



# Ancillary Copyright for Publishers

Taking Stock in Germany

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**bitkom**

## **Publishers**

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The ancillary copyright for publishers (§§ 87f et seq. of the German Copyright Act), hereinafter referred to as »ancillary copyright« was adopted shortly before the end of the last election period in March 2013, despite strong criticism from business associations (BDI, Bitkom, eco etc.) and clear warnings from academics (MPI, GRUR, DAV etc.). Among other things, the ancillary copyright has been criticized for not being justified, neither legally nor economically and for inducing significant collateral damage. A few months after the adoption, the new Federal Government announced plans, in its coalition agreement, to evaluate and review the ancillary copyright as to the achievement of its goals during the current election period. Against this background and with a view to the ongoing debate on the opposition's motion seeking abolishment of the law this paper aims at summarizing facts and recent evaluations of the law's policy outcomes and revisiting arguments made during the legislative process.<sup>1</sup>

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<sup>1</sup> Bitkom's member Bertelsmann SE & Co. KGaA does not back the following statements in this publication

# The ancillary copyright, ...

## ... improving the economic outlook of publishers on the Internet?

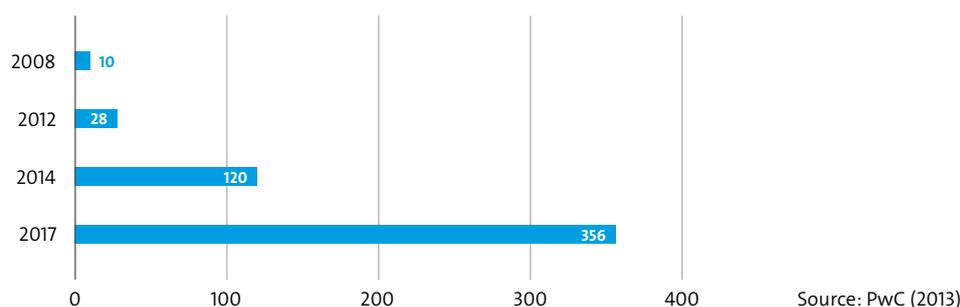
While it is undisputed that many publishers are struggling with sales declines in the print business, their revenue generated through online offers is continuously increasing. Through advertisements, pay walls, paid applications and investments in related fields of business, publishers develop new revenue sources on the Internet.

- **Axel Springer in November 2014:** »... continued profitable growth in the first nine months of the current fiscal year. With a sharp increase in revenue and earnings, digital business models contributed significantly to this development. During the reporting period, digital activities account for more than 52 percent of group revenue and nearly 70 percent of consolidated EBITDA.«
- **PwC Strategy end of 2013:** »Digital revenues have already been the growth driver of the creative sector over the last 10 years. In aggregate, the entire revenue uptake of € 30 billion can be attributed to digital, growing at a yearly rate of 11 percent. [...] online advertising [in the print publishing sector] has been continuously expanding.«

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### Revenue generated through online offers of publishers in Germany

From 2008 to 2014 and forecast for 2017 in Million Euro

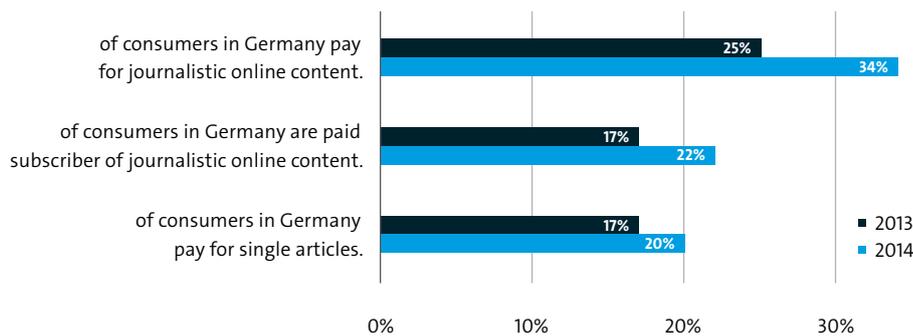


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Pay walls also lead to ever-increasing revenues. According to a representative survey conducted on behalf of Bitkom in 2014, one in three consumers in Germany paid for journalistic content (compared to one in four in 2013).

### Spending for online journalism increases

Internet user in germany



per month on average for journalistic online content.

Source: Bitkom Research 2013/2014

### ..., a strong enforceable right, which harms neither big nor small market players and does not inhibit innovation?

Pending litigations clearly show: The ancillary copyright has led, as expected, to a considerable degree of legal uncertainty. The unclear wording not only raises questions regarding the object of protection and the scope of the ancillary copyright. The law is also vague on the question, who has to meet obligations and who is the beneficiary. Finally, there are various concerns regarding constitutional and European law. These questions will have to be dealt with in long, complicated, and expensive litigation during the next years – if not decades.

