Twitter’s submission on the draft bill of 13 October 2020 implementing the CDSM Directive - (Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts)

Introduction

Twitter welcomes and appreciates the opportunity provided by the German government to participate in the consultation on the draft bill published by the Federal Ministry of Justice and Consumer Protection (BMJV) on 13 October 2020, transposing Directive 2019/790/EU on copyright and related rights in the Digital Single Market (“CDSM Directive”). This response is limited to the transposition of Article 15 regarding the protection of press publications and Article 17 regarding the use of protected content by online content-sharing service providers.

Article 15 CDSM

Sections 87f to 87k of the proposed draft modified GermanCopyright Act (“UrhG-E”) implement Article 15 of the CDSM Directive and contain the new press publishers’ right. Even though German copyright already contains a similar right for press publishers, these existing provisions on the protection of press publishers are inapplicable following the decision of the CJEU in the VG Media case¹ and the existing provisions also differ from Article 15 CDSM on a number of details. This means it is necessary to rewrite the German provisions. Twitter explains below that the press publishers’ right of Article 15 CDSM Directive does not apply to its service and provides some recommendations for the transposition of the provision in the UrhG-E.

Not applicable to the Twitter service

Twitter’s platform is constrained to 280 characters and is uniquely limited in terms of the content which can be placed in a post. When using the Twitter service, press publishers grant Twitter a licence, which extends to Twitter users so that they can enjoy the content posted by the press publishers. Press publishers typically design, draft and promote headlines and articles themselves and upload these to Twitter with the purpose of attracting their Twitter followers and other users to their websites. Twitter does not search on the web for press publishers’ content, nor does it copy it and bring that content to the Twitter platform. When

¹ CJEU 12 September 2019, Case C-299/17, ECLI:EU:C:2019:716 (VG Media).
press publishers upload their content to Twitter, they intend to use Twitter as a distribution and marketing channel to attract an audience through their followers and a broader audience by engagement with other users on the platform.

Consequently, Twitter does not provide news aggregation services as targeted by Article 15. However, both we and our users have an interest in ensuring that Article 15 is adopted in as precise and balanced a manner as possible whilst upholding the principles of freedom of contract and maintaining the free flow of news and other information vital to a democratic society.

Definition “press publication” (Article 2(4))

Section 87f(1) UrhG-E implements the definition of a “press publication” from Article 2(4) CDSM Directive without significant changes. Twitter recommends further clarifying the definition of “press publication” to avoid online platforms acting as arbiters when they define what constitutes a press publication. This will also mitigate any inconsistencies between different online platforms. From the recitals of the CDSM Directive, it is clear that Article 15 is targeted at providers that make their main money from reuse of press publications, specifically news aggregators & press clipping services. In Twitter's view, personal and non-personal blogs & social media feeds should not qualify as being protected as new press publications, even if they are ‘regularly updated’ and ‘have the purpose of providing the general public with information’. To do so would generate unintended consequences and undermine the intention of the CDSM Directive. The explanation of the draft German bill states on page 121 that only journalistic publications published in the course of an economic activity are covered. It would be useful to insert this addition in Section 87f(1) UrhG-E to improve legal certainty.

Section 87f(2) UrhG-E defines “press publisher” as “the person who provides the economic, organisational and technical services required for the publication of a press publication” ("derjenige, der die wirtschaftlich-organisatorische und technische Leistung erbringt"). Although Recital 55 of the CDSM Directive does refer to the need to recognise “the organisational and financial contribution of publishers in producing press publications”, the Directive does not contain a definition of the concept. Article 2(4) does refer to press publications being published “under the initiative, editorial responsibility and control of a service provider”, and Recital 56 specifically states that protection should not apply “to websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.” This suggests that the key point of attachment for the concept of “press publisher” is not economic or technical but rather editorial initiative, responsibility and control. In this respect, the concept of “press publisher” may be comparable to the definition of “audiovisual media service provider” under Directive 2010/13/EU as amended, which is equally focused not on legal, technical or economic but rather editorial responsibility.

Section 87(3) UrhG-E provides an unchanged transposition of the definition of “information society services".
Scope (Article 15(1))

Section 87g UrhG-E lays down the right of press publishers and the limitations to the scope of the press publishers’ right as determined by Article 15(1) CDSM Directive. This transposition mainly sticks to the text of Article 15(1) of the CDSM Directive. However, Section 87g(2)(1) UrhG-E adds one limitation to the scope that is not laid down in Article 15 CDSM Directive:

(2) The rights of the press publisher do not include

1. the use of facts contained in a press publication,
2. the private or non-commercial use of a press publication by individual users,
3. the setting of hyperlinks to a press publication and
4. the use of single words or very short extracts from a press publication.

This forms a welcome implementation of Recital 57 CDSM Directive, which is necessary to prevent any monopolisation of mere facts.

The second limitation concerns the private or non-commercial use of a press publication by individual users. In the explanation of the draft bill on page 122, an explicit reference is made to Twitter:

*If a user posts a tweet for private purposes that refers to a press publication, this use is not covered by the scope of protection, even if the platform (here: Twitter) pursues commercial purposes. This is because in this respect the non-commercial purpose pursued by the user is the only thing that matters.*

This is an important explanation. It would be useful for legal certainty to add to the operative provision that the limitation concerns “the private or non-commercial use of a press release by individual users, regardless of whether the provider of the information society service used pursues commercial purposes”.

Moreover, this statement correctly clarifies that, where a user of Twitter’s service posts a tweet containing (a more-than-very-short extract of) a press publication, that qualifies as “use” of the press publication by the user, and not by Twitter. It would be useful for legal certainty to clarify explicitly that, although individual users of Twitter’s service might potentially be in scope of Article 15, i.e. where they qualify as providers of information society services, Twitter itself is not in scope of Article 15 (except possibly to the extent that it uses its own service to post tweets).

We would emphasise, however, that even where a user posts, for commercial reasons, a tweet that merely “refers to” a press publication, this use would still likely not be in scope of Article because would likely be a hyperlink to a press publication, and/or contain only single words or very short extracts of a press publication.
It is also essential to clarify the terms “acts of hyperlinking” and “very short extracts” in the third and fourth limitation in a manner that preserves the publishers’ rights in determining the look and feel of their publications online platforms whilst preserving the clear intent of the EU legislator to leave short extracts and hyperlinks alone, and the principle of legal certainty, a central requirement for the rule of law.

Given the evolving nature of the CJEU’s jurisprudence around hyperlinking and copyright, it is significant that Article 15 excludes hyperlinking from the scope of protection specifically and explicitly. The explanation of the draft bill on page 122 states, correctly and importantly, that it is irrelevant whether the links are set for commercial or non-commercial purposes. However, Twitter believes that the transposition should in a broader sense confirm that all hyperlinking is excluded in all circumstances. Also, the draft bill should specify that the limitation covers hyperlinks in whatever form they take, such as words, images, etc.

