that individual exploitation, for which the rightholder would be paid, is no longer possible.
- A further condition that can be deduced from recital 60, subparagraph 2 DSM Directive is that the party entitled to compensation must "contribute with their work to a publication", namely they must have made a causal contribution to the publication.

b) One cannot, however, derive a condition of an "indispensable contribution", as is required for example by the German legislation (see here), from recital 60 DSM Directive. According to recital 60, subparagraph 2 DSM Directive, there are instead three possibilities for a contribution to a publication: (1) The author transfers the rights to a publisher; (2) the publisher is granted a licence; or (3) the publisher "otherwise contribute[s] […] to a publication".

As a result, intermediaries who do not hold any rights at all could fall under the wording of recital 60, subparagraph 2. The suggestion of the second sentence of subparagraph 1 of Recital 60 that the publication must be the publisher's own ("In that context, publishers make an investment with a view to the exploitation of the works contained in their publications […]") should not be interpreted as a condition for publishers but merely as a possibility. For example, recital 60 expressly includes publishers in the area of "music publications" within the concept of publisher. However, the nature of the business of music publishers is such that they do not, at least in certain areas of music, produce own publications in the form of sheet music, rather they arrange for the music (of third parties) to be used, e.g., recorded or broadcast. Moreover, recital 60, second sentence of subparagraph 2 only mentions a contribution on the part of the publisher to "a publication".

II. Examples of publishers within the meaning of Article 16(1) DSM Directive

From the above points one can see that the concept of publisher in Article 16(1) DSM Directive must, in line with the meaning and purpose of that provision, be generally understood broadly. Accordingly, book, music, theatre, magazine, newspaper and art publishers in particular fall under the concept of publisher in Article 16(1) DSM Directive. However, other marketers of works that do not meet the classic definition of publisher may also be considered. In the following, we examine the question of whether, for example, stock image agencies should also be seen as publishers within the meaning of Article 16(1) DSM Directive.

a) Stock image agencies first obtain their own exploitation rights from the creators. The agencies then transfer or grant these rights to third parties to exploit the published images. As such, a contribution to the publication within the meaning of recital 60, subparagraph 2 DSM Directive does take place.

To answer the question as to whether stock image agencies meet the conditions of the concept of publisher, one must look at the typical case. To this end, the following facts would seem to be relevant. Stock image agencies are granted rights by photographers. They offer such rights of use in visual materials to third parties and thus occupy a position between the creators and potential customers. Moreover, it is characteristic of many image agencies that they not only market exploitation rights in visual works such as photographs but also often support the creators in the production of those visual materials. At the same time, the marketing activities of many image agencies today are on a highly professional level. In addition to simply offering rights of use, the agencies prepare metadata and attach keywords to the images so that they can be made available in comprehensive (online) image databases which use text and keyword search options, as well as AI-based visual search functions. Moreover, stock image agencies sometimes provide exclusive options (where individual motifs/series are blocked), different resolution levels, support in finding visual materials, preparation of the materials and customer advice. The comprehensive nature of these marketing activities would strongly suggest that the visual materials would not be published without the involvement of the image agencies.

It should also be noted that there is no absolute threshold as regards the quality of the contribution to the publication. There is no "all or nothing" principle. Differing quality levels in terms of the contribution to the publication, as provided by different types of publishers within the meaning of Article 16 DSM Directive, could be accounted for by adjusting the size of the share of the statutory

claims for remuneration.

b) Stock image agencies also typically invest in the works so that they can actually be used (by third parties). In particular, their input goes beyond that of a mere marketplace that enables third parties to do business in their own name. Image agencies – unlike marketplaces – have own rights, meaning they are acting in their own name. Consequently, they are usually themselves liable if any of the images they offer infringe third-party rights.

It does not follow from either the wording or the meaning and purpose of Article 16(1) DSM Directive that the necessary investment (or similarly for the causal contribution) requires image agencies to make an undertaking to the image creators that they will exploit individual works. Such a conclusion would fail to take into account the special characteristics of the market for images. Unlike what happens in the area of music or print, creators of images produce a whole range of different photographs – sometimes in a series – and then grant rights in those photographs to image agencies. It would not be fair to image agencies if they were required to undertake to exploit every single one of those photographs in order to meet the definition of "publisher".