In copyright law, disputes are not rare. Still, the disagreement regarding the ancillary copyright law is fundamental in a very exceptional manner. Last but not least, small and medium-sized businesses and innovative start-ups often suffer the hardest from legal uncertainty. Therefore, the disagreement on the ancillary copyright law harms the whole German economy.

- **Tobias Sasse, systems engineer and operator of the search engine Unbubble.eu:** »The ancillary copyright can jeopardize the existence of alternative search engines and news aggregators. That is why I am convinced that if legislators continue to support the law in this form, many alternative search operators in Germany will have to shut down, resulting in a loss in freedom of information.«
- **Mikael Voss, tersee.de, a German search engine start-up:** »A legal dispute with VG Media [the German collecting society representing rights of a group of German publishers] would have dragged on for years, finally leading to bankruptcy of tersee.de – regardless of the outcome. Four years of intensive research and development would have been for vain. We thought about removing German media from our search index and to relocate our headquarters abroad.«

Due to legal uncertainty, a number of innovative companies were faced with the decision to significantly limit or even shut down their service out of precaution. To mention but a few:

- the blog aggregator »rivva«
  - the news search engine »nasuma.de«
  - NewsClub.de
  - commentarist.de
  - DeuSu.de
  - the non-commercial news review page
  - »Links.Historische«
  - the news provider for historians »res media«
  - the news agency »Radio Utopia«
  - the search engine »Unbubble.eu«
- **Tobias Sasse, operator of the search engine Unbubble.eu:** »Our search engine hides snippets and images of press products of VG Media [the German collecting society representing the rights of a group of German publishers] members. In addition, we check each day for updates of the VG Media member lists. This costs resources I would rather like to use for improving our service.«

### ..., closing a legal gap?

Already during the legislative process, almost all copyright experts pointed out that a separate ancillary copyright for press publishers is not required, as there is no lack of legal protection. Press products are comprehensively protected from unauthorized use without §§ 87f et seq. of the German Copyright Act. In addition, press publishers can control on a technical level (e.g. by robots.txt or meta tags) whether and how their content is displayed by search services. However, since publishers benefit from traffic from search engines, they choose not to use these technical possibilities, but instead optimize their services to be displayed as prominently as possible on the result pages of search engines.

### ..., preventing market failure?

During the legislative process, the need for an ancillary copyright had repeatedly been justified with the argument that search engines parasitically capitalizing on publishers' products – not considering, however, that publishers immensely benefit from search engines and explicitly want them.

Google alone refers more than half a billion clicks to publishers that can be monetized on the publisher websites and are worth 12 to 16 cents according to a US Newspaper Association estimate. Also, the ancillary copyright does not acknowledge the search providers' complex and unique own efforts to offer such services. As a result of publishers' claims (represented by the

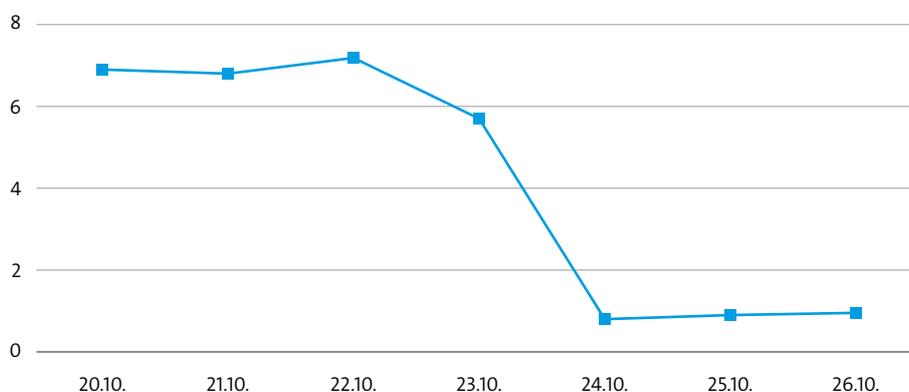
German collecting society »VG Media«) for license payments under the ancillary copyright, many platforms decided to no longer display snippets for related publishers' products (e.g. Google) or to hide the respective search results entirely (e.g. Deutsche Telekom AG, 1&1). Furthermore, many small providers have decided to limit or to even shut down their service. License agreements for the display of search results contradict the business model of search engines and the free link structure of the Internet. In addition, it would not be economically viable for search engine providers to pay for displaying of search results.

