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A Copyright for Authors and Performers

... and the Participation of Publishers in © Revenues

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- Article 16 DSM Dir. on “claims to fair compensation”
 - Para 1:
 - “Member States may provide
 - that where an author has transferred or licensed a right to a publisher, such a transfer or licence
 - constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation
 - for the use of the work made under an exception or limitation **to the transferred or licensed right.**”

- Effect of Article 16 DSM Dir.: overrules CJEU [Hewlett-Packard Belgium v. Reprobel](#) (cf. recital 60 S. 4-5)
 - MS have to ensure that reproduction rightholders receive fair compensation. “However, publishers are not among the reproduction rightholders ...”
 - Thus, “publishers do not suffer any harm for the purposes of those two exceptions. They cannot, therefore, receive compensation under those exceptions **when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation** to which they are entitled under those exceptions.”
 - This is exactly what Art. 16(1) DSM Dir. allows

- But [CJEU Marc Soulier and Sara Doke](#) 16.11.2016 had already limited the impact of Reprobel:
 - “Directive 2001/29 does not prohibit Member States from granting certain rights or certain benefits to third parties, such as publishers, [if] it is provided that those rights and benefits **do not harm the rights which that directive gives exclusively to authors.**” (para 48)
- Accordingly Brussels Court of Appeals 2017:
 - Additional statutory “remuneration” of publishers on top of “fair compensation” of authors under Belgian law is in line with EU law

- Thus, MS have three options under Art. 16 DSM Dir.

Author	Publisher	User
<u>Option 1</u>		
<u>Option 2</u>		
<u>Option 3</u>		

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	Author	Publisher	User
<u>Option 1</u>	+	-	+
<u>Option 2</u>			
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<u>Option 1</u>	+	-	+
<u>Option 2</u>	+	+	++
<u>Option 3</u>			

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<u>Option 2</u>	+	+	++
<u>Option 3</u>	+	+	+

- Why impair the position of authors?
 - Belgium perspective: Art. 16(1) unnecessary
 - The German story of Art. 16
 - No statutory participation of publishers like in Belgium
 - But a de facto CMO participation scheme (VG Wort):
 - Publishers had participated in the total fair compensation/remuneration revenue with a share of up to 50 % (**≈ 30 Mill € annually**)
 - Basis: Not derivative rights, but a recognition of their efforts/investments

Attacked by Dr. Martin Vogel

Inter alia Member of the expert group
on German copyright contract law 2002
(→ Art. 18-23 DSM Dir)



- 2011: Vogel sues VG Wort
 - Publishers are not “rightholders” and thus not entitled to a share in the L&E revenue (Art. 11(4) [CMO Directive](#))
 - No management of exclusive rights
 - Publishers do not acquire statutory remuneration rights
 - Sec. 63a German CA: „Statutory remuneration rights ... may be assigned [by authors] in advance only to a collecting society.”
 - German law does not contain a statutory basis for a participation claim of publishers

- Vogel wins: 21.4.2016 [BGH Verlegeranteil](#)
- 20.12.2016: Amendment of the [German CMO Act](#):
 - Authors may agree to share the revenue from statutory remuneration rights with publishers (few did)
- 18.4.2018 [German Constitutional Court Verlegeranteil](#)
 - Complainant did not show that he acquired rights that entitle them to a share in the CMO revenue in the first place