The explanation of the draft bill states on page 122 that the limitation concerning very short extracts must be interpreted in such a way that the effectiveness of the rights of the press publisher is not affected. However, the explanation should add that on the other hand, the exclusion must also be interpreted in such a way as not to unduly compromise the freedom of expression and information, to prevent the monopolisation of facts, and to ensure a fair balance between the rights of press publishers, users, and service providers. Adopting a strict definition of the term “very short extracts” would undermine the objectives behind the limitation. Moreover, seven words in German are likely to be more characters than used in English. For that reason, any attempt to clarify the meaning of “very short extract” should allow sufficient flexibility to online platforms and press publications to enable them to reflect these cultural intricacies on their platforms, and recognise that this harmonised concept of EU law will ultimately have to be interpreted by the CJEU.

Also, it is not desirable to consider extracts beyond a specific size to be infringing without considering the context of the extract. A welcome clarification would be, for instance, that an extract of a press publication does not interfere with the press publishers’ right where it does not replace the need to consult the press publication itself. An extract which refers to or describes a press publication should therefore not be covered. This is also in the interest of press publishers, as such extracts help users to find their publication with specific keywords and to see that a used search term occurs in the press publication. Moreover, it is useful that the explanation of the draft bill clarifies that “very short extracts” may also be composed of a combination of different types of works and objects of protection:

The "very short excerpts" may also be composed of a combination of different types of works and objects of protection. If, for example, a contribution in a press publication contains both text and graphics, photographs or audio-visual material, the cumulative
use of several elements may be permitted, provided that each element is a very short extract from the press publication.

This explanation correctly reflects the fact that the industry-standard method of showing hyperlinks on online services to third-party party content is to show a snippet of text and a thumbnail image from the source publication. In many cases, the publisher of the source website will have specified in the page code (e.g. through the use of metatags) which snippet text and which thumbnail image should be used for such purposes, in which case the publisher would be considered to have explicitly authorised (to the extent required) the use of that snippet and that thumbnail image for reference purposes. Even where the code of the source page contains no such explicit instructions, however, the use of a brief snippet and a thumbnail image to refer to a page is not economically detrimental to the publisher, and falls outside the scope of protection of Article 15, on the basis that it is a hyperlink and/or very short extract.

It is also important to clarify in the operative provisions of the draft bill that, in light of recital 57 CDSM Directive, the limitation for very short extracts should not restrict otherwise permissible uses, e.g. based on an existing copyright exception.

Twitter also emphasizes that acts of hyperlinking, and the use of individual words or very short extracts of a press publication, are not exceptions to the right provided by Article 15, but are excluded from the scope of protection in the first place. This is apparent from the wording of Article 15(1) (“the first subparagraph shall not apply”), as compared to the reference to exceptions in Article 15(3). It also follows from the analogy to copyright: the CJEU’s case law on hyperlinking does not concern a hyperlinking exception but when a hyperlink is a communication to the public at all. Similarly, when someone uses a portion of a work that is so short as to not in itself be original, this does not mean that an exception applies but rather that no communication to the public or reproduction has occurred at all. This distinction is of significant practical importance, in that the application of exceptions is generally restrictive and subject to the three-step test, with the burden of proof generally being on the user; conversely, it is generally up to the rightholder to demonstrate that a particular act engages the exclusive right. The German transposition of Article 15 should therefore make it clear that it is up to the rightholder to demonstrate that a particular online use by an information society service provider is more than (a) an act of hyperlinking and (b) the use of individual words or very short extracts of a press publication.

Finally, in the interest of both a positive user experience and transparency, Twitter recommends that headlines be excluded from the protection provided under Article 15 CDSM Directive and Section 87g(1) UrhG-E regardless of how they are featured on the online platform (i.e. contained in hyperlinks or displayed in very short extracts) or their length, particularly where press publishers publish to a platform themselves. This will allow online platforms to provide context to their users about the content of these extracts or hyperlinks which is an essential factor that users rely upon to decide whether to read the content or not; and of course, this is
the very intent of publishers to distribute their works on the platforms where they have selected to upload the content themselves.

Article 17 CDSM

Twitter has previously submitted a response to the BMJV’s public consultation relating to the transposition of the CDSM Directive of 6 September 2019. That response was limited to Article 17 CDSM Directive. In its response, Twitter explained that its current service does not fall within the scope of Article 17 CDSM Directive and provided six main recommendations to the German government for a balanced, consistent and uniform transposition of Article 17 of the CDSM Directive in German law. This earlier response forms a basis for Twitter’s current response.

We again emphasise that Twitter’s current service does not fall within the scope of Article 17 but we believe that both we and our users have an interest in ensuring that it is adopted in as precise and balanced a manner as possible, which respects the rights and interests involved and creates a predictable regulatory landscape for online-sharing services.

The draft bill of the BMJV introduces a new legal instrument, the draft for a Copyright Service Provider Act (“UrhDaG-E”), to implement Article 17 of the CDSM Directive. In setting out Twitter’s response to this implementation of Article 17 CDSM Directive, we follow the structure of the CDSM Directive.

Platforms covered (Article 2(6) CDSM Directive)

Under the draft bill, an online content-sharing service provider (“OCSSP”) as defined under Article 2(6) CDSM Directive is referred to as a “service provider” and is defined under Section 2(1) UrhDaG-E. The definition of a service provider under Section 2(1) is similar to the first paragraph of the definition in the CDSM Directive. Section 3 UrhDaG-E implements the second paragraph of the definition from the CDSM Directive and sums up the services that are excluded from the definition. The excluded services under Section 3 are exactly the same as the services excluded under Article 6(2) CDSM Directive.

The definition in Section 2(1) UrhDaG-E implements part of recital 62 of the CDSM Directive by explicitly stating that service providers “compete with online content services for the same target groups”. This explicit inclusion of recital 62 of the CDSM Directive is important because it clarifies the scope of the definition. However, the full passage of recital 62 that is important in this context determines that the definition of an online content-sharing service provider “targets only online services that play an important role in the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences”. To compete for the same audience as another online content service, a service must contain a similar amount of the same type of copyright protected content as that other
content service. Otherwise, the audience of the first service will not be interested in the second service and the services do not compete. Therefore, a service with a small amount of copyright-protected content cannot be considered to compete with another service with a big amount of (or another type of) copyright-protected content. It would be useful to add this complete passage of recital 62 to Section 2(1) UrhDaG-E and to insert the above clarification in the explanation of the draft bill. Moreover, it is important to emphasise the element in recital 62 determining that the scope only extends to services that play an important role on the content market - not just any market. Therefore, any other service that is not listed in Article 2(6) and Section 3 3 UrhDaG-E but that plays no role or that does play a role, but not an important role, on the content market is also excluded from the definition.