Even without any obligation on the part of image agencies towards the image creators, one must still assume that there is a sufficient incentive for the agencies to initiate the use of the photographs by third parties. As far as we are aware, it is quite normal for image agencies' remuneration to be dependent on their success: they only get paid if the images are used by third parties. As such, all uses under the copyright exceptions of the publications that the image agencies have brought about damage them by depriving them of income.

c) One must also take into account that prior to the *Reprobel* judgment stock image agencies in many EU Member States – including, for example, Germany – did receive a share in statutory remuneration claims such as fair compensation for private copies. The share of that fair compensation previously received by image agencies is a further argument in favour of image agencies falling within Article 16(2) DSM Directive. According to recital 60, subparagraph 1 DSM Directive, it is the very objective of Article 16 DSM Directive to enable the Member States that had compensation-sharing mechanisms "before 12 November 2015" (i.e. before the *Reprobel* judgment) to re-intoduce them.

III. Outlook

The further development of possibilities for exploiting copyright protected works and thus also the adaptation and continuing advancement of business models for the reproduction and publication of works has already led to a shift in the classic publisher role. At the same time, Article 16 DSM Directive forces us to take a new approach to defining the concept of publisher. The question therefore arises as to which other exploiters, in addition to classic publishing houses, will in future fall within the definition of "publisher". It seems compelling to us that image agencies, for example, should fall within the EU law concept of publisher.

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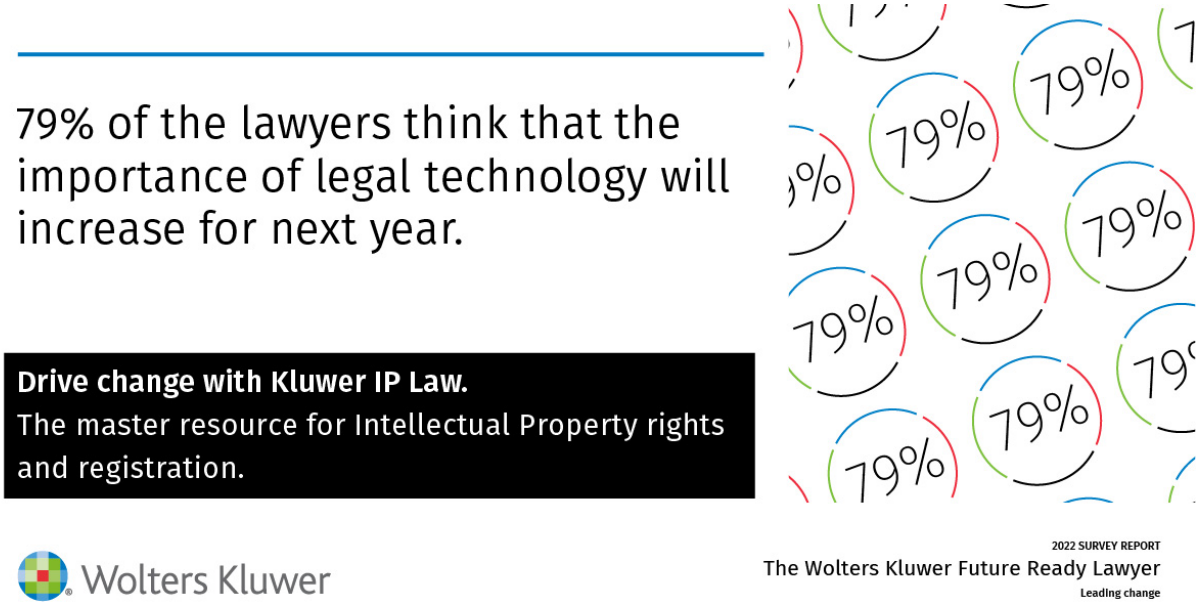

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