LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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The Press Publisher's Right

Conference "Copyright in the Digital Single Market – Analysis and Implementation of the New Directive"

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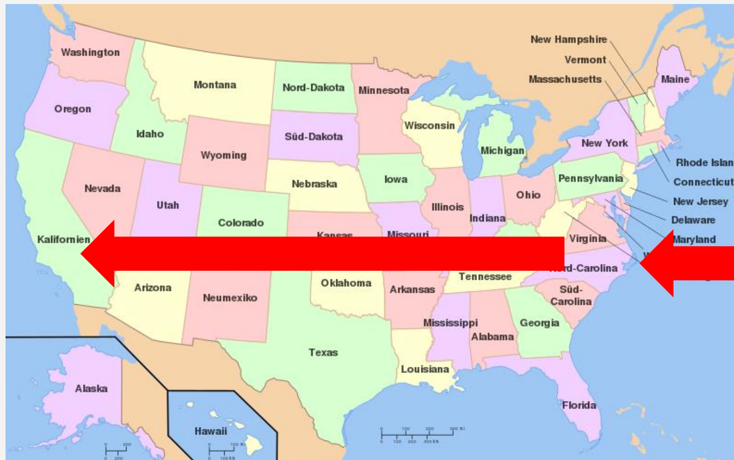

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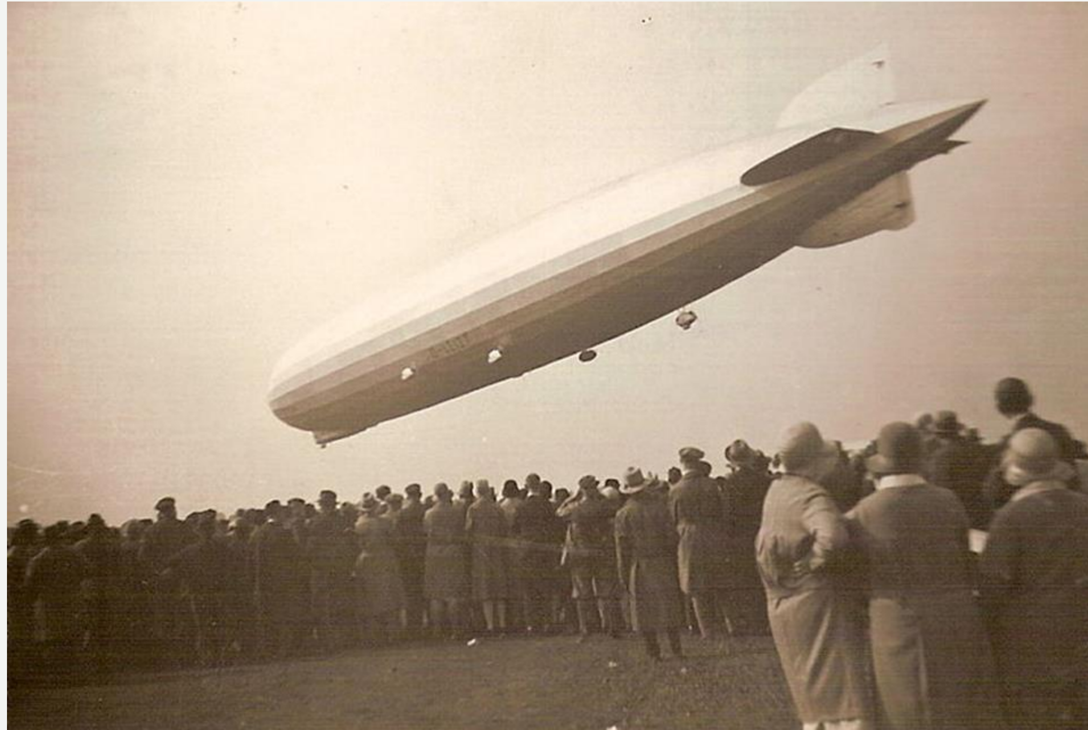
INS v AP, 248 US 215 (1918): “reaping without sowing”?



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Reichsgericht (German Supreme Court), 20 April 1939, RGZ 128, 330 – Graf Zeppelin: no case of unfair competition

Agenda

National experiences

Arguments for and against

Interpre-tation and implemen-tation

Conclusions

The UK experience

- Publisher‘s right in “typographical arrangements of published editions” (Secs 1(1)(c), 8(1) CDPA)
- Term: 25 years
- *Newspaper Licensing Agency v Marks & Spencer* [2003] 1 AC 551 (HL): only infringed if entire page is copied

The German Press Publisher‘s Right (§§ 87 f-h UrhG)

- Enacted 2013 after heavy criticism by almost all © law academics
- Press publisher has exclusive making available right for press publications or parts thereof
  - Press publication = editorial and technical fixation of journalistic articles in a periodically published collection
  - Exception for individual words or very short extracts
- Term = 1 year
- Making available permitted unless made by commercial search engine operators or equivalent service providers (“Lex Google”)
- Criticism in Bundesrat: badly drafted → many open terms → grey zones which will only become clarified after years of litigation

