Discussion draft of the Federal Ministry of Justice and Consumer Protection

Second Draft Act adapting copyright law to the requirements of the Digital Single Market

From [...] 

The Bundestag has passed the following law:

Artikel 1

Amendment of the copyright law 

[...]

Artikel 2

Amendment of the Collecting Societies Act

[...]

Artikel 3

Act on the copyright liability of service providers for sharing online content

(Copyright Service Provider Act – Urheberrechts-Diensteanbieter-Gesetz – UrhDaG)
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Part 1

General provisions

§ 1 Communication to the public, liability

(1) A service provider (§ 2) performs an act of communication to the public of works if he gives the public access to copyright protected works uploaded by users of the service.

(2) If the service provider fulfils its obligations under §§ 4, 10 and 11 in accordance with high industry standards and in compliance with the principle of proportionality, it shall not be liable under copyright law for an act pursuant to paragraph 1 or for the reproduction of works required for this purpose. In particular, the following shall be taken into account:

1. The nature, the audience and the scope of the service,
2. The nature of the works uploaded by users of the service,
3. The availability of appropriate and effective means of fulfilling the obligations, and
4. The costs incurred by the service provider for measures taken pursuant to point 3.

(3) The service provider cannot invoke § 10 of the German Telemedia Act (Telemediengesetz)\(^1\).

(4) A service provider whose main purpose is to participate in or facilitate copyright infringements cannot invoke paragraph 2.

§ 2 Service providers

(1) Service providers within the meaning of this Act are service providers within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1), who

1. exclusively or at the least partly pursue it as their main purpose to store and communicate to the public large amounts of copyrighted content uploaded by third parties,

\(^1\) § 10 TMG contains a safe harbor provision for hosting providers and reads:

§ 10 Storage of information

Service providers are not liable for third-party information that they store on behalf of a user, provided that

1. they have no knowledge of the unlawful act or the information and, in the event of a claim for damages, they are not aware of any facts or circumstances from which the unlawful act or the information becomes apparent, or
2. they have taken immediate action to remove the information or block access to it as soon as they have gained knowledge of it.

Sentence 1 does not apply if the user is subordinate to the service provider or is supervised by him.
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2. organise copyrighted content within the meaning of point 1
3. advertise content within the meaning of point 1 for the purpose of making profit, and
4. compete with online content services for the same target audience.

(2) Start-up service providers are service providers with an annual turnover within the European Union of up to EUR 10 million and whose services have been available to the public in the European Union for less than three years.

(3) Small service providers are service providers with an annual turnover within the European Union of up to EUR 1 million.

(4) For the purpose of calculating the turnover of a service provider under paragraphs 2 and 3, the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36; L 334, 27.12.2019, p. 164) shall apply. In each case, the turnover of the previous calendar year shall be relevant.

§ 3

Services not covered

This law does not apply in particular to
1. non-profit online encyclopaedias,
2. non-profit educational and scientific repositories,
3. platforms for development and distribution of open source software,
5. online marketplaces,
6. cloud services provided between undertakings, and
7. cloud services that allow their users to upload content for their own use.

Part 2

Authorized uses

§ 4

Contractual rights of use

(1) A service provider is obliged to make every effort to acquire the contractual rights of use for communication to the public and the reproduction required for this purpose of copyright-protected works. The service provider fulfils this obligation if he acquires rights of
use which are either offered to him or which are available through a collecting management organization or a dependent collecting body established in Germany.

(2) Rights of use under paragraph 1 shall

1. apply to works that users of the service provider typically upload,
2. comprise a representative repertoire,
3. cover the territorial scope of this Act, and
4. enable the use on appropriate conditions.

§ 5

Mechanically non-verifiable uses authorized by law

The communication to the public and the reproduction required for this purpose of copyright-protected works and parts of works is permitted for the following purposes:

1. For quotations according to § 51 of the of the German Copyright Act (Urheberrechtsgesetz),
2. For caricatures, parodies and pastiches according to § 51a of the of the German Copyright Act (Urheberrechtsgesetz)
3. For other cases authorized by law of communication to the public and the reproduction required for this purpose in accordance with Part 1 Section 6 of the German Copyright Act (Urheberrechtsgesetz).

