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Roberto Viola
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6 June 2017

Necessary Participation of EU Commission in European Court of Justice (CJEU) - Case C-299/17

Dear Roberto Viola,

Please allow us to inform you that we consider it to be in the strong interest of the EU Commission to deliver the EU Commissions' opinion in the CJEU-proceeding VG Media ./. Google Inc., US. The EU Commission will receive the official request for your opinion in June 2017.

We regard the Directive 98/34/EC and its notification procedure as important secondary EC law enabling member states to align on technical standards in the interest of the functionality of the internal market. However, an over-extensive interpretation of the Directive might lead to the inapplicability of vast numbers of existing national laws that would then fall within the Directives' scope.

An extensive interpretation of the Directive would de facto leave the independent German press publishers without compensation for the exploitation of their rights through Google Inc., US, and other search engines. As publishers, we trust that you have realized how important it is to keep an independent press alive and to help financing this press against all odds. Saying this the law granted to press publishers by the German legislator was an important step. We appreciate that the EU Commission is also taking measures to protect a free and independent press against exploitation through Google Inc., US, and others.

Enclosed please find our common line of arguments. Please do not hesitate to contact us.

Best Regards,

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Case C-299/17
Information for the
EU COMMISSION

**CJEU Preliminary Ruling on the Interpretation of Directive
98/34/EC**

with regard to the

German Ancillary Copyright for Press Publishers

A free and pluralist press is a vital element of democratic societies

A free, independent and pluralist press is crucial for the functioning of democratic societies. It is the duty of the press to inform and to stimulate public discourse. In this respect, the European Court of Human Rights has rightfully referred to the press as a "public watchdog". However, quality journalism is both time-consuming and cost-intensive. Press publishers therefore rely on legal protection of their work product against free riding. If informing citizens ceases to be economically viable, this task will sooner or later be neglected.

The Commission and Member States jointly endeavour to provide legal certainty to press publishers

Aware of the pivotal role of press publishers for European democracy, the Commission has recently proposed a directive which sets out an ancillary copyright for press publishers regarding press publications (COM(2016) 593 final). Similar provisions are enshrined in German law since 2013: § 87f of the Copyright Act provides press publishers with an exclusive right for the making available to the public of press publications. Other Member States, such as Spain, have adopted comparable legislation or have started legislative projects in that regard.

Google strives to protect its business model at all cost

Google dominates the European market of online search services with a share of over 90 %. Its business model consists in the exploitation of online content provided by others. Equipped with enormous financial resources and quasi-monopolistic market power, Google has initiated a Europe-wide campaign against any attempt to protect the intellectual property of press publishers. As part of its campaign, Google has come up with the argument that Member State provisions on the ancillary copyright for press publishers are inapplicable because they were not notified to the Commission in accordance with Directive 98/34/EC (as amended by Directive 98/48/EC).

The CJEU is called to rule on the applicability of the ancillary copyright for press publishers

In a private law dispute between the German press publishers, represented by VG Media GmbH, against Google Inc., the district court of Berlin has recently decided that the case must be brought before the Court of Justice of the European Union (CJEU) for preliminary ruling. The district court considers that Google has indeed violated the ancillary copyright of press publishers. However, it deems that this right constitutes a 'rule on services' and, thus, should have been notified to the Commission in accordance with Article 8(1) of Directive 98/34/EC. Furthermore, the district court is of the opinion that the supposed breach of Directive 98/34/EC renders the ancillary copyright inapplicable.

The German ancillary right for press publishers does not fall in the scope of Directive 98/34/EC

When adopting the respective provisions in 2013, the German Federal Government was convinced that notification under Directive 98/34/EC was not required. The European Commission took notice of that position and, in spite of intense lobbying by Google actors, did not see any need to take further steps. This is in line with the Commission's guide to Directive 98/34/EC, which points that it is "extremely important to emphasize that the obligation to notify in advance does not apply to all draft national regulations which – directly or indirectly, explicitly or implicitly – may concern Information Society services". Only a limited number and a well-defined category of draft national regulations will, for the

purposes of the Directive, have to be notified in advance, namely the regulations specifically aimed at Information Society services.”

A negative CJEU ruling would have unforeseeable consequences

If the CJEU were to share the view of the district court, countless provisions of Member State law, including such that confer rights on individuals, would be regarded as notifiable under Directive 98/34/EC and, thus, as inapplicable. This would have potentially disastrous consequences on economic actors that rely on the existing legal framework. What is more, the disavowing of national laws on the protection of press publishers would represent a considerable setback to the Commission's own efforts to modernise EU copyright rules.

Case C-299/17
Legal Analysis

**CJEU Preliminary Ruling on the Interpretation of Directive
98/34/EC**

with regard to the

German Ancillary Copyright for Press Publishers

CJEU – preliminary reference regarding ancillary copyright for press publishers

A. Summary

The German Copyright Act sets out an ancillary copyright for press publishers. In a dispute between a collecting society and Google, the district court of Berlin has asked the CJEU for a preliminary ruling. It considers the right inapplicable because the respective provisions were not notified to the Commission in accordance with Directive 98/34/EC (as amended by Directive 98/48/EC). This paper shows that the district court has adopted an overly broad interpretation of the obligation to notify flowing from Directive 98/34/EC. If the CJEU were to share the position of the district court, this would have unforeseeable consequences for existing national legislation.

B. Background

A free and pluralist press is essential to the proper functioning of a democratic society. In order to ensure that the press can fulfil its role as a 'public watchdog'¹ under economically sound conditions, the German Copyright Act (UrhG) gives press publishers a right related to copyright for the making available to the public of press publications. The relevant provisions read:

§ 87f(1) first sentence UrhG:

"The producer of a press publication (press publisher) has the exclusive right to make the press publication or parts thereof available to the public for commercial purposes except for individual words and minimal text fragments."

§ 87g(4) UrhG:

"The making available to the public of press publications or parts thereof is permissible unless it is done by commercial providers of search engines or by commercial providers of services that process information in a similar way. Moreover, the provisions of part 1 section 6 apply *mutatis mutandis*."²

When adopting these provisions in 2013, the Federal Government expressed the view that notification under Directive 98/34/EC was not required. The European Commission took notice of that position and, in spite of intense lobbying by interested economic actors, did not initiate infringement proceedings against Germany. Spain has adopted similar provisions without notification. Also, the draft directive on copyright in the digital single market proposed by the European Commission foresees an ancillary copyright for press publishers.³

VG Media is a collecting society representing German press publishers. It has brought suit before the district court of Berlin against Google arguing that Google violated the ancillary copyright of press publishers.

By decision dated 9 May 2017, the district court of Berlin has initiated a preliminary ruling procedure before the CJEU. It has essentially asked the CJEU whether a national provision that requires only commercial providers of search engines as well as commercial providers of services that process information in a similar way to obtain permissions from press publishers for making press publications

¹ See European Court of Human Rights, *Barthold v Germany*, no. 8734/79, Series A, no. 90, § 58.

² Part 1 section 6 of the UrhG, referred to in the second sentence of § 87g(4) UrhG, lays down general limitations to copyright.

³ COM(2016) 593 final.

available to the public qualifies as a 'rule on services' in terms of Article 1(5) of Directive 98/34/EC. The district court considers that Google has indeed violated the ancillary copyright of press publishers. However, it deems that this right constitutes a 'rule on services' and, thus, should have been notified to the Commission in accordance with Article 8(1) of Directive 98/34/EC. Furthermore, the district court is of the opinion that the supposed breach of Directive 98/34/EC renders the ancillary copyright inapplicable.

C. Assessment of the questions referred for a preliminary ruling

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