Also, recital 62 states that the definition does not cover services “that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.” This implies that it is not enough that a service has, for instance, the uploading or sharing of content as one of its purposes, while the main purpose of the service is different. Only part of recital 62 is explicitly included in Section 2(1) UrhDaG-E. It is important to include the full relevant passage of recital 62 in the definition of Section 2(1) of the draft bill and not only part of it, in order to clarify the exact scope of the definition and to ensure a full and proper transposition. In fact, the draft bill should ensure that the definition of a service provider only covers market-dominant platforms that compete directly with licensed content for the same audiences. The explanation of the draft bill on page 42 refers to Youtube, but also to “small special interest platforms”. However, it is important to emphasise in this context that such small special interest platforms are only covered if they are market-dominant platforms, playing an important role on the online content market and competing with other online content services such as Youtube, which is a requirement that is unlikely to be met by such small platforms.

However, the assessment whether a specific service qualifies as service provider according to the definition as it is under the current draft of Section 2(1) UrhDaG-E, even with the additions suggested above, remains an uncertain exercise. This uncertainty threatens to chill investment and innovation by existing and potential OCSSPs, both large and small, European and global. That is particularly problematic given the stark, binary consequences of qualifying as a service provider. Twitter therefore encourages the German government to add other specific examples of the types of services that fall in and out of scope under Section 3 UrhDaG-E. Also, it is important to clarify in Section 3 that the list of services in the provision is not exclusive. A significantly broader range of services may fall outside scope (even if they meet other parts of the definition), on the grounds that they do not compete with other online content services such as online audio and video streaming services, for the same audience.

Twitter also suggests clarifying the requirement of having the sharing of copyright-protected works as a "main purpose". Criteria that determine whether this requirement is fulfilled are that (i) the sharing of the protected content should be the normal use for which the service was designed (see the first sentence of Recital 62) and (ii) the service should clearly be competing
with licensed services offering comparable protected content. The fact that the “designed”
normal use of the service is relevant, implies that one should not look at actual, possible or
foreseeable uses of the service. Rather, a service’s designed normal use will probably need to
be assessed by looking at aspects such as user interface, features, marketing, FAQ, terms of
service etc.

Services are only OCCSPs if and to the extent that they compete with other (licensed) content
services, and only in relation to the types of works whose uploading and storing is part of their
main purpose. For example, where the main purpose and designed normal use of a service is
for users to upload and share photos, and the service competes with licensed photo services for
the same audiences, that service might be subject to Article 17 as regards photographic works,
without thereby also qualifying as an OCSSP for other types of works, e.g. music or ebooks.
Should a user of the service upload and share a music or ebook file, the provider would not be
liable for a communication to the public under the specific regime of Article 17, but its liability
would have to be investigated under the general regime of Article 3(1) of Directive 2001/29 and
Article 14 of Directive 2000/31. Clarifying this in the draft bill would ensure that the bill stays
limited to achieving the goals envisaged by Article 17 CDSM Directive, and that it does not
reach further than those goals.

Moreover, in order to ensure that the solution intended by the legislator is focused on the
problem as identified by the legislator, Twitter suggests to clarify explicitly that only the amount
of unlawfully uploaded third-party content must be taken into account in the assessment of
whether a service qualifies as an OCSSP. Much of the content available on online services such
as Twitter is first-party content (i.e. users uploading their own creations), or content uploaded
lawfully (e.g., on the basis of a license, or an exception or limitation). These are not part of the
licensing problem that Article 17 seeks to address, and should not be considered when
assessing whether a “large amount” of content is being uploaded. This interpretation is also
supported in recital 82 of the CDSM Directive:

Nothing in this Directive should be interpreted as preventing holders of exclusive rights
under Union copyright from authorising the use of their works or other subject matter for
free, including through non-exclusive free licences for the benefit of any users.

Finally, Twitter recommends clarifying the terms “organising” and “promoting” in Article 2(6).
These terms should not be interpreted too broadly. “Organising” should not cover, for instance,
the mere existence of a search function that allows users to find certain content based on
keywords. Moreover, the term “promoting” relates to the promoting of the user-uploaded content
by attempting to attract a larger audience for it (see recital 62). Moreover, the promotion only
relates to user-uploaded third party content. For instance, the fact that an advertiser pays a
service provider to promote content the advertiser created itself should not be relevant to the
question whether a service promotes user-uploaded content.
Twitter believes it is precisely the combination of key features discussed above that excludes its operations from the definition of OCSSP. The main use case of Twitter is that it allows users to upload their own content, i.e. Tweets, rather than copyrighted third-party works. The fact that Twitter doesn’t compete, or seek to compete, with licensed audio and audiovisual content services is also obvious from its product design, which shows users their timeline, rather than videos, music or any other specific type or source of works. To the extent that users attach images to their Tweets, or include hyperlinks in them, the main use case is as an illustration of a point made in a Tweet, so that an exception or limitation (quotation, parody, etc.) will often be applicable. Twitter is neither a “market-dominant platform” which makes large quantities of (let alone third-party, unlawfully uploaded) copyright-protected works accessible, nor does it build its business model on the exploitation of user-uploaded third-party copyrighted works. Twitter also does not compete with any licensed, paid audio or video streaming services. Its users don’t access their Twitter feed to find and watch protected content online. They do so because they want to know and engage with what’s going on in the world, and what people are talking about. Thus, its service belongs in the list of out-of-scope services (together with Wikipedia, Github, WhatsApp and Blogs) referred to in the German government statement from 15 April 2019 on the draft CDSM Directive:

*The requirements laid down in Article 2(6) of the Directive must be addressed and clarified, since the rules are aimed solely at those market-dominant platforms which make large quantities of copyright-protected uploads accessible and which base their commercial business model on such a practice, i.e. services such as YouTube or Facebook. At the same time, we will make it clear that services such as Wikipedia, university repositories, blogs and forums, software platforms such as Github, special-interest offers without any connection to the creative industry, messenger services such as WhatsApp, sales portals or cloud services are not platforms within the meaning of Article 17.*

Twitter started with the idea of an individual using an SMS service to communicate with a small group. Its service is also often referred to as “microblogging”. Both types of services – an electronic communications service (SMS) and a (micro) blogging service – are expressly excluded from the definition of an OCSSP. By way of illustration, approximately only five percent (5%) of daily tweets in the EU include some sort of video or image. Of that five percent of Tweets in the EU that include video or an image, most are users posting, for example, their own photos or videos.

A statutory definition along the lines described above would provide much needed legal clarity in conformity with the letter and spirit of the CDSM Directive, protecting the many permissible ways in which users interact with copyright-protected works online. It is also necessary to safeguard an interpretation of the CDSM Directive that allows a fair balance to be struck between the

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protected interests of rightholders and the exercise of the right to freedom of information and freedom to conduct a business by users and exempted online services.

