We would like to comment on specific aspects of the draft:

**Artikel 1, Unterabschnitt 5a (Gesetzlich erlaubte Nutzungen nicht verfügbarer Werke; Information über kollektive Lizenzen mit erweiterter Wirkung), and Artikel 2**

We broadly welcome the German implementation of the provisions contained in Articles 8-11 of the Directive, which, we hope, will lead to significantly more works becoming available in order to support education, research and access to culture. In particular, we welcome the new exception under 61f in order to allow previews of works.

We would like to make the following additional points:

**1. Definition of works subject to the provisions**

We welcome the title of the section - nicht verfügbarer Werke - which covers not only works which are out of print (i.e. have once been for sale, but which are no longer), but also works which have never been in commerce. A large share of the collections of libraries and archives in particular can consist of such works, and so a solution for this is required.

We note that the Ministry intends to leave the definition of the conditions for declaring a work to be unavailable to a later date (61e(4) of the Copyright Law, 51e(7) of the Collecting Society Law). In the light of the widespread recognition that the Orphan Works Directive has broadly failed because of the complexity of ‘diligent search’, we would urge the government to make
clear, already, that such conditions should be proportionate, and not stand in the way of the effectiveness of the law.

2. Representativity of Collecting Societies (51a, Collecting Society Law)

We believe that the definition of representativity is a key factor in the success of the Directive, given that collecting societies will potentially be empowered to collect money on behalf of non-members, without the guarantee that any revenues will ever end up in the hands of the original creators.

As such, we believe that while reference to ‘significant’ numbers of rightholders having provided rights (51a(1) of the Collecting Society Law), we would be concerned by paragraph 51a(2), which would appear to give any collecting society, regardless of its representativeness of creators in a given sector, automatic rights to collect money. Given that they would be receiving often public money from libraries and other cultural heritage institutions, there is a duty to ensure that this money is well spent. A higher standard should therefore be in place.

We would therefore advise that, in line with the recommendation made in Directive itself, it would be helpful to bring together government, cultural heritage institutions and collective management organisations in order to determine for which sectors, and which uses, extended collective licencing applies. Furthermore, we advise careful definition of different sectors (such as broadcast, letters, posters and pamphlets), in order to avoid categories of works for which there are no collecting societies ending up subject to licensing.

3. Remuneration for uses of unavailable works (60d(5), Copyright Law)

We note with some concern the provision obliging cultural heritage institutions to pay for any uses of unavailable works, through collecting societies. This is not required by the Directive - and indeed, the failure to do so implies that such uses should be free, while of course protecting the right of rightholders to object to making such works available.

Furthermore, this provision means that, in situations where the extended collective licencing provisions do not apply, due to collecting societies being absent or unrepresentative, collecting societies are still entitled to collect money. This is challenging, in that it effectively
means that public money is being paid to such societies in situations where it is clearly going
to be difficult to pay this money out to original creators. This risks undermining the legitimacy
of the entire system, as well as representing a waste of public money.

We would therefore recommend removing article 60d(5), thereby allowing libraries and other
cultural heritage institutions to spend resources on their missions of preserving, digitising and
giving access.

gez. Wyber / Hinte