Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'

1. On which grounds do you obtain rights for the purposes of publishing your press or other print content and licensing it?

Other (please specify)

On the basis of deeds of assignment concluded with broadcasting stations and press publishers, VG Media is granted the original ancillary copyrights and derivative copyrights and ancillary copyrights acquired by such companies from third parties in relation to licence agreements and from employees in the context of their employment relationships for the purposes of management.

2. Have you faced problems when licensing online uses of your press or other print content due to the fact that you were licensing or seeking to do so on the basis of rights transferred or licensed to you by authors?

Yes, often

There are problems in Germany with regard to the issuing of licences for the online use of press content, primarily due to the market structure on the users' side. Although licensing through VG Media is based on the specific – albeit limited – intellectual property right of the press publishers it represents, the behaviour of Google as by far the largest, essentially monopolistic user of digital press products represents the biggest hurdle for VG Media when it comes to licensing such products. The behaviour of the dominant market player inevitably also has a bearing on licensing and contractual negotiations with other search engines and news aggregators. (With regard to the problems regarding competition law, see also the remarks under question 3 below). In particular:

VG Media is a collecting society based in Germany with significant international operations (turnover of more than 9.5 million euros generated abroad in 2015). As a collecting society for private media companies, it represents the ancillary copyrights of close to 230 digital publishing services (domains). VG Media exercises the ancillary copyright of press publishers on the basis of Section 87f of Germany's Copyright Act (UrhG) and concludes licence agreements with the commercial users of digital press products – search engines, news aggregators and news apps. As far as is publicly known, the remaining German press publishers that have not assigned their rights to VG Media have to date not assigned their rights to any other collecting society and have not independently arranged licences with users.

German press ancillary copyright does not cover hyperlinks. There are also no restrictions on the private use of press products. Only commercial use by search engines and other aggregator services is subject to payment obligations. This does not include 'individual words' and 'small text excerpts’. In accordance with the settlement proposal of the Arbitration Board of the German Patent and Trade Mark Office (DPMA) dated 24 September 2015 regarding VG Media’s tariff,
these ‘individual words’ and ‘small text excerpts’ are limited to seven words in length. All texts which are longer than seven words are consequently subject to payment obligations.

To date, VG Media has succeeded in concluding agreements concerning press ancillary copyright remuneration with five news aggregators and search engines.

Google Inc. is the largest user of digital press products. Google has a share of more than 94% of the German search engine market. On the basis of Google’s dominant market position alone, which has been confirmed by the European Commission the company is able to refuse to pay for the use of digital press products, in spite of the fact that the applicability of the VG Media tariff has been confirmed by the Arbitration Board of the DPMA. As the largest user, Google refuses to recognise the law as applicable, including competition law, and refuses to refrain from misusing its market power prior to the judicial clarification of legal disputes: Google threatens publishers who wish to assert their ancillary copyright with reduced presentation in or delisting from its search results and services.

This results in considerable losses of traffic on the affected publishers’ websites, thus jeopardising the refinancing potential of what is offered on the sites. The publishers represented by VG Media have only been able to prevent a downturn in traffic by granting Google usage permission for free. Before granting such free usage permission on 5 November 2014, Axel Springer SE put up with having limited presentation on Google pages for a period of two weeks starting on 23 October 2014. This had a drastic impact: the traffic on the websites bild.de, autobild.de, sportbild.de and computerbild.de generated by means of Google searches fell by 40%. Traffic generated by searches via Google News even slumped by 80%.

Axel Springer SE calculated the impending financial losses caused by lost advertising revenues as a result of the downturn in traffic to be a seven-figure sum per website in the course of a year. Axel Springer SE therefore followed the other publishing companies in granting Google permission to use its press products for free.

Google was thus able to use its dominant market position to force the press publishing companies which had granted VG Media their collection rights to allow it to use text excerpts free of charge.

In addition, Google’s behaviour as outlined and as widely discussed in the public arena has led to other press publishers choosing from the outset not to assert the ancillary copyright created in their favour.

3. Have you faced problems enforcing rights related to press or other print content online due to the fact that you were taking action or seeking to do so on the basis of rights transferred or licenced to you by authors?

