

# Ancillary Copyright in Germany

## Timeline

- *March 2013* - The German Ancillary Copyright (Leistungsschutzrecht für Presseverleger or "AC") is adopted. It comes into force August 2013.
  - The wording of the law (which excludes "single words and smallest excerpts of text") is somewhat unclear as to what length of snippet is permissible to use.
- *Prior to August 2013* - To avoid legal uncertainty, Google asks all German publishers included in Google News to confirm that they consent to have snippets of their content displayed in the product for free.
  - The vast majority of news publishers opt to remain in Google News.
- *June 2014* - VG Media, a collecting society representing German publishers and collecting AC/AC fees on their behalf, brings Google before the Copyright Arbitration Board at the German Patent- and Trademark Office (this Copyright Arbitration Board is the competent body to rule on all disputes concerning a tariff of a collecting society before a lawsuit can be decided by regular - civil - courts).
  - VG Media sought to obtain a tariff of 11% of the revenues of online services subject to the AC tariff (11% of online services revenues). This covers worldwide revenues "associated" with the display of German publisher content.
  - VG Media claimed that the law AC should apply to search engines as well as news aggregators.
- *September 2014* - In response, Google asks VG Media publishers to again confirm consent, this time for showing snippets not only in Google News but also in Search.
  - The vast majority of publishers agree.
  - Axel Springer initially withholds consent for four publications. Google subsequently removes snippets entirely for those publications in Google News and Google Search, showing only a headline and a URL. However after two weeks Springer grants consent, claiming that the loss of traffic had led to significant loss of revenue.
- *Spring/Summer 2014* - VG Media issues a complaint to the German Cartel Office (*Bundeskartellamt*), claiming that Google's request that publishers consent to the free display of their snippets amounts to an abuse of dominant position.
- *December 2014* - 41 publishers, members of VG Media, formally sue Google at the Regional Court of Berlin on antitrust grounds, claiming that Google's request that publishers consent to the free display of their snippets amounts to an abuse of market power.
- *September 2015* - the German Cartel Office (*Bundeskartellamt*) decides that Google's request for publisher consent is not an abuse of market power.
- *September 2015* - The Arbitration board issues a (non-legally binding) decision that VG Media's published tariff is unreasonable.
- *February 2016* - the Regional Court of Berlin dismisses VG Media antitrust lawsuit. The court describes the relationship of linking and referral traffic as a "win-win" system for publishers, users and search engines, thrown out of balance by AC and publishers request for remuneration
- *December 2015* - VG Media brings a new suit against Google to the Regional Court of Berlin. This suit attempts to collect damages for AC from the entry into force of the law in August 2013, inter alia claiming that any consent given was invalid in light of Google market power.

## Overview

This document lays out the impact of the implementation of German Ancillary Copyright (Leistungsschutzrecht für Presseverleger, hereafter referred to as "AC"); and the legal proceedings that have sought to ensure a practical implementation of the law.

While this summary is focused on our own experience, we are also aware of disputes and legal proceedings involving third parties. These include proceedings involving Yahoo!, 1&1 (a web hosting company owned by Germany's United Internet) and Deutsche Telekom before the German arbitration board; a complaint by Yahoo! to the German Constitutional Court; proceedings against German startup UberMetrix (an aggregation service) that is currently pending before the Munich Court of Appeals.

We also understand the AC has not yielded any financial benefits, whether for publishers or their collecting society. VG Media, in its response to the Commission's public consultation, estimated that they have accrued EUR 714,540 for the exploitation of the new right since its entry into force on 1st August 2013. However, it is widely understood that Deutsche Telekom has settled a claim from VG Media for approximately EUR 700,000. This payment is reportedly a settlement to enable Deutsche Telekom to sell off its search business to Stroer, and is not payment for the use of text-snippets. As a result, licensing income collected by VG Media nearly 3 years after the entry into force of the law is close to zero.

### **The debate around permissible snippet length**

The AC was adopted in Germany in March 2013, and came into effect in August of that year. While it granted publishers an ancillary copyright over press "products" it exempted "*single words and smallest excerpts of text*".<sup>1</sup> The explanatory remarks in the Copyright act also state that: "*The short, free but useful description of the linked content remains free*".

This wording leaves it unclear to what extent short fragments of text typically used by news aggregators are covered by the law.

The ambiguity of the wording (as well as subsequent claims from some news publishers) led the company to take steps to minimise legal uncertainty and avoid the risk of claims for infringement of the AC. Accordingly, prior to the entry into force of the AC in August 2013, Google requested of all German news publishers who were included in Google News that they confirm their consent for snippets of their text to be shown in Google News without payment of a fee.

News publishers already had the ability to not to feature in Google News using the robots.txt protocol (with which they could remove their content entirely, **remove only snippets** or exercise further control); however Google felt that requesting confirmation of publisher consent would do away with any uncertainty created by the new law.

The vast majority of the most prominent German publishers who had been invited to confirm their consent did so.<sup>2</sup>

---

<sup>1</sup> Section 87f (1) German Copyright Act ([https://www.gesetze-im-internet.de/urhg/\\_\\_\\_87f.html](https://www.gesetze-im-internet.de/urhg/___87f.html))

<sup>2</sup> However, note that a large number of 'long-tail' publishers did not respond to the request for confirmation, and were therefore removed from Google News. This may be merely a result of lack of resources, but is evidence that the smallest players tend to lose out when efforts to licence snippets result in inevitable back-and-forth around consent.

#### *VG Media claims and proposed tariff for the use of snippets*

Nonetheless, in May 2014, VG Media, acting on behalf of 230 German press publishers and broadcasters, posted a tariff on its website for the use of snippets of its publishers members' works in both news aggregators and *search engines*.

