
Sehr geehrte Damen und Herren,

The following document provides COMMUNIA’s comments on the second discussion draft on the transposition of the Directive on Copyright and Related Rights in the Digital Single Market ("CDSM") into German law. We apologize for submitting our comments in English but hope that they will nevertheless be useful for the further deliberation of the implementation proposal.

COMMUNIA is an international association incorporated under Belgian law whose mission is to foster, strengthen and enrich the Public Domain, including user rights created by limitations and exceptions to copyright. We have been actively involved in copyright reform advocacy, and followed closely the legislative process that led to the adoption of this Directive.

We are limiting our response to issues concerning the implementation of Articles 8-12, Article 14 and Article 17 CDSM.

**Articles 8-12**

Article 8-11 CDSM are an important step in enabling cultural heritage institutions to make more of their collections available online. The solution found by the EU legislator for the issue of Out of Commerce Works is one of the most complex elements of the Directive. On the other hand many cultural heritage institutions are relatively small and lack the resources to navigate complex legal questions. This means that national implementations of the out of commerce works provisions should strive to establish clear and easy to understand rules.
In general the proposed implementation in §51 - §51d VGG-E and §61d-g UrhG-E contributes to this goal. We support the use of the term “Nicht verfügbare Werke einschließlich vergriffener Werke” instead of the less precise “vergriffene Werke” used in the Directive.

We also support the inclusion of an additional exception in §61f UrhG-E that will enable cultural heritage institutions and collective management organisations to publish previews of works assumed to be out of commerce on the EUPO portal for the purpose of informing rightholders of their intention to make these works available online. This addition addresses a structural shortcoming of the Directive and has the potential to make the EUPO portal much more useful to all stakeholders affected.

While implementing the CDSM licensing provisions for out of commerce works as a special case of a more broader introduction of Extended Collective Licensing (“ECL”) makes sense in terms of structure of the law, we must underline that any form of ECL enabling online uses that is limited to domestic uses remains fundamentally flawed as it would contribute to a further fragmentation of the online information space within the European Union.

- Given the broad use of ECL in the proposal we therefore recommended that the German Federal government should work with the EU legislator towards enabling cross border use of works licensed in accordance with §51 VGG-E / Article 12 CDSM. In this context we recall paragraph 6 of Article 12 CDSM that makes it possible for the Commission to introduce a “legislative proposal, including as regards the cross-border effect of [...] national [ECL] mechanisms” together with the review or the Collective Management Directive, which is due in April of 2021.

In addition, we see two points where the implementation proposal can be improved. The first one relates to the representativity of CMOs and the second one to the proposal to implement the fallback exception as a remunerated exception.

1. Representativity of CMOs

We are concerned that the representativity requirement for CMOs in §51a VGG-E is too vague. This refers to the requirement for “eine erhebliche Anzahl von Berechtigten” to have mandated the CMO with regards to the rights subject to the license. This wording leaves significant room for interpretation especially in areas where only a small subset of works originate from professional creators. We are concerned that this will lead to legal uncertainty for cultural heritage institutions who will need to determine if a representative collective management organisations exists for works they intend to make available before they can proceed to make them available either under the §51b-d VGG-E or §61d-g UrhG-E. Within the context of the provisions aimed at facilitating the access to out of commerce works, cultural heritage institutions will benefit from clear guidance here, which could be provided via the mechanism foreseen in §51f (5).
• We recommended that instead of applying a general criterion such as the one proposed in §51 VGG-E, the German legislator, in close collaboration with cultural heritage institutions, collective management organisations and other relevant rightholders determines for each type of work if a representative collective management exists or not. The results of this determination should then be published in the form of a degree pursuant to §51f (5) VGG-E.