§ 6

Mechanically verifiable uses authorized by law

(1) The communication to the public and the reproduction required for this purpose of copyright-protected works and parts of works for non-commercial purposes is permitted to the following extent:

1. up to 20 seconds of an individual film or motion picture,
2. up to 20 seconds of an individual audio track,
3. up to 1 000 characters of an individual text and
4. an individual photograph or an individual graphic with a data volume of up to 250 kilobytes.

(2) Paragraph 1 shall only apply if there is no contractual right authorizing uses according to paragraph 1 and it is not a use authorized by law according to § 5.

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2 This provision introduces a new statutory exception in Artikel 1 of this Act and reads:

"§ 51a Caricature, parody and pastiche: The reproduction, distribution and communication to the public of a published work are permissible for the purpose of caricature, parody and pastiche. The authorization pursuant to sentence 1 shall include the use of an image or other reproduction of the used work, even if such reproduction itself is protected by a copyright or related right."
§ 7

Direct remuneration claim for contractual use, appropriate remuneration for uses authorized by law

(1) If the author has granted the right of communication to the public of a work to a third party, the service provider must nevertheless pay the author an appropriate remuneration for the communication of the work to the public for uses pursuant to § 4. § 20b paragraph 2 sentences 2 to 4 of the German Copyright Act (Urheberrechtsgesetz) shall apply accordingly.

(2) The service provider must pay the author an appropriate remuneration for uses in accordance with § 6. § 60h paragraph 3 sentence 1 and § 60h paragraph 4 of the German Copyright Act (Urheberrechtsgesetz) shall apply accordingly.

§ 8

Pre-Flagging of authorized uses

(1) The service provider is obliged,

1. 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, and

2. to enable the user to pre-flag the use as contractually or legally authorized.

(2) If the user has pre-flagged the content uploaded by him according to paragraph 1 and if such pre-flagging is not obviously incorrect according to § 12, the blocking or removal is not permitted according to §§ 10 and 11. In such cases, the service provider shall inform the rightholder of the communication to the public.

§ 9

Extension of authorisations

(1) If the service provider allows the communication to the public and the reproduction of a work necessary for this purpose, this permission also extends to the user, provided that the user is not acting commercially or is not generating substantial income.

(2) If the user has authorization to communicate a work to the public via a service provider and to reproduce it for this purpose, this permission also extends to the service provider.

Part 3

Non-authorized uses

§ 10

Blocking of non-authorized uses

(1) If a rightholder requests the service provider to block his work, the service provider shall be obliged to do so in accordance with § 1 paragraph 2 as soon as the rightholder has
provided the information required for this purpose and to the extent blocking is permitted under §§ 8 paragraph 2 and 12.

(2) Startup service providers (§ 2 paragraph 2) are not obliged to block as long as the average monthly number of unique visitors to the internet pages of the service does not exceed 5 million.

(3) It is rebuttably presumed that small service providers (§ 2 paragraph 3) are not obliged to block in view of the principle of proportionality.

§ 11

Removal of non-authorized uses

If a rightholder requests the service provider to remove his work which has been communicated to the public without authorization, the service provider is obliged to do so in accordance with § 1 paragraph 2 and to block the work in the future in accordance with § 10 as soon as the rightholder has provided the information required for this purpose and provided that the removal and blocking is permitted in accordance with §§ 8 paragraphs 2 and 12.

§ 12

Blocking and removal of uses pre-flagged as authorized

Blocking and removal shall be carried out even if pre-flagged pursuant to § 8 paragraph 2 if such pre-flagging is obviously incorrect. When invoking legal permissions this may in particular be the case, if the content uploaded by the user corresponds to at least 90 percent of the information provided by the rightholder. Sentence 2 does not apply to individual images.

Part 4

Legal remedies

§ 13

Remedies, access to the courts

(1) For users and rightholders, participation in a complaint procedure (§§ 14 and 15) is voluntary.

