6 November 2020

European Visual Artists statement to implementation of Article 17 European Council and Parliament Directive on Copyright in the Digital Single Market 790/19

Submission to the public consultation on the Referenten-Entwurf, dated 2 November 2020:

Dear Madame or Sir,

EVA members are following with great interest your consultation on the implementation of the European Council and Parliament Directive on Copyright in the Digital Single Market 790/19 (in the following: DSM Dir). We humbly submit the position of our membership to you and are at your disposal for any further information. We are also referring to our statements delivered to the European Commission Stakeholder Dialogue where we participated and to the statement submitted by our German member VG Bild-Kunst. Jointly with VG Bild-Kunst the members of EVA share the concern that the visual repertoire is not appropriately taken into consideration by your proposals to implement Article 17 of the DSM Dir. Moreover, our members have the impression that the single focus of the German Federal Ministry of Justice lies on other work categories and repertoires than the visual repertoire, namely music and audio-visual works, thus, ignoring the specificities and solutions for visual works to make Article 17 DSM Dir work smoothly. Music and audio-visual works are exploited in different market structures as it is the case for visual authors. A great majority of visual authors is not licensing exclusive use of their works to an industrial publisher or producer, but license non-exclusively. As a consequence, large amounts of visual works appear in different media which are not licensed for reuse. Third party uploads and postings are not subject of most of these licenses and are not carrying to a large extent identifiers at all, or only identifiers leading to the licensees and not of the authors.
CMOs are the main licensors for large quantities of visual repertoire because they are representing the authors. Furthermore, our members are deepening their relations to picture agencies to offer a joint repertoire and licensing to OCSSPs. Direct licensing by large picture agencies are fully compatible with the CMOs collective licensing models. Smaller and medium sized picture agencies will more likely rely on the services of CMOs or else may be confronted with the limits of “best offers to obtain a license”. EVA is also in a process to update its international licensing one-stop-shop Online Art to be available in the first half of 2021.

1. Competing streaming services, Recital 62/63

We strongly oppose that the national legislator would implement elements from Recitals of the DSM Dir not expressively used in the legal text. The definition of a OCSSP being liable for unauthorised use is regulated in Article 2 (6) DSM Dir. To extend the list of excepted cases by conditions which are uniquely used in recitals is a severe infringement of constitutional law and fundamental rights. The condition obviously refers to music and audio-visual streaming services. It is not applicable for the visual repertoire due to the different structure of the markets for image works. It is likely to exclude visual repertoire from being licensed in future and would maintain the present value gap without justification and therefore discriminating visual authors.

Our members already consider and inquire generally for legal action should the wording of the German national implementation would include elements from Recitals into the legislation.

2. Upload of works ‘typical’ for a given OCSSP

If a platform qualifies as OCSSP and becomes liable for uploads by its users relies only on Article 2 (6) DSM Dir. To limit the application to works “typically” uploaded is an addition to the contents of the DSM Dir which has its roots in the lobbying of streaming service platforms which want to limit their liability. The Directive does not back this limitation. The liability covers all protected works uploaded on an OCSSP. In our members understanding this additional condition is targeted to exclude visual authors from Article 17 DSM Dir applications. To limit to typical uploads would not be incompliance with the principle of legal clarity and determination. Besides of excluding and discriminating the visual repertoire it would also
open the door in general and for all other repertoires to prove to a platform that the use of the content is in fact “typical”. A large vague of legal procedures to clarify the term is very likely to become the consequence across all repertoires.

In our submissions to the stake holder dialogue we have provided documents proving that visual works are upload in large numbers also, when streaming services did consider their appearance as untypical. On streaming services, we find sound recordings where standing image is the main visual component, tutorials about art works, reuse of photography uploaded from postings in other media and being part of new mixed media publications in blogs and other formats.

3. New exceptions, here: pastiche

The DSM Dir does not require that new exceptions need to be included for analogue use. Germany has a well-functioning concept of exceptions due to use by third parties. The pastiche exception is a model familiar to other legislations in Europe where it has the function of a catch-all clause. In Germany there is no need besides of the ‘freie Bearbeitung’.

4. Remuneration of exceptions

Unnecessary additional exceptions have to be prevented in order to prevent that authors’ rights are damaged without justification. Following the Three Step Test visual authors have a right to be rewarded for those uses which are justified but only to the extend needed to achieve this result. Copyright has the role to support and reward creativity and therefore ensure that creation will be continued. All exception mentioned in Article 17 (7) DSM Dir have to be remunerated.

The Stakeholder Dialogue clearly demonstrated that the users’ community welcomes broad collective management because it provides that users of social media and sharing platforms may continue to benefit from the technical in legal certainty.

The authors, however, need to be awarded and may not be deprived of their authors’ rights to strike a fair balance. The national legislators benefit as well because the visual works CMOs are providing collective licensing which does neither require any upload filters, nor complex pre-flagging concepts.

Collective licensing set the scene for a positive and forward-thinking model of relations between rightsholders and users for the benefit of all.
5. De minimis clause

EVA members are concerned about the de minimis clause of the proposal of the German Federal Ministry of Justice to exclude certain uses of the application of Article 17 DSM Dir provided that they are of minor impact. To the best of my knowledge the German proposal is not supported by any other EU Member State and appears to be rather isolated. To fix sizes of works by legislation already carries the problem that technical developments cannot be take into consideration easily. Always, the national legislator would have to run through a full revision procedure.

The limits for the visual sector at a level of 250 KB is chosen far to high because it would exclude most image works from protection. Moreover, the size of the monitor used will always play a role but cannot be included in this concept.

That the size of an image would not matter is unlikely to be carried by the CJEU where the Advocate General in September was published in C-392/19 and concluded that also thumbnails are protected.

However, sizes of images may be considered for the licenses that OCSSPs will negotiate with our members, in particular for the tariffs applicable.

I am at your disposal for any further query

Kind regards,

EVA, European Visual Artists represents the interest of European visual authors and their collective management organisation. EVA has 28 members from 23 European countries and over 130,000 authors of fine arts, illustration, photography, design, graphic design, comic strips, street art and other visual authors. The cmos are managing individual rights, such as reproduction and distribution, broadcasting and the making available or communication to the public right. They also manage collective rights such as private copy, reprography, cable, public lending and also the resale right. EVA represents the interests towards the institution of the European Union and as official observer to WIPO.