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Comments on Media and Digital Platforms Inquiry (Terms of Reference) - The Bundeskartellamt

- There has been a dispute about the distribution of power on the internet between publishers, journalists and authors on the one hand and digital platforms on the other for many years, in particular with regard to the rapid developments in digitisation. In Germany, the discussion on the monetisation of news media content has been going on for more than 10 years and there was a first attempt of introducing an ancillary copyright in German law in 2013 which was later invalidated for formal reasons.
- On 7 June 2021, an EU-wide reform of copyright law in the form of ancillary copyright came into force: The scope of protection of press publishers' rights to their press publications was redefined in order to regulate their relationship to i.a. large search engines such as Google more clearly and it includes a new ancillary copyright for press publishers.
- The aim of the reform was to address the constantly changing development of media technologies. The former EU copyright law dated back to 2001, when major content platforms like YouTube, Instagram, Twitter and Facebook did not yet exist. Adapting to the digital age, the use of protected works such as images, videos, texts and music on the internet needed to be regulated more clearly.
- Through the ancillary copyright, press publishers now receive an appropriate financial share when, for example, snippets from articles are displayed on commercial digital platforms such as Google News. However, the copyright reform does not grant press publishers unrestricted decision-making power over the online use of their press publications. The mere reproduction of the facts contained in a press publication, private or non-commercial use by individual users as well as hyperlinks to a press article available online remain possible without further ado. The use of individual snippets, i.e. individual words or very short excerpts from a press release, also remains free. Graphics, photographs, audio and video sequences are allowed as well in short excerpts.
- On Facebook text previews and images are now only displayed if a publisher itself shares the respective content on the platform. However, if a third party shares the content, only a hyperlink with the headline of the article is displayed. At the moment, Facebook does not want to buy the licences to display content from third parties. It only accepts free consent from the press publishers. Meta justifies this decision with the argument that publishers would receive support through the use of the social media platform already, for example through analyses and advertisements, and can thereby gain new readers.
- Google on the other hand started to pay royalties to publishers. However, an association of publishers had previously complained to the Bundeskartellamt that they were not allowed to assert their ancillary copyright collectively by a collecting society. The Bundeskartellamt initiated proceedings against Google in June 2021 (mainly based on the Bundeskartellamt's new competences under the provisions for large digital companies, Section 19a of the German Competition Act, GWB). Following the Bundeskartellamt's intervention in „Google News Showcase“ Google adapted their conditions. German publishers can now license their ancillary copyright regarding crawled press content separately from an individual Showcase agreement, just as enforced in France by the French competition authority as well.

- Within the context of the proceeding under competition law on Google News Showcase the collecting society Corint Media and three associations of publishers have made further complaints against Google. These accusations mainly referred to the issue of adequate remuneration for published content used by Google (ancillary copyright for press publishers). For the time being the Bundeskartellamt has for discretionary reasons refrained from examining this in detail and has not intervened. With reference to the prohibition of discrimination the authority already achieved that Google offered to pay Corint Media ancillary copyright fees the level of which at least matched the fees payable under the licensing agreements concluded between Google and individual publishers. This included the offer of an interim agreement which ensures that the publishers represented by Corint Media have the option to clarify the level of remuneration in dispute proceedings.
- As to the issue of adequate remuneration payable for the ancillary copyright for press publishers, the legislator has provided for a special arbitration proceeding to be conducted under the German Collecting Societies Act (VGG) at the German Patents and Trademark Office. Such a proceeding has already been brought by the parties. The Bundeskartellamt has the possibility to act as *amicus curiae* in the proceeding.