

Should we tax the Internet?

- Comments on ancillary copyrights for press publishers

AGENDA

1 Background: General aspects of ancillary copyrights for publishers

2 The German and the Spanish approach

3 Ramifications of the German and Spanish approach

4 Assessment and recap

In general: What is or can be an ancillary copyright for publishers?

- **Basically: An ancillary copyright is not a tax but rather a reallocation of profits between private players realized through private law.**
- **Taxes are collected by the state and spend to serve the public interest. Ancillary copyright incomes - if any - are individual claims to remuneration by one market player against another. They are legal monopolies that intervene fundamentally with the free market. Hence strong evidence is required that they are needed to justify them**
- **All the more, ancillary copyrights are no “Google taxes” but affect many others first and foremost**

In general: What is or can be an ancillary copyright for publishers?

- **An ancillary copyright is an Intellectual Property Right. The ancillary copyright for publishers extends the scope of copyright to tiniest excerpts of content that copyright does not protect deliberately (i.e. are public domain so far).***
- **Note: The ancillary copyright has nothing to do with a protection of authors! It is an additional Intellectual Property Right for publishers that did not exist so far anywhere in the world.**

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The German ancillary copyright

- **Introduced August, 1, 2013 against advice of all commentators (academia, economy, start-ups ...)**
- **The German ancillary copyright is an exclusive right over the use of snippets to be displayed in search results. Hitherto such snippets are not protected (i.e.: public domain) because such exclusive rights would massively obstruct the rights to communicate and to link and the freedom of speech***

The German ancillary copyright

- As an exclusive right on snippets any search engine and aggregator needs to conclude a license contract for any snippet before it is displayed. Any use without license is a copyright infringement!
- Ancillary copyrights of this fashion lead to licensing obligations for linking like the ones music and movie online services struggle with.

The Spanish ancillary copyright

- The Spanish ancillary copyright is a compulsory remuneration right (no exclusive right) that cannot be waived
- Differences to Germany: The use might be legal without clearing rights in advance. However a remuneration must be paid
- It is an unprecedented measure of paternalism – no publisher of “*periodic publications or websites which are regularly updated, for the purposes of information*” can opt-out*. Not even the publishers of open content**

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Ramifications in Germany

- **Some large publishers joined a collecting society (VG Media)**
- **VG Media claimed up to 11% (!) of the turnover of search engines and aggregators that is directly or indirectly generated from displaying snippets**
- **None of the addressed ISPs complied. VG Media sued Google, Yahoo!, Microsoft and others. Several others, e.g. small aggregators were pushed to conclude license agreements**
- **So far not a single cent has been paid (except to courts and lawyers)**

Ramifications in Germany

- All ISPs except Google stopped to index VG Media publishers completely
- Google announced to reduce search results to links and headlines
- All publishers gave in and granted Google (not: the other ISPs) a gratuitous license. Axel Springer made a test and found out that – if only links and headlines are provided – they lose 40% of search engines users
- VG Media tried to force Google to provide full search results through a complaint to the antitrust authority
- Antitrust authority declined but launched inquiries over VG Media's practices instead (because of the discriminatory preferential treatment of Google)

Ramifications in Spain

- **Google News was shut down – Spanish publisher association AEDE begged Spanish and European authorities for help***
- **Spanish aggregators (like “Meneame”) consider to move to another territory or to go out of business entirely (like “Infoaliment”)**
- **Many foreign aggregators, app providers et cet. providing Pan-European services (also in Spain) have to react. Options: Geo-block Spain or pay**

Ramifications in Spain

- **Spanish publishers (together with French, Polish and Italian) expressed deep concerns about the introduction of ancillary copyrights in an open letter to Commissioner Oettinger**
- **Estimated result: Spanish users will be blocked from news aggregating services indefinitely**

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Assessment and recap

- Ancillary copyrights lead to lose-lose-situations on a large scale
- Particularly for small and medium market players (ISPs and publishers alike) who cannot afford long-term lawsuits, legal uncertainty, loss of visibility (i.e. users, clicks, add revenues)
- Initially the ancillary copyright addressed Google. It turned out that Googles competitors or competitors-to-be suffer most*
- Same is true for small publishers: Those who can push for enforcement, bear legal costs, risk visibility and coverage might one day benefit. The others rely on the fruitful symbiosis with search providers

Assessment and recap

- **No need for ancillary copyrights: no market failure, no competition but collaboration between search and content providers. Their services are complementary not competitive**
- **National ancillary copyrights are restraints to the single digital market: They make it impossible to provide European-wide search services on the same legal basis**
- **Ancillary copyrights are not in line with the EUCJ cases BestWater and Svensson according to which content that is made publicly available online can be displayed on other sites without permission or remuneration**
- **Exclusive rights on linking jeopardize (European) online innovation, fundamental rights of the users and the main functional principles of the Internet**