The decision of search engine providers and news aggregators to no longer display search results or display search results without snippets demonstrates very clearly that the displayed results are not required for the respective business model. On the contrary, it has been shown that the concerned publishers in Germany immensely benefit from the services of search engines and to that extent the economic premise of the ancillary copyright is false.

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#### Impact of the ancillary copyright on the coverage of the German website welt.de on the section pages of Google News.

The graphic shows how many search results of welt.de were shown on average on the section pages of Google News between 20th and 26th October 2014.



Source: takevalue consulting

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This is why the majority of important and successful providers of quality journalism deliberately abstains from making claims – such as Spiegel Online, Zeit.de, Süddeutsche.de or Heise.

#### ..., without making a regulatory redistribution?

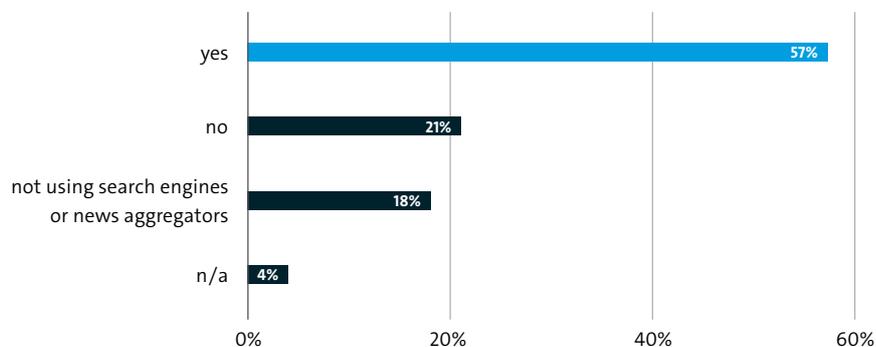
By combining license claims on the one hand (based on §§ 87 et seq. of the German Copyright Act) and a complaint with the Federal Cartel Office of Germany on the obligation to display search results on the other hand, VG Media tried to construct a compulsory license. The Federal Cartel Office (Bundeskartellamt) rejected this request in plain words and made clear that search providers have no obligation to display snippets in their search results, where respective license claims are raised by publishers.

## ..., neither weakening consumer interest nor causing a loss in quality of web searches

In Germany, through the implementation of the ancillary copyright, users could not access search results anymore to the usual extent (see above). The ancillary copyright leads to less diversity of expression and hinders the free flow of information.

### Many consumers consider snippets in search results helpful.

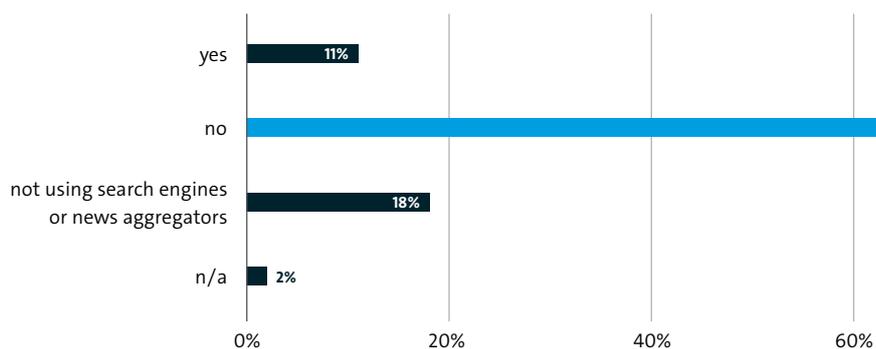
All interviewed internet users aged 14 and older (n=1.004)



Source: Bitkom Research, Aris

### Snippets of just three words are not sufficient for most consumers.

All interviewed internet users aged 14 and older (n=1.004)



Source: Bitkom Research, Aris

Reactions to the shut-down of Google News in Spain after the implementation of a similar law clearly demonstrate the high value news search operators provide to society. First studies have shown that small providers are particularly affected by the shut-down of Google News in Spain. Search engines and news aggregators make users especially aware of smaller, lesser-known press publishers, which otherwise would have rather not been directly accessed.

## ..., in line with German constitutional law?

A constitutional complaint of Yahoo in July 2014 is pending before the German Federal Constitutional Court. Not only in the opinion of Yahoo, the ancillary copyright raises serious constitutional concerns. In particular, it puts freedom of information (Art. 5 para. 1 sentence 1 of the German Constitutional Law) at risk by affecting important intermediaries and information services. It also intervenes with the freedom of media (Article 5 para. 1 sentence 2) and the economic freedom of the affected information services (Art. 12, para. 1 of the German Constitutional Law).

