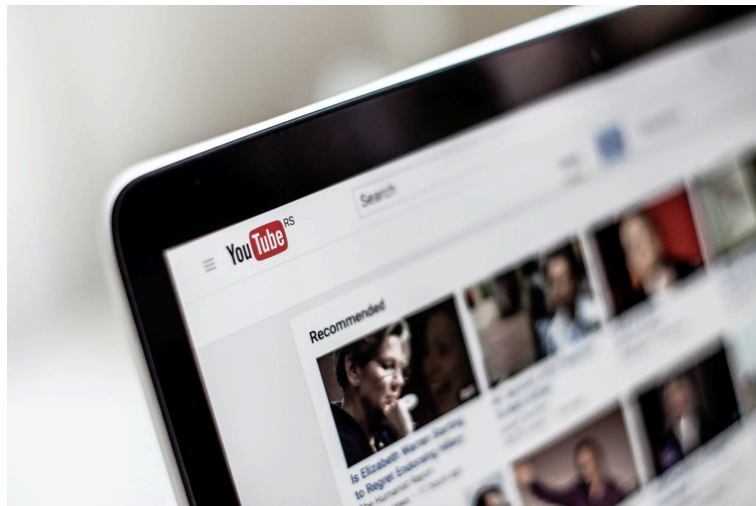


Kluwer Copyright Blog

Implementation of Art. 17 DSM Directive into German National Law – the German Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)

Julian Waiblinger, Jonathan Pukas (NORDEMANN) · Monday, February 28th, 2022

At the time that Directive 2019/790/EU (DSM Directive) was being developed, much media attention was focussed, over a period of many months, on the liability of online content sharing service providers for content uploaded by their users. Initially in Art. 13 and ultimately in Art. 17 of the DSM Directive, the Directive stipulates that online content sharing service providers like YouTube or Vimeo are now also responsible under



copyright law for user uploads, if these providers fail to meet certain obligations. The German implementation of Art. 17 DSM Directive came into force on 1 August 2021, shortly after the deadline for transposition expired with the adoption of the Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG). This provides for a complex regulatory mechanism which affects not only platform operators, but also users and rightholders. The purpose of this article is to shed some light on how this mechanism works.

1. Structure of the UrhDaG

Instead of implementing Art. 17 DSM Directive into German law through means of selective modification of each of the relevant affected sections of the German Copyright Act, the German legislature decided to implement it by means of a standalone act. At the core of the Act is a licensing obligation (Sec. 4 UrhDaG) and blocking obligations (Sec. 7, Sec. 8 UrhDaG); general responsibility under copyright law for user uploads is established in Sec. 1 UrhDaG.

2. Service provider responsibility under copyright law for user uploads

According to Sec. 1(1) UrhDaG, service providers are deemed to have carried out their own act of communication to the public, within the meaning of Sec. 2 UrhDaG, if they give the public access to copyright-protected works uploaded by their users.

Under the provisions of Sec. 1(2) UrhDaG, however, service providers can absolve themselves of their responsibility under copyright law. They can achieve this by meeting their obligations under Sec. 4 UrhDaG (obligation to obtain rights where possible and proportionate) and under Sec. 7 to 11 UrhDaG (blocking obligations). If this is unsuccessful, the legal consequences are decided, in the absence of provisions stipulating otherwise, according to Sec. 97 et seqq. UrhG.

3. Platform operators as service providers within the meaning of the UrhDaG

According to the UrhDaG, only certain platform operators are responsible under copyright law for user-generated content. It is necessary that they meet the requirements under Sec. 2(1) UrhDaG.

The main purpose of a service must firstly be storing and making available to the public large volumes of copyright-protected content that has been uploaded by users. This content must, in addition to simply being made available, be organised and, in particular, promoted by the service provider with the purpose of earning a profit. Finally, the service providers must be competing with other online content services for the same target customers.

