COMMUNIA

Brussels, 09 November 2020

Subject: Opinion on the the Referentenentwurf des Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, published by the Federal Ministry of Justice and Consumer Protection on 13th of October 2020

Sehr geehrte Damen und Herren,

The following document provides COMMUNIA's comments on the Referentenentwurf des Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes. We apologize for submitting our comments in English but hope that they will nevertheless be useful for the further deliberation of the implementation proposal. We thank you for the opportunity to provide our feedback at this stage. In line with our submissions in reaction to the two previous discussion drafts, we will focus our feedback on the Implementation of Article 17 of the Directive on Copyright and Related Rights in the Digital Single Market through the proposed Urheberrechts-Diensteanbieter-Gesetz (UrhDaG-E).

Comments on the changes to UrhDaG-E

We have noted the changes to the provisions of the UrhDaG-E with great interest. While there are a number of changes that are in line with proposals that we had made in our submission in reaction to the Diskussionsentwurf (in particular the addition of the §23 that protects the provisions of the proposed law from contractual override and the changes to the liability of service providers in §16 UrhDaG-E), the amendments made to §8 in the Referentenentwurf have the potential to cancel out the considerable efforts made to arrive at an implementation of Article 17 that is protective of users' rights.

In order to arrive at a final version of the UrhDaG-E that adequately protects users' rights, the following four issues will need to be addressed:

1. Reflect the fact that the obligation introduced by 17(4) is a best effort obligation

Article 17(4)b of the DSM directive clearly states that the obligations imposed on service providers to avoid liability for infringing uploads by their users are obligations to make "best efforts". In addition it is also clear that nothing in the directive requires service providers to

implement specific technological measures (such as finger-print based automated content recognition) to comply with this obligation. The proposed language in §8 and §10 of the Referentenentwurf does not reflect the technology neutral "best effort" nature of the obligation and can therefore not be considered to be a correct implementation of the provision in the directive.

The proposed language in §8 (first sentence) and §10 (first sentence) requires all service providers to block access to works identified by rightholders and then to immediately notify the uploader of the blocking request. In practice this would leave service providers no other option than to implement automated content recognition technology to block uploads that match works that rightholders have requested to be blocked. In other words, contrary to the stated objective of the German legislator, the proposed versions of §8 and §10 would require the use of automated filters by all platforms.

This does not meet the proportionality requirement, unnecessarily limits the freedom of service providers to conduct their business and will be especially harmful to smaller platforms that may not be able to bear the associated costs and to niche platforms that may be better served by other measures (technological or otherwise).

In order to bring the proposed implementation in line with the provisions of the directive, two relatively minor changes to the text of §§ 8 and 10 are required:

- The first sentence of §10 should be modified by adding the qualifier that service providers are required to make best efforts to block once rightholders have provided the required information (In the first sentence add "bestmögliche Anstrengungen zu unternehmen, das betreffende Werk zu sperren" after "verpflichtet," and before "sobald").
- The first sentence of §8 should be modified by requiring platforms to notify the user *before blocking a work subsequent to a request made according to §10*. This would reflect the fact that not all measures implemented to comply with §10 will allow platforms to inform uploaders immediately upon uploading content that contains a match.

2. Ensure that uploaders always have the ability to flag uploads as legitimate before they can be automatically blocked or removed

While we support the underlying rationale for giving platforms the option to replace the pre-flagging mechanism contained in §8 of the Diskussionsentwurf with a pre-checking mechanism in §8 of the Referentenentwurf, the proposed implementation of this mechanism is fundamentally flawed and as such does not meet the requirement of the directive that "the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works [...] uploaded by users, which do not infringe

copyright [...]". The proposed mechanism only allows uploaders to flag their uploads as legitimate when the uploads are matched with works that rightholders have requested to be blocked at the time of upload. As a result content that has already been uploaded and that contains (parts of) works that rightholders request to be blocked after the upload has been completed cannot be flagged as legitimate by the uploaders before platforms are required to take it down. This will inevitably lead to the prevention of availability of uploads that do not infringe copyright.

In order to prevent this from happening, uploaders must either be given the ability to flag uploads as legitimate after they have been successfully uploaded (this would re-establish the principle contained in §8 of the Diskussionsentwurf in which uploaders have the availability to flag all of their uploads). Alternatively, §8 must contain a provision that ensures that uploaders have a reasonable period of time to react to a notification that they receive before uploads can be automatically removed subsequent to a match. To achieve this, the following paragraph should be added to §8:

> *(2 neu) Erfolgt das Sperrverlangen erst nachdem das Werk vom Nutzer hochgeladen wurde, so muss der Diensteanbieter den Nutzer nach Abs.1 Nr. 1 und 2 nachträglich informieren und ihm eine angemessene Frist zur Nachholung der Kennzeichnung nach Abs. 1 Nr. 3 setzen. Während dieser Frist ist der Inhalt öffentlich wiederzugeben.*