Yes, often

After its tariff for the ancillary copyright of press publishers was stated and announced in the German Federal Gazette, VG Media offered to engage in negotiations with the providers of search engines and news aggregators regarding the issuing of licences subject to payment obligations. However, a number of the major search engine operators, in particular the market leader Google, still refuse to recognise the law as applicable and the appropriateness of the usage tariff.
The body responsible for clarifying disputes of this kind is, in the first instance, the DPMA’s Arbitration Board. This board reviews the applicability and appropriateness of the tariff published by VG Media. The Arbitration Board presented a settlement proposal to the parties on 24 September 2015, in which, among other things, it confirmed the applicability of the tariff for press publishers. The only aspect not confirmed by the Arbitration Board was the amount of the tariff. The Arbitration Board called upon the parties to enter into negotiations regarding the payment due in specific cases. All the parties filed objections to the Arbitration Board’s decision. The enforcement of press ancillary copyright is now being pursued in the manner prescribed in civil law.

Google uses its dominant 94% share of the search engine market to circumvent press publishers’ ancillary copyright in Germany and to cause division among the rightsholders (see question 2). With Google’s essentially monopolistic position enabling it to decide to what extent publishers’ products can be found online, the publishers that insist on asserting their ancillary copyright are placed at a serious competitive disadvantage compared with those publishers that – intimidated by Google’s threats – choose not to assert their right from the outset.

Germany’s Federal Cartel Office has so far been very reticent regarding the application and enforcement of German competition law for global Internet enterprises. An examination of Google’s market behaviour by the Federal Cartel Office in relation to the introduction of publishers’ ancillary copyright as initiated by the press publishers and VG Media failed to bear fruit. A number of the publishing companies organised within VG Media therefore took the matter to the Berlin Regional Court. With these legal proceedings, the publishing companies took a stand against their permission for Google to use their digital publishing products for free, which came about on the basis of what they consider to be Google’s misuse of its considerable market power. The Berlin Regional Court dismissed the case on 19 February 2016. The publishing companies are planning to have the regional court’s decision reviewed by the Court of Appeal in Berlin.

4. What would be the impact on publishers of the creation of a new neighbouring right in EU law (in particular on their ability to license and protect their content from infringements and to receive compensation for uses made under an exception)?

Strong positive impact

There are clear basic legal provisions regarding the use of property, irrespective of whether in relation to tangible goods or intellectual property. Accordingly, ancillary copyrights that protect the services of media enterprises have existed for decades: the rights of the producers of recordings, of broadcasting companies, of film production companies and many others.

The work of the press publishing companies creates the organisational, technical and business parameters for maintaining a diverse media landscape. A dedicated intellectual property right for press publishers was introduced in Germany on 1 August 2013 in order to ensure that the publishing companies can continue to perform this important function in the age of digitisation too. Previously, copyright had failed to offer the publishing companies sufficient protection against the use of their press products online. It was possible to use and reproduce press products or parts thereof as people wished without having to first seek permission from the provider of the publishing service. It is the explicit wish of the German legislator that publishing companies now be able to protect their services on the basis of their own intellectual property right and that they be given the foundations for refinancing their investments in the digital age too.
Moreover, the principles of copyright which have been in place for decades to achieve settlements between rightsholders and users could be applied to the digital media world in an appropriate manner. In particular, this would give publishers legal certainty regarding the use and enforcement of their rights and would allow them to use the revenues generated in this way to make the necessary investments in new content and business models. This safeguards not only the diversity of what is offered, but also competition among the publishing companies.

When the EU’s Information Society Directive (InfoSoc Directive) entered into force in 2001, publishers were not even remotely faced with the publishing business conditions which have since materialised in the course of digitisation. At that time, a publisher had complete control over its product’s value chain. This is no longer the case. VG Media therefore explicitly supports the wish to close the gap in European Union law and to award press publishers their own intellectual property right.