1. National experiences

The German experience

- Interim injunction granted by Munich District Court and unheld by Court of Appeal (OLG München, 14 July 2016, 29 U 953/16, GRUR-RR 2017, 89)
- Subsequently free licence granted to Google by press publishers
- Action for abuse of dominant position against Google failed (LG Berlin, 19 February 2016, 92 O 5/14 Kart, GRUR-RR 2016, 426)
- Provisions inapplicable due to lack of notification (CJEU, 12 September 2019, C-299/17)

The Spanish experience

- Exception coupled with non-waivable remuneration right (Art 32(2) TRLPI)
- Google News withdrew from Spanish market
- Traffic on news websites has declined by 13 %, hitting smaller press publishers harder than larger publishers

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Arguments in favour

- Need to preserve a free and pluralist press
- Equal treatment with phonogram producers etc
- News aggregators are free-riding
- Difficulty of enforcement in digital environment

Arguments against

- Sufficient protection by © law, no sound economic case
- News aggregators are not free-riders, but suppliers of a complementary service
- Inherent overlap with © law
- Might restrict free flow of information
- Increases transaction costs
- Doesn‘t solve problems of press in digital environment
- Doesn‘t work (→ German and Spanish experiences)

2. Arguments for and against

Arguments in favour

“By creating a press publisher‘s right against the resistance of powerful players in the internet economy, the European legislator has reaffirmed its claim to retain its sovereignty in the internet environment and not to leave the development of the regulatory framework for the internet to the major Internet platforms.”

(Ole Jani, ZUM 2019, 674, 684)

Arguments against

“At a high level of abstraction, this provision falsifies the assumption of federalism theory, which expects learning effects at EU level from legislative experiments in the Member States. At some levels of abstraction below, those entrusted with the implementation and the subsequent application will probably have to wait for quite a long time before the questions of interpretation raised by the provision have been clarified by the CJEU.”

(Thomas Ackermann, ZUM 2019, 375, 383)

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Subject-matter and right owner

- press publication = a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter; (1) within a periodical, (2) purpose = providing news, (3) editorial responsibility and control of a service provider(Art 2 (4))
  - **Issue 1**: drawing the line to audio-visual media
  - **Issue 2**: drawing the line to blogs (→ Recital 56: (-) in case of an activity not carried out under editorial responsibility of service provider)
- Periodicals published for scientific or academic purposes exempted
- Press publishers = service providers, such as news publishers or news agencies, when they publish press publications (Recital 55)
- Only those established in a Member State
  - **Issue**: extension to non-EU publishers by national implementing legislation possible?

Rights granted

- Communication to the public
  - Art 3(2) InfoSoc as interpreted by CJEU
  - But only relating to the online use by information society service providers
- Exception 1: private or non-commercial uses by individual users
  - But information services must be normally provided for remuneration anyway.
- Exception 2: hyperlinking
  - Independent of *GS Media* criteria
  - **Issue:** How about framing? → CJEU, C-348/13 – *BestWater*
- Reproduction right
  - Not covered by German press publisher's right so far
  - **Issue 1:** independent significance? Perhaps in cases of individual communication
  - **Issue 2**: separately licensable?

Rights do not apply to “individual words or very short extracts“

- **Big issue**: Likely to be referred to CJEU soon!
- Follows German model
  - Motives to § 87f German Copyright Act: short headlines such as ”Bayern schlägt Schalke“ (or:„”Liverpools beats Man City“)
  - Munich Court of Appeal: 25 words are too much
  - Differing interpretations suggested in legal literature
  - Most convincing → proportionality test → everything necessary to identify the target of a hyperlink
- German draft implementation gives examples (**issue:** may it do that?):
  - headlines
  - thumbnails of no more than 128 x 128 pixels
  - videos or sound recordings of up to three seconds

Overlap with ©

- Conceptual problem: press publication and work are often inseparable
- Art 15(2): Rights shall in no way affect copyright of authors and other rightholders
- Rights granted under non-exclusive licence shall not be invoked to prohibit use by authorised users
  - **Issue 1**: now abour sub-licences?
  - **Issue 2**: how about open access?
- © exceptions apply
  - e g quotation right
  - Relevant or irrelevant?

Authors are to receive an appropriate share (Art 15 (5))

- **Issue 1**: only of the revenues derived from licensing this right (i e zero in case of free licence)?
- **Issue 2**: What is ‘appropriate‘?
- **Issue 3**: relation to Art 18 if copyright is also licensed?
- **Issue 4**: how about employed authors?

Will it work?

- Individual or collective licensing possible – collective licensing probably makes sense
- Potential of extended collective licensing (Art 12)?
- **Big issue:** no exception, coupled with (non-waivable) claim to remuneration (unlike Spanish model) → pressure by Google for licence (as in Germany) conceivable
  - … which might put smaller (and European) service providers at a disadvantage
- Antitrust law as a remedy? No, says Berlin District Court.

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- A free and diverse press is essentially important for a democratic society.
- But the press publisher‘s right is not the solution to the press‘s problems.
- It is doctrinally ill-conceived.
- The text is full of open terms which will keep judges and lawyers busy.
- And it may not work.

Thank you for your attention!