**Licensing (Article 17(1) and Article 17(2))**

First, it would be good to stipulate in the draft bill that Article 17(1) CDSM Directive points to the rightholders referred to in Article 3(1) and 3(2) of the InfoSoc Directive, namely: authors, performers, phonogram producers, producers of the first fixations of films and broadcasting organisations. This list does not include the new category of rightholders created by Article 15 CDSM Directive – the press publishers – so that these do not qualify as “relevant rightholders” from whom authorisation must be sought. The same is the case for producers of databases, holders of rights in computer programs, trademark owners etc. It would be useful to explicitly exclude such rightholders from the scope of the obligations for service providers under the UrhDaG-E.

Article 17(2) CDSM Directive determines that an authorisation obtained by the OCSSP from a rightholder also covers acts carried out by users of the service that do not act on a commercial basis or whose activity does not generate significant revenues. Article 17(2) is literally implemented in Section 9(1) UrhDaG-E.

The CDSM Directive and the draft bill do not define the meaning of “acting on a commercial basis” or “generate significant revenues”, which can lead to important legal uncertainty. By means of an example (theoretical, since Twitter is not an OCSSP), while a user of Twitter who posts a Tweet once a year, with only a handful of views, will be clearly non-commercial, and Tweets of content by accounts owned by broadcasters may be clearly commercial, there is a lack of clarity as to where the line should be drawn. This potentially makes it very difficult for OCSSPs to determine whether their users are considered commercial or non-commercial users in certain situations. Social media influencers may for example be particularly difficult to categorise, especially when they are not (yet) very popular.

This is an issue because OCSSPs will have to establish which of their users are commercial or not to assess whether they are at risk of liability or not, while the number of such professional users and the extent of such a liability may be substantial. There is a real risk that this will result in an onerous administrative burden where professional users for example have to indemnify an OCSSP or demonstrate chain of title. For larger players this may not be particularly problematic, early-stage micro-professionals however are likely to be heavily impacted threatening the freedom of speech and entrepreneurship.

Twitter therefore recommends the German government to introduce in the UrhDaG-E a presumption that all users who do not self-identify as commercial entities are deemed non-professionals covered by an authorisation obtained by an OCSSP. Such presumption could be rebuttable, whereby rightholders can notify an OCSSP of accounts that in their view are
clearly operated by a commercial entity. Only this way, an OCSSP and its ‘undeclared’ users alike would gain some comfort that they won’t accumulate significant liabilities while using the service during the early stage of their ventures.

It is also important for the draft bill to clarify that, unless they agreed otherwise, OCSSPs are not involved and are not expected to facilitate the agreements between rightholders and users acting for commercial purposes or whose activity generates significant revenues. Such agreements merely concern these types of users and the rightholders and, as follows from Article 17(2), must be seen separately from the arrangement between the OCSSP and the rightholders.

However, the CDSM Directive intends to safeguard the contractual freedom of parties (recital 61). Therefore, rightholders and OCSSP are free to agree on broader licensing terms than those established under Article 17(2) and that they can choose to agree that the license covers all uses, also to users acting for commercial purposes or whose activity generates significant revenues. Twitter recommends to clarify this in the draft bill.

Section 9(2) UrhDaG-E determines that if the user has a permission to reproduce a work through a service provider, this permission also works in favour of the service provider. This forms a welcome implementation of recital 69 CDSM Directive. However, it is important to ensure that OCSSP are not required to proactively check with every individual rightholder and user whether they have already concluded an agreement. It would therefore be useful, for instance, if users could indicate, when creating an account or uploading content, whether they already have an agreement with a rightholder.

Elimination of liability (Article 17(4) and 17(5))

a. Principle of proportionality

Article 17(5) CDSM Directive makes clear that all three best efforts obligations of the new safe harbour for OCSSP’s (i.e. to license, to filter and to operate a notice & takedown procedure) are subject to the principle of proportionality, stipulating specific elements that must be taken into account:

- the type, audience and size of the service and the type of works uploaded by users of the service, i.e. the kind of service provided; and
- the availability of suitable and effective means and their cost for service providers, i.e. what is possible to do.

Under the draft bill, the principle of proportionality is implemented in Section 1(2) UrhDaG-E. It is positive that the principle of proportionality is explicitly transposed in the draft bill. Section 1(2) correctly refers to the obligations in Sections 4, 10 and 11 UrhDaG-E, which comprise all three
elements of Article 17(4) CDSM Directive. Sections 10 and 11 each also refer to Section 1(2) but Section 4 does not. It would be useful if Section 4 also explicitly refers to the principle of proportionality of Section 1(2), to ensure that it is fully clear that the requirement of best efforts to obtain authorisation is also subject to the principle of proportionality. Even though the explanation of the draft bill states this on page 43, it would be useful to make this as clear as possible in the operative provisions of the draft bill.

b. Compatibility with primary EU law

The UhrDaG-E should transpose Article 17 in a way that is compatible with the EU Charter. Twitter will refer to the pending Polish annulment proceedings with respect to Article 17(4) in its discussion of best efforts to prevent availability. The German transposition should obviously respect the CJEU’s judgment in that case, whether it annuls part of the provision or interprets it in such a way that it is compatible with the Charter.

The UhrDaG-E should also transpose Article 17 in a way that is compatible with free trade agreements with third countries to which the EU and Germany are a party. Twitter refers specifically to the following provisions:

- Articles 253-254 of the FTA with Colombia and Peru
- Articles 10.65-10.66 of the FTA with South Korea
- Article 20.11 of the FTA with Canada (CETA, applied provisionally pursuant to Council Decision (EU) 2017/38 of 28 October 2016)

The FTAs with Columbia, Peru and South Korea contain almost verbatim copies of Articles 14 and 15 of Directive 2000/31/EC. They therefore share its closed system of conditions for invoking the safe harbour (i.e. that the provider does not have actual knowledge of infringement and, upon obtaining such knowledge, acts expeditiously to remove or to disable access to the information). Requiring that an OCSSP wishing to invoke a safe harbour also has to make best efforts to obtain an authorisation and prevent the availability of infringing works appears to go beyond those conditions.

Article 20.11 CETA is if anything even more unconditional in its wording:

1. Subject to the other paragraphs of this Article, each Party shall provide limitations or exceptions in its law regarding the liability of service providers, when acting as intermediaries, for infringements of copyright or related rights that take place on or through communication networks, in relation to the provision or use of their services.
2. The limitations or exceptions referred to in paragraph 1:
   (a) shall cover at least the following functions:
   (i) hosting of the information at the request of a user of the hosting services; […]
3. The eligibility for the limitations or exceptions referred to in this Article may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity.

4. Each Party may prescribe in its domestic law, conditions for service providers to qualify for the limitations or exceptions in this Article. Without prejudice to the above, each Party may establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. [...] 