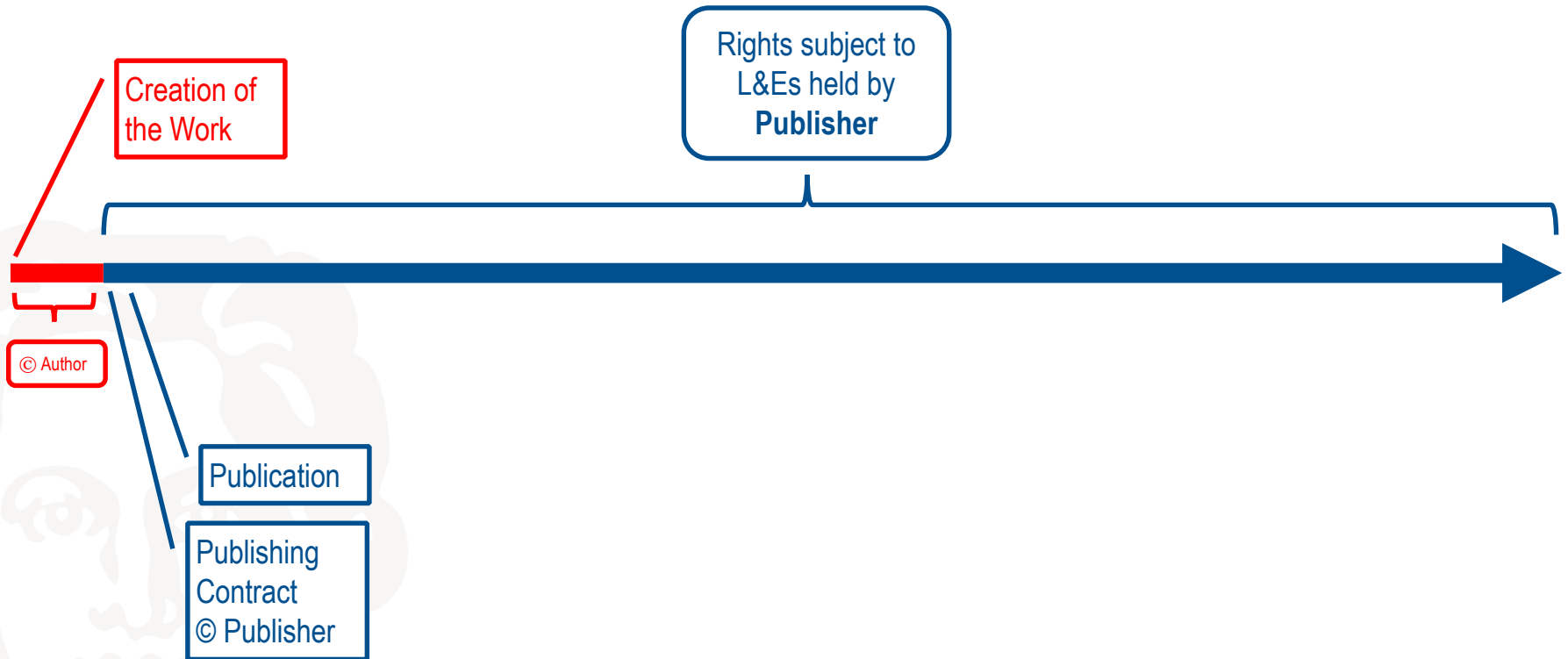
- What Reprobel and Vogel missed



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- Fair sharing of total © revenues between authors and publishers
 - Authors' share
 - “Appropriate and proportionate” in publishers' revenue from exclusive exploitation (Art. 18-23 DSM Dir.)
 - E.g. 10 % of the net sales price of a book
 - Publishers' share in statutory remuneration for L&Es
 - Up to 100 % because they hold the rights at the relevant time?
 - Or only 10-20 % because their contribution to the value of lawful uses is small?
 - Perhaps 30-70 % is fair, depending on the type of work and use in question?
 - Precisely this was the practice of VG Wort until 2015.

- The moral of the (German) story of Art. 16
 - Benefit: Formalization of CMO practices
 - There is more to be done (e.g. participation of book editors in L&E revenue lawful?)
 - But dangers of an “Author Focus Fallacy” (AFF)
 - © maximalism in the name of the author to the detriment of the public
 - Ignorance towards legitimate participation claims of other parties can have unintended consequences
- “Copyright” is more accurate than “Urheberrecht”