2. Remunerated nature of the fallback exception

We are surprised by the decision to make the fall back exception (§61d UrgH-E / Article 8(2) CDSM) subject to a compensation requirement. Given that §61d UrgH-E only applies in situations where a representative collective management organisation does not exist, it seems problematic to require cultural heritage institutions to pay compensation as by definition there will be no collective management organisation that can disburse the compensation among a representative group of beneficiaries. We underline that the Directive does not contain a compensation requirement or the option to make the exception contained in Article 8(2) subject to compensation (for other exceptions where compensation is optional such as the online education exception in Article 5 CDSM this option is explicitly reserved in the Article; similarly, in the InfoSoc Directive the option to subject the exceptions to the payment of compensation is expressly mentioned in the recitals). From our perspective this shows the intent of the EU legislator to make the fall-back exception unremunerated.

Removing the compensation clause from §61d UrgH-E would bring the proposed implementation more in line with the text of the Directive and - more importantly - reduce the amount of required complexity for cultural heritage institutions intending to make out of commerce works available to the public.

• We therefore recommend removing the compensation requirement in §61d (5) UrgH-E.

Article 14

From the perspective of COMMUNIA, Article 14 CDSM is one of the most welcome elements of the Directive and we are fully supportive of the intent of the EU legislator to ensure that reproduction of Public Domain works are not subject to neighbouring rights. Article 14 repairs a fundamental flaw of the EU copyright framework that currently allows exclusive rights in the copies of works that are not subject to copyright. Article 14 makes an end to this legal travesty.

In this context, the proposed §68 UrhG-E that would implement Article 14 CDSM in the German Copyright Act, achieves this legislative objective in a convincing way. We strongly support the choice to apply the provision to the category of “visuelle Werke” instead of the narrower “Werke der bildenden Kunst” in order to capture all works that can be perceived visually. For example this will ensure that §68 UrhG-E also applies to reproductions of public domain manuscripts which are digitized by cultural heritage institutions.
We also welcome the clear rules for the application in time of the provision that are discussed in the explanatory section on page 69 of the discussion draft. Given the importance of providing clarity on this point we stress that this explanatory section must be preserved in later versions of the text.

In addition, we see two points where the implementation proposal could be improved. This concerns the use of the term “erlischt” in §68 UrhG-E and the lack of a provision that declares contractual restrictions aimed at preventing reproductions of public domain works invalid:

- We recommend replacing the use of “erlischt” by a wording that refers to the status of the reproduced work as being free from copyright. This would make it clear that § 68 UrhG-E applies to all works in the public domain including those that have never been protected by copyright. This intention is clear from the explanatory text whereas the text of §68 UrhG-E is ambiguous on that point.
- We recommend adding a provision to §68 UrhG-E that prevents owners of public domain works from eliminating or restricting the freedom provided for by Article 14 by way of contract.

**Article 17 CDSM**

We welcome the proposal to implement Article 17 CDSM by way of a new "Urheberrechts-Diensteanbieter-Gesetz" reflecting the “lex specialis” character of Article 17 CDSM.

We are also pleased to see that the proposed implementation strives to reflect the delicate balance between the rights and interests of the different stakeholders that will be affected by Article 17 CDSM. To this end the proposal makes a number of important legislative choices and provides a number of clarifications that we strongly support:

- We welcome the effort to target only those types of platforms whose emergence has provided the reason for Article 17 CDSM. The condition that the new provisions only apply to service providers that "compete with online content services for the same target audience" (§2(1)4 UrhDaG-E) will provide much needed legal certainty for a range of services that are not the intended targets of Article 17 CDSM.
- Similarly, we welcome the introduction of clear criteria to comply with the "best efforts to obtain authorisation" obligation laid down in §4 UrhDaG-E.
- In addition, the creation in §7(1) UrhDaG-E of a right to appropriate remuneration to be paid by service providers to creators, for the use of works that have been licensed to service providers, is a welcome reflection of the intention of the EU legislator to ensure that individual creators benefit more from the use of their works in the online context.

