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EDITORIAL

Searching the Future of Newspapers: With a Little Help from Google and IP law?

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A paper called *Relation aller Fürnemmen un gedenckwürdigen Historien*, printed in Strasbourg in 1605, is often seen as the world's first newspaper. Knowledge of this kick-start of the press is taken from a petition by the publisher, found in the Municipal Archives of Strasbourg. With this petition, Johann Carolus, printer and publisher, asked for a monopoly right so as to protect his investment against those fellows who copy news.[1]

Some 400 years later, the successors of Johann Carolus share his feeling of being in need of protection. Their investment in getting information, researching facts, selecting news, writing stories and editing papers is no longer as profitable as it was, and thus, newspaper companies are in dire straits to find a new business model. One model is to take money from those who profit from the diligently compiled content in the digital age – Google for instance. Germany and France have dealt with the request to skim off some profits from the search engine giant. The solutions in the two countries are completely different in design, but they do teach three lessons for intellectual property in the digital age.

The starting point for making Google and the like pay is the use of "snippets", i.e. small extracts from newspapers on websites and particularly in the search engines run by Google. These brief excerpts are combined with so-called "deep links" to the articles from which they were taken. In *Paperboy*, the German Federal Supreme Court ruled that such news services on websites neither violate the database or other rights of publishers nor are unfair for bypassing the starting page

[1] Cf. Weber (1992), 38, 257 ff.

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of newspapers by directing the user directly to the relevant article.[2] In *Infopaq*, the European Court of Justice seems to have accepted that eleven words from a newspaper article may constitute an intellectual creation that enjoys copyright protection.[3]

Now, the German parliament decided on 1 March 2013 to introduce a neighboring right for newspaper publishers in the German Copyright Act. The Act at Sec. 87(f)(1) now reads:

"The producer of a press product (press publisher) has the exclusive right to make the press product or parts thereof available for commercial purposes, except for individual words or smallest text excerpts."[4]

The exception for "individual words or smallest text excerpts" represents a last-minute change in government opinion. Originally, the German coalition government had favored a more comprehensive right for publishers. According to the explanatory memorandum, the exception leaves the possibility to search engines and aggregators to briefly describe the search result they link to. Does Google have to change the current Google News model? That is hard to tell with a view to the materials and the wording. Payments from Google to publishers are unlikely and would probably not amount to very much. Now, it remains blurry who is targeted by the new rule.

In France, the solution to the snippets issue was completely different. Faced with the threat of a tax on links, Google paid €60 million into a "Digital Publishing Innovation Fund" to facilitate the transition of newspapers to online. The French President François Hollande called the agreement between the Internet giant and the French Press Association, negotiated under government auspices, a "world event".[5] Essentially, Google provides some money and the know-how of its technicians to co-operate on selected projects with newspaper publishers. While the exact design and operation of the fund is still unclear, it seems that Google took a very easy way out. The company now may directly influence how publishers go online and devise an integrative strategy for those content providers on which Google depends. Probably, competitors would wish for such privileged access.

What is to be learned from the snippet solutions in Germany and France?

Firstly, the Internet still troubles the newspaper publishing community. What is protected under the current regime? What deserves protection? Who should profit? And how can a rule be devised and enforced? Such basic questions of IP law still need further investigation. The two solutions in Germany and France prove that hard work remains to be done: Buying the French press, celebrated as a victory of

[2] German Federal Supreme Court, 17 July 2003, Case No. I ZR 259/00, 35 IIC 1097 (2004) = 2003 GRUR, 958 – *Paperboy*.

[3] ECJ, 16 July 2009, Case No. C-5/08, 2009 ECR I-6569 – *Infopaq*.

[4] Translated by RP from the German version: "*Der Hersteller eines Presseerzeugnisses (Presseverleger) hat das ausschließliche Recht, das Presseerzeugnis oder Teile hiervon zu gewerblichen Zwecken öffentlich zugänglich zu machen, es sei denn, es handelt sich um einzelne Wörter oder kleinste Textausschnitte*." BT-Drs. 17/12534, *cf*. http://dipbt.bundestag.de/dip21/btd/17/125/1712534.pdf and BT-Drs. 17/11470, *cf*. http://dipbt.bundestag.de/dip21/btd/17/114/1711470.pdf.

[5] *Cf*. http://www.elysee.fr/declarations/article/declarations-conjointes-a-l-issue-de-la-signature-de-l-accord-avec-google/.

private negotiations, may be read as a government failure in intellectual property. The government proposals in Germany were met with much criticism regarding technicalities, but also for the understanding of copyright law in general. For instance, references to judgments of the Federal Supreme Court made in the explanatory memorandum seem irritating; crucial expressions leave room for (too much) interpretation and litigation.

Secondly, the discussions accompanying the deals in both countries show that the protection of IP rights is not a business of neutrality. The battle for the new neighboring right was hard-fought with tough lobbying from publishers and Google alike. The principle that IP legislation should not favor some business models over others had always been a chimera. Granting exclusive rights does have a regulatory impact on markets and is more helpful for some actors than for others. While this sounds obvious, the academic community in parts still upholds the alleged neutrality of intellectual property rules and chooses to ignore an effects-based analysis.

Thirdly, if intellectual property reform needs a principled approach and is highly political, it may no longer be seen as an isolated field of law, but as a regulatory tool in economic policy. Public interest in this noble area, boon and bane at once, poses challenges for IP law scholars in the digital age. In this regard, three aspects stand out: Scholars need to see the broader picture of economic policy, which – from a legal perspective – means to look at the fundamental rules of competition law. In both solutions, competition law concerns arise. Scholars also need to make their points in public, which means that clear language and conclusive evidence is needed. Academic scholars, amongst them some of the most prominent German IP lawyers, had opposed the neighboring right in a resolution published by the Max Planck Institute for Intellectual Property and Competition Law.[6] This step influenced the debate in Germany, but it also required some public-relations work, which is rather uncommon for some academic institutions.

Finally, the snippet issue showcases the complexities of regulation: Google directs the traffic into several directions; it also optimizes advertising for publishers; the company explores new fields of business; and faces competition law charges for some of its services. Targeted interventions run the risk of producing unforeseen effects – IP legislation is a discovery procedure nowadays. Is "market failure" a suitable starting point for pro-protectionist intervention? If yes, remedying market failures may easily turn into a government failure. This calls for a more refined economic analysis of Internet and IP markets on the one hand, but also for a more principled approach to IP legislation on the other hand. As long as innovation researchers cannot say what will happen if certain incentives are granted, the question whether to introduce such an incentive remains a value judgment, a normative decision, which should be based in the general concept of IP. Both the French fund and Sec. 87(f) may remain toothless tigers. With a view to the dynamics in the field, this animal is more welcome in the garden of IP law than a monkey with razor, even if some business models have to be reinvented. Johann Carolus learned that 400 years ago. His petition was dismissed.

[6] *Cf.* http://www.ip.mpg.de/files/pdf2/Stellungnahme_zum_Leistungsschutzrecht_fuer_Verleger.pdf.

Reference

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