(2) For users, rightholders and service providers, participation in alternative dispute resolution (§§ 17 and 18) is voluntary.

(3) Protection of the author against distortion of the work according to § 14 of the German Copyright Act (Urheberrechtsgesetz) remains unaffected.

(4) The right to appeal to the courts remains unaffected.
§ 14

Internal complaint procedure

(1) The service provider must provide users and rightholders with an effective, free of charge and expeditious complaint procedure regarding the blocking, removal, communication to the public and reproduction of protected works necessary for that purpose.

(2) Complaints must be substantiated.

(3) Decisions about complaints must be made by natural persons who are impartial.

(4) The service provider is obliged,
1. to notify all affected parties about the complaint without undue delay,
2. to give all affected parties the opportunity to give their views on the complaint without undue delay; and
3. to make a decision on the complaint within one week of the date the complaint was lodged.

§ 15

External complaint body

(1) The service provider may use a recognised external complaint body to fulfil his obligations under § 14.

(2) The decision on the recognition of an external complaint body is taken by the Federal Office of Justice in agreement with the German Patent and Trade Mark Office. The provisions of the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) on the recognition of an Institution of Regulated Self-Regulation shall apply mutatis mutandis to the requirements and the procedure for recognition.

§ 16

Liability in case of uses pre-flagged as authorized

If the user has pre-flagged the uploaded content according to § 8 paragraph 2 and such pre-flagging is not obviously incorrect according to § 12, the service provider is not liable for the communication to the public as well as for the necessary reproduction under copyright law. The exemption of the service provider from liability shall end when the complaint procedure has been concluded or the period for deciding on the complaint pursuant to § 14 paragraph 4 no. 3 has expired.

§ 17

Alternative dispute resolution by private arbitration bodies

(1) Users and rightholders can call upon a private arbitration body for alternative dispute resolution regarding the removal, blocking or communication to the public by service providers of protected works.
(2) § 3c of the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) with the exception that the Federal Office of Justice as the competent authority shall decide on the recognition of a private arbitration body in agreement with the German Patent and Trade Mark Office.

§ 18

Alternative dispute resolution by official arbitration bodies

(1) The Federal Office of Justice, in agreement with the German Patent and Trade Mark Office, sets up the official arbitration body.

(2) The official arbitration body is only competent where a private arbitration body pursuant to § 17 is not available.

(3) The provisions of the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) on the official arbitration body shall apply accordingly.

Part 5

Final provisions

§ 19

Measures against abuse

(1) If self-proclaimed right holder repeatedly requests the service provider remove or block third-party or public domain works as his own works, the service provider is entitled to exclude the self-proclaimed right holder for a reasonable period of time from the procedures according to §§ 10 and 11.

(2) The self-proclaimed right holder is liable to the service provider and the user according to the principles of unjustified warning notices for intellectual property rights.

(3) If a user falsely pre-flags uses as authorized repeatedly, the service provider is entitled to exclude the user for a reasonable period of time from the possibility of pre-flagging uses as authorized.

(4) If the service provider erroneously blocks or removes authorized uses repeatedly, an association entitled to claims according to § 3a of the German Injunctions Act (Unterlassungsklagengesetz) may claim injunctive relief from the service provider.

§ 20

Information rights

(1) The right holder may request information from the service provider about the use of the licensed repertoire.
(2) The rightholder may request appropriate information from the service provider about the functionality of the mechanism for blocking and removing non-authorized uses in accordance with §§ 10 and 11.

§ 21

Person authorized to receive service in the Federal Republic of Germany

§ 5 paragraph 1 of the German Network Enforcement Act (Netzwerk-durchsetzungsgesetz) shall apply mutatis mutandis to the obligation of the service provider to name a person authorized to receive service in the Federal Republic of Germany.

§ 22

Application to related rights

This Act shall also apply to related rights within the meaning of the German Copyright Act (Urheberrechtsgesetz).

Artikel 4

Entry into force

This Act shall enter into force on 7 June 2021.