As we have made clear via our contributions to the European Commission’s stakeholder dialogue, we consider finding a balance between the rights of users of online platforms (both in their capacity as creators who upload works and as consumers who access works shared by others) the most crucial element of implementing Article 17 CDSM. We welcome that the
proposal reflects a clear commitment to protect the rights of users against unjustified blocking and removal of uploaded content. We also welcome that the proposal fully acknowledges that technological solutions alone are not capable of safeguarding these user rights, as important uses authorised by law are "mechanically non-verifiable". We therefore support the following measures introduced to this end:

- The introduction of a provision that will allow uploaders to pre-flag uploads that make authorised uses of protected works in §8 UrhDaG-E. Given the fact that technology cannot recognise the context in which a use takes place and that most copyright exceptions are context dependent, this is an essential safeguard against the suppression of lawful expression.
- The introduction in §6 UrhDaG-E of a “Bagatellschranke” to the rights created by Article 17 CDSM that covers a wide range of non-commercial acts of everyday creativity and that will provide legal certainty for users and service providers. While the thresholds included in the proposal are unlikely to cover the full width of creative expression based on lawful transformative uses of existing materials, we consider these thresholds to be adequate safeguards that provide the necessary protection for creative expression to continue to flourish on these platforms. In this context we also explicitly support the fact that the exception requires the payment of appropriate remuneration by service providers to the creators of the works used under this exception (§7(2) UrhDaG-E).
- The introduction of a new exception in Article 1 §51a of the German Copyright Act allowing uses for the purpose of caricature, parody and pastiche, which makes maximum use of the policy space provided by the generic provision in Article 5(3)k of the InfoSoc Directive, recognising that Parody, Pastiche and Caricature should be treated as autonomous concepts of EU law.
- The inclusion of provisions that allow service providers to take measures against unjustified requests by self proclaimed rightholders (§19(1) UrhDaG-E) as well as making such self-proclaimed rightholders liable to users and service providers (19(2) UrhDaG-E). The same goes for the ability of associations acting on behalf of their users to obtain injunctions against service providers that repeatedly "block[s] or remove[s] authorized uses". In its totality §19 UrhDaG-E introduces a balanced set of incentives for all stakeholders to refrain from practices that infringe on the rights of others.

Overall the proposal for a new "Urheberrechts-Diensteanbieter-Gesetz" is a balanced attempt to implement the flawed provisions of Article 17 CDSM into German law within the boundaries established by the EU legislator.

While we support the overall structure of the proposal, we have also identified the following issues where the proposal can be further improved:
1. Implementing exceptions for criticism and review

Article 17(7) second para. CDSM requires Member States to implement exceptions for “quotation, criticism, review”. §51 of the German Copyright Act covers uses “for the purpose of quotation”, but does not mention criticism or review.

- We recommend adding these purposes to §51 of the German Copyright Act or introducing a new exception for criticism and review, in line with the Directive.

2. Protecting exceptions in the terms and conditions of service

The obligation in §8(1)(1) UrhDaG-E to “inform the user during the upload works about the legal permissions according to §§5 and 6 or of the necessity of contractual rights of use” is not enough to comply with Article 17(9) fourth para. CDSM, which is aimed at ensuring that the terms and conditions of service do not prevent users from benefiting from their rights under the law, namely from copyright exceptions.

- We therefore recommend adding a new provision to §8 to require service providers to inform their users about their legal right to use works or other subject matter under all existing exceptions and limitations in a way that can not be overridden via their terms and conditions.

3. Improving the pre-flagging system, and preventing abuse by service providers

§8 UrhDaG-E allows users to pre-flag the use as “contractually and legally authorized”. The wording is not adequate to cover the lawful use of content in the public domain (works that are not subject to copyright protection or that are no longer subject to copyright protection).

- We therefore recommend amending §8(2) to include language that clearly allows users that pre-flag uses as content in the public domain as a separate category, in addition to “contractually or legally authorized” uses.

Asserting the legality of the use of protected content can be a complex exercise. Therefore, service providers should not draft their terms and conditions or design their services in a way that makes uploading of content dependent on pre-flag.

- We therefore recommend adding a new number to §8 UrhDaG-E to prevent contractual terms and conditions or technical measures from making the upload of content dependent on pre-flag and from making uploading content without pre-flagging significantly more difficult.