Online marketplaces, cloud services provided for private use and online encyclopaedias like Wikipedia are explicitly not covered by the UrhDaG (Sec. 3 UrhDaG). In addition, partial special provisions apply to start-ups and small service providers (Sec. 2(2), (3) UrhDaG). These provisions place, in particular, limitations on such entities' blocking obligations.

4. Release from liability for service providers

In order that service providers covered by the UrhDaG can absolve themselves of their liability under copyright law, it is necessary that they comply with certain licensing and blocking obligations (in more depth on this point *Waiblinger/Pukas*, MRD 2021, 1489 marg. nos. 18 et seqq.).

1. Service providers' licensing obligation (Sec. 4 UrhDaG)

Sec. 4 UrhDaG obliges service providers to use their *best efforts* to acquire the contractual rights of use for the communication to the public of copyright-protected works via their platform. However, this obligation does not require the service providers to license the worldwide repertoire. On the contrary, it only covers selected usage rights. They must satisfy certain qualified requirements, both in terms of their origin and their size. Only if this is the case are the respective rights subject to the licensing obligations in Sec. 4 UrhDaG.

Firstly, the selected exploitation rights include those rights that are actively offered to service providers. In addition, the research obligations for service providers are limited: active efforts to acquire exploitation rights need only be made with collecting societies or dependent rights management entities based in Germany and with representative rightholders known to the platform operator.

As a next step, the rights offered must cover a substantial repertoire in relation to works and rightholders. That can be achieved in particular by rightholders coming together and collectively offering a package of exploitation rights to platform operators. In terms of territory, it is necessary for the rights to be applicable to the entire territory of Germany. It is also important that service providers only have to acquire those exploitation rights which apply to content that, by its nature, they are obviously making available to the public on a more than minor scale. The legislature also

envisions that the service providers themselves can influence which content is covered, through their general terms and conditions. Licensing conditions must ultimately be designed to enable use by platform operators under reasonable conditions. Only if the licence package offered meets all of these requirements do the platform operators have to conclude a licensing agreement in order to absolve themselves of liability. In all other cases, however, “best efforts” suffice: an obligation to enter into a contract on the part of service providers (and rightholders) can thus not be derived from Sec. 4 UrhDaG. The requirements set out in Sec. 4 UrhDaG can therefore also be met without a licence being concluded.

2. Blocking obligations of service providers (Sec. 7 et seqq. UrhDaG)

At the heart of the UrhDaG, however, are the blocking obligations of the service providers. These are set out in Sec. 7-11 UrhDaG. Content sharing platforms like YouTube or Vimeo also have to comply with these obligations if they are to avoid liability under copyright law for user uploads. The UrhDaG differentiates in this regard between “qualified”, usually preventive and non-specific (Sec. 7 UrhDaG), and “simple”, meaning specific and repressive (Sec. 8 UrhDaG), blocking obligations.

Even before a work is made available to the public in a copyright-infringing manner, service providers are therefore obliged, under Sec. 7 UrhDaG, to preventively block the content. Practically, this obligation can only be met through the use of upload filters. However, in order that any such filters be implemented, it is necessary for rightholders to provide platform operators with the information necessary for the blocking. This could be done, for example, using watermarking techniques. In any case, it depends on the applied filter techniques which information is necessary.

Special provisions for the use of automated processes, thus including “upload filters”, can be found in Sec. 9 to 11 UrhDaG. Sec. 9 UrhDaG stipulates that content which is “presumably permitted under the law” but still potentially copyright-infringing will not be blocked, but must initially be communicated to the public. In introducing this concept of “presumably permitted” use, the German legislature has made considerable use of the latitude afforded for implementation. Article 17 of the DSM Directive does not provide for “presumably permitted” uses. For content to be deemed presumably permitted, it must meet several requirements cumulatively. First, it is necessary that only less than half of a respective work is used. The part(s) has/have to be combined with other content. This could be parts of other works or indeed completely different content. However, in contrast, images can be used as a whole, since partial use is not reasonably possible from a practical perspective. Nevertheless, they still have to be combined with other content. The most important factor, however, is that the use must always be “minor” or the act of use must be labelled as legally permitted (“flagged”) by the user.