Article 17(3) of the CDSM Directive is difficult to reconcile with Article 20.11(1) CETA. After all, Article 17(3) states expressly that such a limitation of liability does not apply when an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in that directive, while Recital 65 maintains that this does not affect the application of Article 14 of Directive 2000/31 to OCSSPs for non-copyright purposes. In other words, Article 17 of the CDSM Directive rules out, at least to a degree, the applicability of Article 14 ECD in the context of copyright, which is a copyright-specific carve-out that Article 20.11(1) CETA does not provide for. Although Article 17(4) provides its own safe harbour, the conditions for that safe harbour are difficult to reconcile with Article 20.11(3) CETA, unless the eligibility for the safe harbour is in no way conditioned on the service provider “monitoring its service, or affirmatively seeking facts indicating infringing activity”.

These FTA provisions are of significant importance when transposing Article 17. Germany has a duty of loyalty to ensure proper transposition of secondary EU law such as the CDSM the Directive. However, that secondary law should be interpreted in a manner that is consistent and compatible with primary EU law, including the EU Charter and FTAs such as those mentioned here. Where such a consistent interpretation is not possible, Germany’s duty to respect such primary EU law is of a higher order than its obligation to respect secondary law.

c. Best efforts requirements

Introduction

The draft bill implements the English term “best efforts” from Article 17(4) as “bestmögliche Anstrengungen”, while the German version of the CDSM Directive speaks of “alle Anstrengungen”. The term “bestmögliche Anstrengungen” forms, however, a more correct translation of the term “best efforts” and it is therefore positive that the draft bill has not literally implemented the language of the German CDSM Directive on this point. The language of the German CDSM Directive, “alle Anstrengungen”, seems to require “all efforts” from OCSSPs, which is a higher threshold than what is meant with “best efforts”. However, the term “bestmögliche Anstrengungen” could also be interpreted as forming a higher threshold than
“best efforts”, as it literally translates to “best possible efforts”. It would be more correct if the draft bill spoke simply of “beste Anstrengungen” instead of “bestmögliche Anstrengungen”.

In any case, it is important to clarify that there is no obligation for platforms to essentially do everything in their power to obtain authorisations from rightholders (even if it requires disproportionate effort and/or comes at a commercial loss). Given the cross-border context, and the purpose of harmonisation, it makes sense to take guidance from an international source like the principles developed by the International Institute for the Unification of Private Law (UNIDROIT), aimed at harmonisation of international commercial contract law. Article 5.1.4 of the UNIDROIT Principles (2016) clearly distinguishes between an obligation of result, and an obligation of effort, and further clarifies that an obligation of effort does not imply an obligation to expend all possible efforts, but only reasonable efforts:

**Duty to achieve a specific result. Duty of best efforts**
1. To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
2. To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstance. This is also consistent with Recital 66, which states that “account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator.”

**Pflicht, einen bestimmten Erfolg zu erzielen. Pflicht zum Einsatz aller Kräfte**
(1) Soweit die Verpflichtung einer Partei eine Pflicht umfasst, einen bestimmten Erfolg zu erzielen, ist diese Partei verpflichtet, diesen Erfolg zu erzielen.
(2) Soweit die Verpflichtung einer Partei eine Pflicht zum Einsatz aller Kräfte bei der Ausführung einer Tätigkeit umfasst, ist diese Partei verpflichtet, solche Anstrengungen zu unternehmen, die von einer vernünftigen Person gleicher Art unter gleichen Umständen unternommen würden.

In both language versions, it is clear that - notwithstanding the use of the words “Einsatz aller Kräfte” [application of all powers] in the heading - the best efforts obligation does not require “all powers” to be applied, but only such efforts as would be made by a reasonable person of the same kind in the same circumstance.

**Best efforts to obtain authorisation**

According to Article 17(4)(a), OCSSPs must make “best efforts” to obtain an authorisation from rightholders. This provision is implemented in Section 4 UrhDaG-E, which stipulates in paragraph 1 that the service provider fulfills this obligation if it acquires rights of use which are either offered to it or which are available through a collecting society.

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This seems to imply that the OCSSP only has to obtain authorisation when a rightholder has offered it a license or when it was able to obtain a license through a collecting society, but that the obligation to obtain authorisation does not apply when no license is offered to it and when it cannot obtain a license through a collecting society. This is confirmed by the explanation of the draft bill on page 43 and 143 which states that, when assessing the expected efforts of the service provider, the principle of proportionality must be observed and that this means that the service provider is in principle not obliged to actively search for license offers from individual rightholders.

While the clarification that an OCSSP need not always proactively seek out rightholders is welcome, the suggestion that an OCSSP should always obtain an authorisation when it is offered a license or when a license is available from a collecting society is incorrect.

The principle of contractual freedom (as referred to in recital 61 CDSM Directive) applies to both rightholders and OCSSPs, and means that, while Member States might foster mechanisms to facilitate agreements between rightholders and service providers, any such mechanisms should be purely voluntary. Although the wording of Section 4(1) UrhDaG-E gives the impression that the best efforts requirement is only fulfilled when the OCSSP acquires the rights of use of a work, there are many scenarios in which an OCSSP might reasonably refuse a license even when one is offered to it. For example, an OCSSP might not want (or even permit) certain types of works on its service (e.g. because the works are unlawful, harmful or do not fit the design or main purpose of the platform). An OCSSP should thus have the freedom to refuse a license, even when offered to it on terms that might be reasonable with respect to other OCSSPs, without thereby becoming liable for user uploads.

Moreover, not all rightholders might be in favour of licensing their content to all OCSSPs. Therefore, it should be clarified that “best efforts to obtain authorisation” does not necessarily require effort to obtain a license; it can also mean effort to agree with rightholders on measures to prevent the availability of content which the OCSSP does not want to license.

The “best efforts” requirement to obtain authorisation in the CDSM Directive does not contain an explicit reference to the material terms of a license. Recital 61 says however that “licensing agreements should be fair and keep a fair balance between both parties”. The statement of the German government, following its vote in favour of the CDSM Directive, also highlights that rightholders have to be cooperative and reasonable in their royalty demands.\(^4\) Section 4(2) UrhDaG-E determines the conditions under which the obligation to obtain an authorisation exists:

- It must apply to content that the service provider typically reproduces in public
- It must concern a significant repertoire in terms of works and rightholders
- It must cover the territorial scope of the UrhDaG-E

Reasonable conditions must apply

This is a welcome limitation of the obligation to obtain an authorisation. It is very important that service providers are not obliged to license content which they do not typically offer. According to the explanation on page 143, “content” can also be interpreted as meaning, for instance, music genre. Also, according to the explanation, a service which, for example, mainly reproduces audiovisual content to the public is therefore not obliged to license photographs or other images, even if these are also occasionally uploaded on the service’s platform. The requirement of a significant repertoire of works and rightholders is to “avoid the service provider having to deal with a large number of individual rightholders, which would be disproportionate in view of the transaction costs involved.” It is very important that these limitations are maintained in the final version of the UrhDaG-E.