When an ancillary copyright was created for press publishers in Germany, the German lawmakers assumed that, on the basis of this new legal position, the press publishers would be able to reach agreements with search engine operators and news aggregators regarding the use of their press products and the payment of adequate remuneration. Although mandatory management by a collecting society was indeed discussed in the legislative process, at that time the lawmakers deemed the optional incorporation of the press publishers’ ancillary copyright into a collecting society to be sufficient. However, as has since become evident, the actual market conditions, which are essentially monopolistic in nature, stand in the way of the effective enforcement of the press publishers’ ancillary copyright. While there is no legal framework for the joint enforcement of the rights of all press publishers, the dominant market player will continue to succeed in getting the rightsholders to waive any assertion of their rights on the basis of its behaviour.

An EU-wide intellectual property right for press publishers would also aid the enforcement of the ancillary copyright of press publishing companies in Germany. The assertiveness of the entire European Union and its member states would be strengthened and improved, in particular in relation to the US enterprises which hold sway over the market.

There must, however, be appropriate supporting regulations from the start to ensure that an EU-wide intellectual property right effectively can be enforced by the press publishers. In addition to mandatory management by a collecting society for the licensing of such press product use, these include a so-called outsider arrangement that allows collecting societies to enter into negotiations for a complete repertoire even if not all the rightsholders have explicitly placed their rights with the collecting society. Only in this way can the division of the rightsholders into various groups be avoided — such a division allowing a dominant market player to pit these groups against each other and to thus prevent them from asserting their rights effectively. Based on their legal framework and the duty imposed upon them to be non-discriminatory and transparent, only collecting societies as a legal exception from the ban on cartels can guarantee that press publishers’ ancillary copyright can be licensed to the dominant market players on the basis of appropriate conditions.

5. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on authors in the publishing sector such as journalists, writers, photographers, researchers (in particular on authors’ contractual relationship with publishers, remuneration and the compensation they may be receiving for uses made under an exception)?
No opinion

As VG Media only asserts the ancillary copyright of press publishers in accordance with German copyright law in addition to the copyrights and ancillary copyrights of private broadcasting companies, it is unable to comment authoritatively on the impact of a new, related intellectual property right for publishers in all sectors as it lacks the necessary empirical data. Please see question 6.

6. Would the creation of a neighbouring right limited to the press publishers have an impact on authors in the publishing sector (as above)?

Strong positive impact

The appropriate participation of the press publishers in the value added generated on the basis of their publishing services would, on the one hand, play a part in safeguarding their existence as publishers and broadcasters in the age of digitisation too, and would thus also safeguard their continued investment in education and employment of the authors.

On the other hand, Germany’s ancillary copyright for press publishers also explicitly recognises the services of the authors on the basis of the own right of participation of the author as formulated in Section 87h of the German Copyright Act (UrhG). Pursuant to German law, authors are to be awarded an appropriate stake in the remuneration generated by ancillary copyright. The level of this right of participation is a matter of negotiation between the press publishers and the journalists and editorial staff hired by them.

As such, the authors benefit from the press publishers’ intellectual property right too because the publishing companies employ innumerable journalists, editorial staff and freelancers, and make investments in media content and innovations.

Intellectual property rights for press publishers which are similar throughout Europe would therefore also have a positive impact on all authors working in the publishing sector: writers, journalists, photographers and editorial staff.

A dedicated intellectual property right for press publishers would not affect the authors’ copyright, nor would it have any bearing on contract law arrangements between publishing companies and authors.

7. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on rightholders other than authors in the publishing sector?

No opinion

As VG Media only asserts the ancillary copyright of press publishers in accordance with German copyright law in addition to the copyrights and ancillary copyrights of private broadcasting companies, it is unable to comment authoritatively on the impact of a new, related intellectual property right for publishers in all sectors as it lacks the necessary empirical data. Please see question 8.

8. Would the creation of a neighbouring right limited to the press publishers have an impact on rightholders other than authors in the publishing sector?

Strong positive impact
VG Media assumes that, besides authors, journalists and editors (see question 6), other right holders, for instance photographers and other image creators, who are involved in the production of published works, or who desire to make use of press content, would also benefit from a right covering press publishers. The press publishers would also pass on fees for their protected works to their employees, which would safeguard and create jobs. A considerable number of jobs would be affected: a total of 528,000 people were employed in the European newspaper and periodical sector in 2013 – more than in any other sector of the creative industry. In Germany, more than 60,000 people were employed by periodical publishers alone in 2014.

9. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on researchers and educational or research institutions?

No opinion

Since, besides the copyright and ancillary copyright of private broadcasting companies, VG Media deals exclusively with the protection of ancillary copyright of press publishers in accordance with German copyright law, it cannot make any informed statements about the impact of a new neighbouring right covering publishers in all sectors because it does not have the necessary experience.

10. Would the creation of a neighbouring right limited to press publishers have an impact on researchers and educational or research institutions?

No opinion

Since VG Media deals exclusively with the ancillary copyright of press publishers in accordance with German copyright law, enforcing it against commercial users like search engines and news aggregators, it cannot make any informed statements about the impact of a new neighbouring right covering press publishers on research and educational institutions.

11. Would the creation of new neighbouring right covering publishers in all sectors have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press or other print content)?

No opinion

Since, besides the copyright and ancillary copyright of private broadcasting companies, VG Media deals exclusively with the protection of ancillary copyright of press publishers in accordance with German copyright law, it cannot make any informed statements about the impact of a new neighbouring right covering publishers in all sectors because it does not have the necessary experience. Please see question 12.

12. Would the creation of such a neighbouring right limited to press publishers have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press content)?

Strong positive impact

Firstly, it should be borne in mind that a European right covering publishers would not affect the ability to freely create links to articles or to share them. Nor would it in any way restrict the freedom of quotation or private use.
An EU-wide right for press publishers would also provide legal certainty for online service providers regarding the use of press content. As a result, the legal framework for the protection of publishers' investments in the creation of press content in digital value chains would be clearly defined in harmony with the fundamental principles of copyright.

A central principle of copyright is that right holders must receive an appropriate share of the user revenues earned with the help of their works. The fact that, in the process, the right holders also profit from the exploitation of the rights by the users is not the exception but rather the rule. For instance, music labels also benefit when music by music creators they have signed is played on the radio. However, this does not release the radio stations from their obligation to pay to use the music. The same thing must apply to the use of press content by search engines or news aggregators, for example, which, just like the radio stations, benefit considerably from the attractiveness of the content generated by the newspapers and periodicals.

Both VG Media’s published tariff for ancillary copyright payments for press publishers in Germany as well as other possible calculation methods suggested by the Arbitration Board take account of the turnover generated by the platform operator through the use of the content. The ancillary copyright for press publishers therefore creates an equitable situation and fair competition because small search engines with low turnover pay a correspondingly smaller amount than large search engines. According to the settlement proposal made by the Arbitration Board of the DPMA, providers with no turnover need only pay a minimum amount.

13. Would the creation of new neighbouring right covering publishers in all sectors have an impact on consumers/end-users/EU citizens?

No opinion

Since, besides the copyright and ancillary copyright of private broadcasting companies, VG Media deals exclusively with the protection of ancillary copyright of press publishers in accordance with German copyright law, it cannot make any informed statements about the impact of a new neighbouring right covering publishers in all sectors because it does not have the necessary experience. Please see question 14.

14. Would the creation of new neighbouring right limited to press publishers have an impact on consumers/end-users/EU citizens?

Strong positive impact

A European right for publishers would give consumers and end-users the certainty that publishers and journalists were being adequately compensated for their works, including for digital press content. Readers of newspapers and periodicals pay for high-quality journalistic content as a matter of course – at the newsstand and via subscriptions. A right for press publishers will give readers the certainty that they will continue to have access to quality journalism in the future, since publishers will be able to refinance their investments and continue to make investments in the future.

For end-users, it is particularly important that they can continue to find informative journalistic content and opinion pieces via search engines and news aggregators in the future. Their own dedicated right will enable the press publishers to be compensated for the use of their works, and also safeguard high-quality content and ensure it is widely available online.
A representative online consumer survey on the use and importance of Internet search engines carried out by Solon Management Consulting on behalf of VG Media (http://lsraktuell.de/mediathek/statistiken) found in spring 2015 that 79.5% of users believe a Google search results list is incomplete if it does not include journalistic content. 88.9% of users pay attention to the sources of information in Google results lists. Users show a clear preference for relying more on well-known journalistic news sites (82.5%) than on information from unknown sites. 97.7% of users therefore require a good search engine to display all relevant information in full. 97.4% of users also believe a good search engine should display an objective, independent list of results.