VG Media's tariff demanded 11% of all gross turnover directly or indirectly associated with the making available of snippets.<sup>3</sup>

Shortly after the publication of its tariff, VG Media initiated arbitration proceedings against Google, Yahoo, 1&1 and Deutsche Telekom at the Copyright Arbitration Board at the German Patent and Trademark Office (DPMA), asking for:

1. Confirmation that the tariff was applicable to the display of snippets in search engines and news aggregators; and
2. That it was set at a reasonable rate.

Google's General Counsel wrote to those publishers who were members of VG Media, requesting that they extend to Google Search their confirmation of consent that snippets of their content be shown alongside search results. As Google indicated in its letter, the company continued to feel that the law did not cover such snippets, but wanted the avoidance of uncertainty given publishers' apparent attempts to collect revenues.

The vast majority of publishers confirmed their consent and declared that they wish to remain in Google's search and news related products, and for snippets of their content to continue to be displayed free of charge.

For two weeks Axel Springer withheld its consent in regard to 4 publications (bild.de, welt.de, sportbild.de, autobild.de). Google therefore removed snippets from search results for those four publications in this period (but continued to display headlines and URLs in search results). After 2 weeks, Axel Springer consented. Axel Springer claimed that the removal of snippets from their publications would trigger a significant decrease in traffic and a loss of revenue - a seven figure sum.<sup>4</sup>

In September 2015 the Arbitration Board issued its non-binding decision (in effect a settlement proposal). The Arbitration Board found VG Media's tariff to be unreasonable. The Arbitration Board was also critical of the law itself:

*"The contradictions of the current law [the AC], which makes no clear statement on the relation between its subject matter, the scope of the exception and the applicability of the implied consent theory of the German Federal Court of Justice cannot be resolved in a satisfactory manner. However it would have been possible to clarify whether the common display of snippets is or is not covered by the Ancillary Copyright"*

#### **Competition complaints**

---

<sup>3</sup> The tariff stipulates 11% for all publishers combined and 6% for VG Media member publishers

<sup>4</sup>

[http://www.axelspringer.de/presse/Axel-Springer-schliesst-Datendokumentation-ab-Gravierender-Schaden-durch-verschlechterte-Suchanzeigen-bei-Google\\_22070688.html](http://www.axelspringer.de/presse/Axel-Springer-schliesst-Datendokumentation-ab-Gravierender-Schaden-durch-verschlechterte-Suchanzeigen-bei-Google_22070688.html)

In mid-2014, VG Media issued a complaint to the German Cartel Office (*Bundeskartellamt*), claiming that Google's request that publishers consent to the free display of their snippets amounted to an abuse of market power.

In September 2015 the German Federal Cartel Office issued a formal decision<sup>5</sup> stating that they would not take action upon publishers complaint as Google's behaviour could not be viewed as abusive.

The Cartel Office stated that search engines and their display of snippets in search results are in the public interest and that payment obligations would impair the concept of "universal ability of linking" (para 198, page 79 of the decision):

*"There is a public interest associated with the business model of a search engine. In view of the billions of existing websites a possibility to locate individual sites is of high significance for the possibility of each user to make accessible the existing information and to make use of the knowledge potential of the internet that is unprecedented in history. A better methodology as a search engine for the broad access to this knowledge potential has - according to the decision making department - not been produced by the evolution. Would the concept of the universal ability of linking - that includes necessarily also the ability to describe the link - impaired by requiring that operator of search engines would need to enter into negotiations with certain website operators or their representatives, the result would be that also the users would be the bereaved."*

#### *Regional Court of Berlin*

In parallel to their complaint at the Federal Cartel Office, 41 publishers, all members of VG Media, filed an antitrust lawsuit against Google at the Regional Court of Berlin. This suit also claimed that Google abused market power by asking publishers to consent in the display of snippets free of charge in Google News and Google Search.

In this suit, publishers demanded an injunction preventing Google from de-snippetting their results in Search, News, Image and Video Search in the event that publishers did consent to the display of snippets without remuneration *unless* Googler were to simultaneously de-snippet all other publishers--i.e. those who had granted permission for snippets' free display.

In February 2016 the Regional Court dismissed this suit. The court pointed out that Google's search engine is a well balanced system in which all parties (search engine, user, website operator and advertisers) benefit, and that this well-balanced system was thrown out of balance by the AC. In the written grounds (which have not yet been made public) the court states (unofficial translation):

*"Overall, search engines prove to be a combination of benefits and monetary flows as well as the provision of non-cash benefits for all parties involved and creates for all a win-win situation. This well-balanced system has been thrown off balance by the Ancillary Copyright, with publishers now demanding payment for a service that the operator of the search engine provides to the economic advantage of website operators. Therefore, it does not raise concerns if the defendant tries to hold on to its initial business model that is based on displaying search results free of*

---

5

[http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2015/B6-126-14.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2015/B6-126-14.pdf?__blob=publicationFile&v=2)

*payments, and - if necessary - asks those who claim [AC] rights to provide their consent and stops the use if consent is not given".*

#### *Further litigation*

VG Media initiated another lawsuit against Google at the Regional Court of Berlin in December 2015, requesting damages for the use of snippets in Google News and Google Search from 1 August 2013, when the AC entered into force. In this proceeding, VG Media demands a declaratory judgement that Google is obliged to pay damages.

VG Media's suit includes claims for damages for the period after VG Media publishers had already confirmed their consent and thus waived any potential payment claims under the AC (prior to August 2013 for Google News and in fall 2014 for Google News and Google Search). VG Media argues that publisher consents are invalid due to a misuse of our market power. This line of argument has been rejected by the German Cartel Authority and by the Regional Court of Berlin.)

A hearing is scheduled for 7 February 2017. This type of litigation would typically be expected to last for a further 6 to 9 years.