Twitter has repeatedly experienced difficulties in licensing rights. In its experience, rightholders are not always willing to provide information about the rights that they have and the terms under which they might be prepared to license them. While this is to some extent their prerogative, it necessarily has consequences in terms of what can reasonably be expected of an OCSSP. In the event a rightholder cannot provide adequate detail and/or definitive licenses for an OCSSP with respect to the content, then an OCSSP should not be forced to licence and the protection of the E-Commerce Directive should be maintained. A cross licence indemnity would not be sufficient in the commercial licensing terms to cover this gap as the primary law would be to remove the hosting defence under the E-Commerce Directive. In order to maintain a fair functioning of the marketplace, if a rightholder cannot adequately demonstrate his ownership or rights, then the protection of the E-Commerce Directive should be maintained for the OCSSP.

Section 1(3) UrhDaG-E implements Article 17(3) of the CDSM Directive and states that a service provider cannot invoke the safe harbour protection for hosting providers as laid down in Article 14 E-Commerce Directive. In light of the above, however, it would be useful to clarify that the safe harbour protection does apply when a rightholder cannot adequately demonstrate his ownership or rights.

Moreover, it is important to specify in the explanation of the draft bill that the assessment of whether an OCSSP has made “best efforts to obtain authorisation” depends on the following other criteria:

- The amount of a particular rightholder material available on the service in relation to the total amount of works on the service.
- Whether the relevant type of content is prevailing on the service or residual, i.e. the extent to which the uploading and sharing of that type of content is part of or related to the service’s main purpose. Where a particular type of content is residual, the service might not be an OCSSP in relation to those types of works, or at least the amount of effort that can be expected of the provider in relation to that type of content would be lower.
- Whether the rightholder has lawfully demonstrated in a timely and prompt manner that it owns the rights to the works, that its works are regularly uploaded to the OCSSP.
unlawfully, and the impact of the works’ availability on the service on the rightholder’s exploitation interests;
- The number of works uploaded and made available through the service unlawfully in proportion to the total number of works uploaded and made available through the service;
- The difficulty and cost to the OCSSP of identifying, finding and contracting with the rightholder;
- The licensing fee that would be due under a license in relation to the total licensing income of the rightholder and/or the total licensing expense of the OCSSP; and
- The availability and cost of technical means to identify and contract with rightholders must be considered through a proportionality test.

Best efforts to prevent availability

The obligation of best efforts to prevent availability from Article 17(4)(b) CDSM Directive is implemented in Section 10 UrhDaG-E. The OCSSP must block a work upon the request of a rightholder as soon as the rightholder has provided it with the information required. If there is a blocking request by a rightholder, the OCSSP must immediately inform the user when he uploads a work which falls under this blocking request (Section 8(1) UrhDaG-E). Blocking is not allowed if the user labels the content uploaded by him as contactually or legally permitted. This is determined in Section 8(2) UrhDaG-E which is further discussed below in the chapter on “Permitted uses”. However, if the labelling by the user is manifestly inappropriate, the blocking is carried out despite the label (Section 12 UrhDaG-E).

The problem that arises in this context is that platforms need to determine during the upload process by the user whether the specific upload contains works that correspond to a blocking request. This requires a real-time upload filter. This seems to contradict the earlier position of the German government that it would avoid imposing upload filters. Moreover, this indirect requirement of a real-time filter makes the draft bill incompatible with the principle of proportionality laid down in Article 17(5) CDSM Directive. The approach of the draft bill assumes that platforms are able to identify matches between uploads and works that rightholders have requested to be blocked and that they can inform users of this in real-time during the upload. However, the ability to match content in real-time during the upload is not available, at least not to all platforms. In particular, it is disproportional to require such a real-time upload filter, which asks for important investments, from OCSSPs that mostly show first-party content (i.e. users uploading their own creations), or content uploaded lawfully (e.g., on the basis of a license, or an exception or limitation).

Twitter also believes, as the Polish government has argued in its annulment action before the CJEU, that the imposition of upload filters would be incompatible with the EU Charter (and, for similar reasons, with the FTAs discussed above). In the Netlog case, the CJEU considered the imposition of a filtering obligation not only incompatible with Article 15 E-Commerce Directive
(2000/31/EC), but also with the Charter rights of users and service providers. In later cases, the CJEU repeated that a fair balance must be struck between each of these rights. Such fair balance requires, at a minimum, that any measures are strictly targeted, in the sense that they must serve to bring an end to the infringement of copyright without affecting the accessibility of lawful information. An obligation that requires a service provider to check each user upload against a reference library of content to be blocked would be a general monitoring obligation that violates the Charter.

There are significant limitations to current technical tools, specifically they cannot judge context and therefore are unable to apply exceptions and limitations, and it is very important that the transposition takes a technology-neutral approach. This is further discussed below in the chapter on “Permitted uses”. Obliging the application of such limited technical tools is therefore detrimental to the freedom of expression and of information, which are part of the balance mentioned above.

Section 10 UrhDaG-E does not transpose the requirement of Article 17(4)(b) of best efforts “in accordance with high industry standards of professional diligence”. It would be useful, however, for the draft bill to clarify that a different standard of “best efforts” should be applied in this context to platforms who carry copyright-protected content which is residual to the main service as compared to larger platforms who carry a high percentage of copyright-protected content on their service and have spent years building advanced content recognition tools which are proprietary to them.

Section 10 UrhDaG-E requires the rightholder to provide necessary information when issuing a blocking request. It should be explicitly emphasised that, in line with Recital 66 of the CDSM Directive, if the rightholder does not provide the relevant and necessary information to an OCSSP, any liability on the part of the OCSSP should be excluded.

It would be useful for the draft bill to clarify what should be done when the OCSSP is provided with conflicting information. Content recognition systems operated by online platforms are often plagued by multiple claims, made multiple times, by multiple rightholders. In that situation, an online platform is poorly equipped to assess the ownership of particular copyrighted material. Twitter therefore recommends the German government to clarify that an OCSSP which receives conflicting information from rightholders is not required to do more than notify this conflict to the other rightholder. In order to safeguard freedom of expression and avoid blocking access to lawful content, any measures to prevent the availability of content should be suspended pending such conflict unless a court order provides otherwise.

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5 CJEU 16 February 2012, C-360/10 (Netlog), par. 47.
6 CJEU 27 March 2014, C-314/12 (UPC Telekabel Wien), par. 47, 56.
Best efforts to remove content

The obligation to remove unauthorized content upon notification by the rightholder is transposed in Section 11 UrhDaG-E and is also subject to the requirement that the user has not marked the content as being contractually or legally permitted according to Section 8(2), except if it is obviously incorrect (Section 12).

Section 11 states that, upon a request for removal of content, the OCSSP must also block the content in the future in accordance with Section 10. This goes beyond Article 17(4)(c) of the CDSM Directive and forms an undesirable addition. If a rightholder wants the OCSSP to block certain content, he should issue a separate blocking request according to Section 10. A notice to disable or remove specific content forms a separate and targeted request that concerns specific content which is already available on the platform. This notice cannot also be used as a blocking request to be applied to future content uploaded on the platform, as the context of this future content might be different (might be covered e.g. by an exception or limitation or a license). The notice cannot anticipate this different context of future uploads. Twitter therefore advises to delete this addition from Section 11 UrhDaG-E that goes beyond the Directive.