Due to the variety of entirely undefined legal terms, the ancillary copyright also breaches the principle of legal clarity. Finally, the ancillary copyright (at the expense of authors and other content providers) may not be in conformity with the principle of equality (Art. 3, para. 1 of the German Constitutional Law).

## ..., in accordance with European law?

The German legislator is being accused of having infringed notification requirements in terms of Directives 98/34 (as amended by Directive 98/48) and 2006/116 by passing the law without a prior notification to the European Commission. Legal consequence of an infringement of this notification requirement by a Member State is – in accordance with the case law of the Court of Justice of the European Union – the inapplicability of the relevant law. In addition, the ancillary copyright – as it is interpreted by VG Media – infringes the liability safe harbours for Information Society services provided for in the eCommerce Directive (2000/31) as well as the maximum copyright protection of the Copyright Directive (2001/29).

## How does the collecting society VG Media seek to enforce the ancillary copyright?

Fundamental points of criticism of the regulatory framework for collective rights management become apparent in the way VG Media is enforcing the ancillary copyright. Two related complaints with the German Patent and Trademark Office (DPMA) are pending. In addition, the cooperation of publishers in the framework of VG Media and the way VG Media enforces claims lead to antitrust concerns. The Federal Cartel Office (Bundeskartellamt) of Germany has explicitly reserved the right to investigate the publishers' cooperation with regard to Art. 101 TFEU (Treaty on the Functioning of the European Union).

### ▪ **May 22, 2014 – Invitation to enter into a license agreement**

Several companies are prompted by VG Media to conclude licensing contracts. Why and to what extent is not clear from the letter. Inquiries regarding the underlying legal basis and explanations as to how search results can be displayed in accordance with the law from the perspective of VG Media, remain unanswered.

- **June 13, 2014 – Tariff scheme without economic basis**

Retroactive to August 1, 2013, VG Media publishes a tariff. The tariff shows no indication on the derivation of the tariff level or the assessment basis. Concerned companies are deprived of any economic planning security not only because of the retroactive effect of the tariff.

- **June 18, 2014 – Reference to the arbitration board**

Without even entering exploratory talks regarding the claim and the calculation method for the amount of the required rate, VG Media announces the opening of arbitration proceedings against individual companies in the media.

- **October 23, 2014 – Unequal treatment by providing a »free license«**

In violation of § 11 para. 1 of the Law on the Administration of Copyright and Neighboring Rights (Copyright Administration Law, UrhWahrnG) the consent for a use free of charge is issued to a single company (Google). Claims against other companies are being retained.

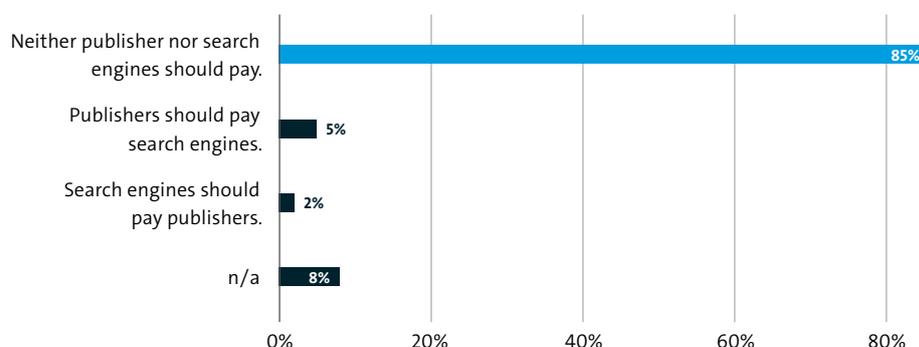
Submitting the so-called »revocable free license« to Google has shown that VG Media does not exercise the rights under §§ 87 f et seq. of the Copyright Act – as required by law from a collecting society – collectively and »for joint exploitation« (§ 1 para. 1 sentence 1 UrhWahrnG), but individually and by individual instructions of the respective rights' owners. Disregarding such a practice, the VG Media tariff »Press Publishers« cannot stand.

## And how would you decide?

Bitkom asked a representative group of Internet users in Germany, who should pay whom.

### Consumers reject levies for ancillary copyright for press publishers.

All interviewed internet users aged 14 and older (n=1.004)



Source: Bitkom Research, Aris

Bitkom represents more than 2,300 companies in the digital sector, including 1,500 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 300 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 78 percent of the companies' headquarters are located in Germany with an additional amount of 9 percent in other countries of the EU and 9 percent in the USA as well as 4 percent in other regions. Bitkom supports an innovative economic policy by focussing the modernization of the education sector and a future-oriented network policy.

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