3. Fully leverage the effects of the minor use exception (§6)

As we have stated in our previous submission, we support the introduction of the new exception covering minor uses in §6, including the remuneration requirement contained in §7. These mechanisms are central in reconciling the two objectives of Article 17: ensuring the fair remuneration of creators whose works are shared via online platforms and protecting the freedom of expression of users of these platforms. However, the potential of the mechanism introduced in §6 seems underutilised in the proposed text. While §6 establishes mechanically verifiable thresholds for minor uses, the text of the Referentenentwurf does not contain an automated "minor uses check". As a result §6 can be invoked by users as the rationale for flagging a use as legitimate, and its criteria can be used when automatically assessing if a user flag is “obviously wrong”. However, it cannot be used as a first test to assess automatically if the use is legitimate. This minor role of §6 in the mechanism stands in no relationship to the overall importance of the safeguard that is introduced in §6.

As a result of the absence of an automated check for minor uses in line with §6, the Referentenentwurf would require user notification for every match that is not licensed. While §6 has the potential to reduce the amount of such notifications (which require uploaders to make on-the-spot legal judgements that they may be ill-equipped to make) this potential is currently not used. From the perspective of users, platforms and rightholders it makes sense to remove

as many matches from resulting in a notification of the uploader as each flag will trigger a resource intensive review process.

We therefore believe that an automated minor uses test should be part of the mechanism proposed in §§ 8-12 of the UrhDaG-E. In this context we also note that the flowchart illustration of these provisions, published by the BMJV on the 16th of October on its website[1], seems to suggest that this has also been the intention of the Ministry when drafting these provisions. This objective can be achieved by adding a reference to §6 in the first sentence of §8:

> *(1) Lädt ein Nutzer ein Werk hoch, das vom Diensteanbieter nach Maßgabe von § 10 gesperrt werden soll* ***und das nicht unter § 6 fällt****, so ist der Diensteanbieter verpflichtet,*

4. Provide a mechanism for protecting works in public domain and openly licensed works from being blocked.

Finally, the change in §8 from the pre-flagging approach towards a pre-checking approach means that the Diskussionsentwurf offers insufficient protection for openly licensed works and works in the public domain. Amending the proposal in line with the suggestions made under point 2 above provides some additional protection for uploads that incorporate such works. However, since the legality of the use openly licensed works and works in the public domain derives from their status (and not from the specific circumstances of their use) there must be a way for uploaders to ensure that uploads containing known openly licensed works or works in the public domain cannot be automatically blocked. This can be achieved by adding an paragraph to §14 (Internes Beschwerdeverfahren):

> *(4 neu) Wird entschieden, dass ein vom Diensteanbieter gesperrter oder gelöschter Inhalt wiederherzustellen ist oder ist ein solcher Inhalt nach §8 vom Diensteanbieter öffentlich wiederzugeben, weil er ein Werk enthält, das gemeinfrei ist oder unter einer freien Lizenz veröffentlicht wurde, so ist die erneute Sperrung oder Entfernung von Nutzungen desselben Werks nach den §§ 10 und 11 unzulässig.*

Pastiche exception §51a UrhG-E

We welcome the approach to implement the generic EU exception in line with the language used in the InfoSoc directive to reflect the fact that pastice is an autonomous concept of EU law. We also stress that (outside of the narrow contexts of the UrDaG-E) the pastiche exception, as a safeguard of the freedom of artistic expression, must remain unremunerated. A remuneration requirement would not only run counter to the objective of the exception but

[1] See: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht_Grafik-Wiedergabe-Verguetung.pdf

would also be impractical to implement outside of the context of the UhrDaG-E. Any requirement on users of the exception to pay remuneration would strongly discourage the use of the exception and would lead to great difficulty in distinguishing between a remunerated pastiche exception and unremunerated parody or caricature exceptions. Furthermore, in the German copyright context, pastiche fulfils a very similar purpose as the former free use exception, which was unremunerated.

A final note on § 68 and §60(a)(3) UrhG-E

We support the changes made to § 68 UrhG-E which remove any uncertainty about the scope of the article. The new version makes it clear that the proposed article applies to all visual works in the public domain and not only to works for which copyright protection has expired.

We maintain our views on Section §60(a)(3) UrhG-E. We understand that the proposed exception shows a clear improvement as compared to the existing exception: where, before, the formal educational community in Germany could not make certain uses of certain materials under the education exception, now they are only prevented from doing so if they are able to easily find in the market licenses for those uses, and provided that those licenses meet the needs and specificities of the educational establishments. However, the DSM directive does not allow member states to simply exclude specific uses from the scope of their educational exception, as it currently does. The national lawmaker was always required to bring those previously excluded uses under the scope of the new exception. In other words, the proposed implementation is not the best scenario for the education community in Germany, since the national lawmaker had the option to not make the educational exception partially dependent on the availability of licenses. As written in our previous submission, in our opinion, Section §60(a)(3) sets a dangerous precedent for users rights, since it negates the effectiveness of the exception, and should, therefore, be rejected.

On behalf of the COMMUNIA association for the public domain

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