Section 11 UrhDaG-E does not lay down any minimum information requirements for a notice by the rightholder to disable or remove content. Instead, it only refers to the information requirement attached to the connected obligation to block the content in the future. The CDSM Directive, however, requires that the notice to remove content is “sufficiently substantiated” and it is essential that this requirement is explicitly transposed in Section 11. The recommendations provided above about the “relevant and necessary information” required under Article 17(4)(b) and Section 10 UrhDaG-E are also valid for the information necessary for a sufficiently substantiated notice to disable or remove access under Section 11 UrhDaG-E.

Furthermore, Twitter suggests a clarification that the information provided by the rightholders in their notice should not only point to the location of specific unlawful files on the platform, but should also provide the OCSSP sufficient evidence that the complainant is the rightholder and that the file is available unlawfully. Article 17(7) and (9) require that legitimate uses remain unaffected. The risk of being liable for unauthorised acts of communication to the public if an OCSSP does not act expeditiously is an incentive to process notifications by rightholders as quickly as possible. Meanwhile, if an OCSSP has only the right of the rightholder and the notified work to go on, it should make its own assessment whether the notified work may fall within an exception or limitation. This assessment is affected not only by the time pressure, but also by the risk of being liable if it assesses the notified work wrongly. Therefore, in order to ensure a fair balance between the rights and interests of rightholders and users, Twitter recommends to clarify that a rightholder is obligated to show why the notified file infringing its copyright and to assess whether an exception or limitation may apply. If the rightholder fails to provide such information, any liability on the part of the OCSSP should be excluded. Therefore, it is essential for OCSSPs to obtain sufficient information on the illegality of the content to be
able to ensure that they do not make legal content unavailable. The information should be sufficient to ensure that the OCSSP can act without having to communicate further with the rightholder who provided the information.

We also refer to the Opinion of AG Saugmansgaard Øe of 16 July 2020 in Joined Cases C-682/18 and C-683/18 (Peterson/YouTube and Elsevier/Cyando) in par. 190 that the “notification must identify the protected work, describe the alleged infringement and provide sufficiently clear indications of the victim’s alleged rights to the work. Where the application of an exception is not automatically precluded, the notification must contain reasonable explanations why it should be. Only this interpretation can avert the risk of intermediary providers becoming judges of online legality and the risk of ‘over-removal’.”

Notice-and-action procedures can sometimes be abused with bad practices or in bad faith. It is useful that Section 19 UrhDaG-E provides measures against such abuse. We recommend in relation to users’ redress, that the transposition should state explicitly that an OCSSP, which has taken a good-faith decision in response to a user complaint, is indemnified for claims from both users and rightholders if that decision later turns out to have been wrong. Without such a safe harbour for good-faith decisions in disputed cases, OCSSPs risk being put in an impossible situation. It would also be useful if the draft bill would emphasise that, when a user complains against a notice from a rightholder, the first step is for the rightholder to expeditiously duly justify the notice, providing proof of copyright infringement. The OCSSP should not be held to assess the complaint by the user if the rightholder does not provide such a justification, and in that case the content should be made available or be restored without an assessment by the OCSSP. The content should also be made available or restored if the rightholder does not react within a reasonable timeframe.

Permitted uses (Article 17(7))

The draft bill inserts a new Section 51a UrhG-E, which permits the copying, distributing and publicly reproducing of a published work for the purpose of caricature, parody and pastiche. This also covers the use of an illustration or another reproduction of the work that is used, even if the work itself is protected by a copyright or a related right. With this provision, the draft bill implements Article 5(3)(k) of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (“Infosoc Directive”). The right of quotation is laid down in the already existing Section 51 UrhG-E.

Sections 5 and 6 UrhDaG-E make a distinction between legally permitted uses that can and cannot be checked by a machine. It provides criteria for machine verifiable legal uses (Section 6) on top of the legally permitted uses referred to by Article 17(7), which are the exceptions of
quotation, criticism and review and use for the purpose of caricature, parody or pastiche (Section 5). These clear criteria (20 seconds of a film or audio track, 1000 characters of text and 250 kilobytes of a photo) are useful, as the technical flaws of content recognition technology make it impossible to assess the context of an upload without such clear criteria.

**Appropriate remuneration**

Section 7(2) UhrDaG-E requires that the service provider pays an appropriate remuneration for communicating a work to the public even if the work is used for the purpose of a pastiche or forms a machine verifiable legally permitted use. Therefore, the application of the pastiche exception of Section 5(2) and the application of Section 6 do not free the OCSSP from having to pay a remuneration.

This transposition of Article 17(7) is undesirable and at odds with the delicate balance that the EU legislator sought to achieve with Article 17. Article 17(7) was inserted in the CDSM Directive in order to protect freedom of expression and information, and forms an important counterbalance to the liability and cooperation provisions. The requirement of remuneration for these two types of permitted uses is detrimental to this freedom of expression and information and leads to an imbalance between the rights of OCSSPs and users on one hand and of rightholders on the other. Quite apart from the very significant technical and operational costs of implementing such a system, it is unfair, unreasonable and stifling to innovation that users are given a right to use protected works for specific purposes, but that someone else (i.e. the OCSSP) nonetheless has to pay a remuneration for that use. In this context, it should be noted that many OCSSs are offered to users for free, and that forcing OCSSPs to incur potentially uncontrollable out-of-pocket costs will significantly hamper their ability to do so. At the very least, introducing a system in which service providers have to pay for their users’ lawful uploads strongly disincentivises them to allow such uploads, thereby threatening the very freedoms that the Directive and the UhrDaG-E seeks to protect. Here, too, it should be kept in mind that not all platforms are massively large and profitable and able to incur significant additional costs.

Article 17(7) refers to the “existing exceptions and limitations”, referring to Article 5(3)(k) and 5(3)(d) of the Infosoc Directive. This means that these exceptions and limitations should fulfill the criteria of Article 5 Infosoc Directive, which does not require an appropriate remuneration for uses that fall under the exceptions of the provision. Article 5(5) Infosoc Directive does set out the three step test which applies to the exceptions and limitations:

*The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*

This three step test, however, does not provide a justification for asking a remuneration for some of the uses allowed under Section 5 and 6 UhrDaG-E. These forms of free uses without
payment of remuneration would not unreasonably prejudice the legitimate interests of the rightholder. The uses allowed under Section 5 for the purpose of pastiches and under Section 6 are strongly limited and will not conflict with the normal exploitation of the work. It is therefore unjustifiable for a remuneration to be required for such uses.