15. In those cases where publishers have been granted rights over or compensation for specific types of online uses of their content (often referred to as "ancillary rights") under Member States' law, has there been any impact on you/your activity, and if so, what?

**Strong positive impact**

As a collecting society for private media companies, VG Media has been administrating the ancillary rights of nearly 230 digital publishing outlets (domains) since 2014 on the basis of the German ancillary copyright for press publishers, and negotiates licence agreements with commercial users of digital press content – search engines and news aggregators. Since 2001, VG Media has been representing the retransmission rights of nearly all the German private radio stations and broadcasting companies.

At the start of 2014, in the course of admitting various press publishers as shareholders, VG Media was restructured. Since its establishment and authorisation by the German Patent and Trade Mark Office and the European Commission, it has been the only collecting society for media companies in Germany and Europe. In taking this step, the shareholders of VG Media – 13 private television and radio broadcasting companies and 12 press publishers – have emphasised the need for solidarity when protecting the copyright and ancillary copyright of private media companies and systematically enforcing these rights against infrastructure operators with international operations.

16. Is there any other issue that should be considered as regards the role of publishers in the copyright value chain and the need for and/or the impact of the possible creation of a neighbouring right for publishers in EU copyright law?

**Yes**

The plurality of the European press that we know and appreciate every day depends to a vital extent on the ability of the press publishers to continue to invest in content in the future. Press publishers bear the high costs and risks involved in creating and editing journalistic content. They invest substantial sums in staff and technical resources to secure the quality and high credibility of their products, now and in the future. These are not simple industrial products, but constitutionally protected elements of a democratic system of law and freedoms. Press publishers play a key role in the European economy, European culture and society by classifying and depicting world events in their printed and digital coverage.

Media pluralism is an integral, fundamental component of the European Charter of Fundamental Rights. This pluralism entails responsibility – high-quality journalistic content, whether in the form of live coverage, well-researched investigative reports, political journalism or sports coverage, cannot be free. This content is associated with high costs, all of which are borne by the press
publishers: payments made to journalists and editors, costs of production, publication and distribution. The publishers have to be able to make a profit in order to be able to ensure the plurality and therefore the independence of the media, now and in the future.

The Internet economy is a low-cost economy without any entry barriers, whereas the production of journalistic content, from which the Internet economy makes a considerable profit, is associated with high costs. The economic context of the press publishers, which has changed dramatically as a result of digitisation, makes it necessary for press publishers to be covered by the same rights as disseminators of works in other creative industries. Without a free and independent press capable of creating cost-intensive press products of a high journalistic standard, the democratic freedom of the European Union and its Member States would be permanently at risk.

In concrete terms, the financial benefit of a separate right can be calculated using the example of the ancillary copyright for private broadcasting companies, which VG Media protects in Germany on behalf of 97% of private radio and television stations:

For 2015, VG Media received EUR 44 million for its 163 television and radio broadcasting companies that are covered by the right. Revenues from their cable retransmission rights, which VG Media passes on in full to its covered members after the deduction of administrative costs, represent a significant refinancing source for the broadcasting companies. For regional and local broadcasting companies in particular, these revenues represent an indispensable part of their annual budget, which they use to refinance and make investments, to pay their staff and plan innovations.

The private radio and television stations in Germany alone employed over 22,700 permanent staff in 2014 (source: vprt). This does not take into account additional employment effects, for instance in the production and music business, in sport, advertising and the field of networks and technologies. In this way, the private radio sector safeguards several times its number of permanent employees in associated jobs.

Since the greatest user of digital press content, Google Inc., does not publish its turnover figures and, as a virtual monopolist, is preventing the enforcement of ancillary copyright for press publishers in Germany, VG Media is not yet able to provide comparable data for the value of ancillary copyright for press publishers. Other key users have paid significant fees. In total, VG Media has received EUR 714,540 for uses since 1 August 2013 (the date the ancillary copyright for press publishers came into force). This shows that ancillary copyright for press publishers can be applied in Germany and that rights users are prepared to pay – despite systematic resistance from the dominant and quasi-monopolistic market leader on all conceivable levels.