§12 UrhDaG-E sets a machine verifiable rule to qualify the pre-flagging of uses under “legal permissions” as obviously incorrect (sentence 2) and clarifies that such rule does not apply to “individual images” (sentence 3). In our opinion, this is not enough to protect user rights. The
situations where the pre-flagging can be automatically considered “obviously incorrect” should be very limited, otherwise the benefit of having a pre-flagging system will be lost. The following types of matches should never be assumed to be obviously infringing, as the likelihood of being covered by a copyright exception is high: (1) exact or partial matches where the protected work(s) or parts of it constitute less than 90% of the upload and (2) matches of indivisible works (e.g. photographs) and short works (e.g. short poems), even when they correspond to 100% of the upload. We therefore recommend the following:

- To amend the mechanically verifiable rule in the second sentence of §12 to require that the content uploaded by the user must contain at least 90 percent of the information provided by the rightholder and must consist of more than 90 percent of content that corresponds to information provided by rightholders, in order for a pre-flag under a legal permission to be considered obviously incorrect.
- To amend the third sentence of §12 to exclude both individual images and short works from the scope of application of the second sentence.

4. Protecting lawful content uploaded before the entry into force of the directive

The pre-flagging system can only work for uploads made after the entry into force of the new law. For content uploaded before that date, it must be clear that the service provider is prevented from blocking or removing said content except on the basis of a duly substantiated notice pursuant to §11.

- We therefore recommend adding a new section in Part 5 UrhDaG-E preventing the automatic blocking or removal of content uploaded before the entry into force of the new law.

5. Improving the complaint procedure and preventing abuse of the exemption of liability

In order to allow users to exert their rights to complain against a blocking or removal action, service providers must be required to notify users about it. This notification is of course implicit in the discussion draft, but the obligation to do so without undue delay should be explicit.

- We recommend adding a new section in Part 3 UrhDaG-E, requiring service providers to notify users about any blocking or removal carried out by the service provider without undue delay. Such notices must at least include identification of the work in question, the rightsholder who claims that an infringement has taken place, and the legal basis for the removal.

The exemption of liability of service providers in §16 UrhDaG-E disincentivizes these providers from abusing the mechanism to qualify pre-flaggings as “obviously incorrect” and it is,
therefore, essential to protect users. This exemption should not, however, incentivize service providers to encourage pre-flagging for uses that are not lawful and that are covered by a license agreement for which the service provider would need to pay licensing fees.

- We recommend therefore to extend the complaint procedure in §14 UrhDaG-E to cover complaints related with pre-flaggings where the rightholder does not intend to remove or block the content, but merely to challenge the qualification of the use as legally permitted under §§5 or 6.
- We also recommend to clarify in §16 UrhDaG-E that the exemption of the service provider from liability shall be without prejudice of the obligation to pay license fees under §4 and remuneration under §7(1), retroactively, during the period of the complaint procedure, if the uploaded content is found not to be covered by a contractual or legal authorization to the user or not to be otherwise permitted by law.

6. Improving transparency and information rights

As mentioned above, we welcome the measures against abuse. However, for §19(2) and (4) UrhDaG-E to be actionable, users and user associations first need to have access to information held by the service provider.

- We therefore recommend adding a new number to §20 UrhDaG-E granting users, and associations entitled to claims according to § 3a of the German Injunctions Act, the right to request appropriate information from service providers to enforce their rights under §19(2) and (4).
- We also recommend adding a new section in Part 5 requiring service providers to publish on a regular basis statistical information on the blocking and removal under §10 and §11, on pre-flags under §8(2), on pre-flags qualified as obviously incorrect under §12, and on complaints and resolution of such complaints under §14. A similar provision already exists for certain online platforms in the NetzDG and is an important tool for transparency and monitoring of the effectiveness of the law.

We hope that these observations and recommendations are useful and will help to further improve the proposed implementation. Should you have any questions or require additional information we remain at your disposal.

On behalf of the COMMUNIA association for the public domain

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