Much of the content available on online services is first-party content (i.e. users uploading their own creations), or content uploaded lawfully (e.g., on the basis of a license, or an exception or limitation). These are not part of the licensing problem that Article 17 CDSM Directive seeks to address. It is disproportionate that such services would have to pay remuneration for content uploaded lawfully while this content does not touch the primary markets. Regarding machine verifiable legally permitted uses, the explanation of the draft bill states itself on page 145 that the partial free availability of protected content does not harm sales on primary markets, but on the contrary serves the sales of works and therefore benefits rightholders. This makes it even more incomprehensible why service providers should pay rightholders for uses that are exempted from copyright protection and benefit the rightholders.

Section 7(1) UrhDaG-E requires service providers to pay a remuneration to authors who have granted the right of communication to the public of a work to a third party. This is to ensure that creatives, who are often not the rightholders that can grant licenses (these are, instead, publishers, labels, producers or broadcasting companies) receive a fair share in the revenues of the service provider. Twitter supports the objective of providing a fair share for creatives. However, it is important that the share that has to be paid to creatives by service providers is taken into account when determining fair licensing terms (especially the license fee that has to be paid) with the rightholders that give out licenses. Service providers should not carry the full burden of the value gap that exists between creators and rightholders that can give out licenses. This is briefly acknowledged on page 146 of the explanation of the draft bill but should also be included in the operative provisions.

Pre-flagging

The draft bill of June published by the BMJV provided all users with the possibility to pre-flag their upload during the uploading process. By pre-flagging the content, the user marks the upload as being legal and the content is posted online, except in case of obviously illegal uploads or if the pre-flagging is obviously incorrect. Section 8 UrhDaG-E in the new draft bill of October 2020 determines that in case of an upload that contains a copyrighted work that has been reported for blocking, the platform should provide the user uploading the content with the possibility to “pre-flag” his upload during the upload process. This seems to mean that pre-flagging by the user is only possible in case there was already a blocking request for that specific content at the time of the upload. The service provider must immediately inform the user of the blocking request at the moment of the upload.

The first problem that arises in this context, as already discussed above, is that platforms need to determine during the upload process whether the specific upload contains works that
correspond to a blocking request, which requires both a real-time upload filter and a technical and operational process to inform users and process their response. This is an enormous technological and operational challenge, well beyond the abilities and means of all but the very largest platforms.

Moreover, this has the consequence that, when there is no request to block the content at the time of uploading, users do not have the opportunity to pre-flag the content they upload. In that case, if the rightholder decides to report his work for blocking at a later time, after content containing that work has already been uploaded by a user, the user will not have been able to pre-flag this content. The draft bill determines that in such a case, the content is first blocked even if it is legal and, subsequently, the user must actively complain against the blocking of his content in order to have this undone (Section 10 and 11 UrhDaG-E). There is empirical evidence to suggest that users are unlikely to do so, regardless of whether they have plausible grounds to do so. Therefore, this forms a disproportionate limitation of the freedom of expression. It can even be said that the proposal counters article 17(7) and (9) CDSM Directive, as the latter explicitly exclude the blocking of legal content.

Moreover, this system is vulnerable to false copyright claims. In case of a false copyright claim, all content that was uploaded before that corresponds to the false copyright claim will be blocked. Users will not be able to act against such false copyright claims but will have to wait until the content is blocked and can only have the content unblocked afterwards.

The operational and technical challenges discussed above also apply to the rule that service providers should allow pre-flagged content to appear, unless the pre-flag is obviously incorrect. Section 12 as proposed states that, except as regards individual illustrations, a pre-flag is assumed to be incorrect if the content uploaded by the user corresponds to at least 90 percent with the information provided by the rightsholder. In order for the pre-flagging system not to be technically, operationally and financially prohibitive, it is vital that the notion of “obviously incorrect” be strictly defined in objective, quantitative, machine-implementable terms. It is entirely impossible for platforms - at least those of a size comparable to Twitter - to build and maintain an operation in which each individual pre-flag is monitored in real time by a human reviewer in order to determine whether the pre-flag is “obviously incorrect”. In this context, it should be borne in mind that such a determination could require considerable legal knowledge and experience, which again would unreasonably increase difficulties, costs and risks for providers.

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Moreover, even if it were possible to build and maintain such a system, the fact that a human reviewer would be looking at individual uploads before they are made available on the system would cause a serious risk that the service provider would obtain “actual knowledge” of unlawfulness in a non-copyright sense. For example, if a user uploads a message that contains a protected work notified for blocking, but also constitutes criminal hate speech, then a human reviewer checking the pre-flag for “obvious incorrectness” would also potentially be confronted with the criminal aspect of the upload. In that scenario, even if the user’s copyright-related pre-flag was not “obviously incorrect”, the service provider would still risk liability if it allowed the upload to be made available on the system.

Although this is probably not the intention of the UrhDaG-E, the result of both the technical/financial challenge and this liability risk described here would place unreasonable risks and burdens on service providers, and strongly incentivise them to block content by automatic means.

Therefore, Twitter advises the German government to make the implementation of a pre-flagging system by service providers voluntary, at least for all but the very largest platforms; to undo the limitation that users can only pre-flag their upload if there is a blocking request concerning that uploaded work;\(^8\) to stipulate that any verification of a pre-flag by a service provider should be restricted to automated means on the basis of objective, quantitative criteria set out in the law.

It is positive that the explanation of the draft bill states on page 40 that service providers must first make content marked as permitted use accessible online even though the rightholder has registered a blocking notice for the work in question, and should then give the rightholder the chance to complain about the pre-flagging of the work. Twitter recommends including this specification in the operative provisions of the draft bill.

It is also advantageous that Section 16 UrhDaG-E specifies that a service provider is not responsible for the public reproduction of a work if it has been pre-flagged as a permitted use. However, it does not seem fair to oblige the service provider to pay the author if the pre-flagging turns out to be incorrect, as is established by Section 16(2). If the service provider had known that the work did not concern a permitted use, it could have chosen not to allow the work on its platform. The service provider does not get that choice when he has to pay for an incorrectly pre-flagged work, and should not be punished for abuse by its users.

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\(^8\) The German government should add to Section 8 UrhDaG-E the ability to flag any upload as legitimate and that flagged uploads cannot be automatically blocked. Enabling users to assess legality (based on an exception, on a license or on the fact that the content is not protected or is in the public domain) during the upload phase is a viable solution for finding a workable balance between the requirement of best efforts to prevent availability on the one hand, and the proportionality and user rights requirements of Articles 17(5), (7), (8) and (9) on the other hand.
No general obligation to monitor (Article 17(8))

The draft bill must explicitly transpose the prohibition to impose a general monitoring obligation on OCSSPs, as provided in article 17(8). It would also be useful if the draft bill explicitly refers to Article 15 of the E-Commerce Directive, or its national version.

Conclusion

We thank the BMJV for the opportunity to share our views and are available for a more detailed discussion. Despite the fact that our service does not fall within the scope of the proposed Articles 15 and 17 mainly, we want to provide feedback to relevant stakeholders to ensure that the Articles are adopted in a predictable, balanced manner that respects and protects all rights and interests involved.