Whether or not a use of a work is deemed to be of a minor nature is set out in Sec. 10 UrhDaG. The stipulation is that parts of works may only be made available for non-commercial purposes or to generate insignificant income within certain limits, as defined in Sec. 10 UrhDaG in minute detail: for example, the use of 160 characters per text or 125 kilobytes per photographic work is permitted. The latter also applies to images which can be used in their entirety. In the area of audio, visual and audiovisual works, uses of up to 15 seconds per film work, moving picture or audio track are considered minor. If these conditions are not met, the content can, ultimately, also be flagged as “permitted under law” (Sec. 11 UrhDaG). This means that the use in question is not minor but the user nevertheless expressly confirms that they assume that it is a permitted use under

copyright law. In this regard, the permissibility can arise from exceptions under copyright law which are provided for in Sec. 44a et seqq. UrhG and referred to in Sec. 5 UrhDaG.

The rightholders cannot bring an end to such acts of reproduction using the (qualified) blocking procedure but only by actively initiating a complaints procedure, although there are special provisions for the first communication to the public of film works. An important factor is that this provision also includes the user's communication to the public in cases of minor use (Sec. 12(3) UrhDaG). Even if a complaint procedure determines that a communication to the public of uploaded content has occurred in violation of copyright, that communication to the public will have been legal at least for the duration of the complaints procedure. This provision is subject to deep concerns under European law, however.

On the other side of the enforcement of copyrights on service providers' portals is the simple, specific, repressive blocking obligation under Sec. 8 UrhDaG. It obliges service providers to bring an end to the communication to the public of an uploaded work as soon as the rightholder has requested this for the specific individual case and has provided a sufficiently well-founded argument for the unlawfulness of the communication to the public.

5. The complaints procedure: an instrument for users and rightholders

If user content which is presumed to be copyright-infringing is blocked, the respective user must be immediately informed about the block and about their right to complain (Sec. 14 UrhDaG). In the scope of this extrajudicial process, the user can prove the lawfulness of their use of the work and have their content unblocked. The complaints process must be concluded within no more than one week. Participation is voluntary for users and rightholders and does not constitute a prerequisite for legal action against unlawful blocking.

The complaints process is also available to rightholders. They can, for example, take steps against the communication to the public of presumably permitted uses which have not been initially blocked. Trusted rightholders can also make use of the so-called "red button" procedure, in accordance with Sec. 14(4) UrhDaG. This process especially enables them, in a departure from Sec. 9(1) UrhDaG, to bring to an end a communication to the public of presumably permitted uses immediately if they deem them to be rights-infringing. They would then no longer have to wait for the end of the complaints procedure.

The central precondition for using the "red button" procedure is that the rightholder must be regarded as trusted. The UrhDaG does not define when this is the case, however. Trusted status is also a suitable subject matter for an action for a declaratory judgment.

6. Conclusion: the UrhDaG – a complex national solution

Even just the overview presented here shows how complex the regulatory structure of the UrhDaG is. Like the European legislature in the scope of Article 17 DSM Directive, the German legislature is attempting to carefully balance the conflicting interests of all stakeholders. Nevertheless, it follows its own path.

Whether the German legislature is successful in this will be seen in the coming months and years. It can certainly be expected that the CJEU will, in time, take a position on one or another implementation provision. Likely, this could also be the German UrhDaG. Developments in relation to copyright law regarding online content sharing service platforms are therefore far from

completed.

A more detailed version of this article was published in December 2021 in the German law journal, MDR (issue 24/2021, p. 1489). The article has been translated into English by Adam and John Ailsby.

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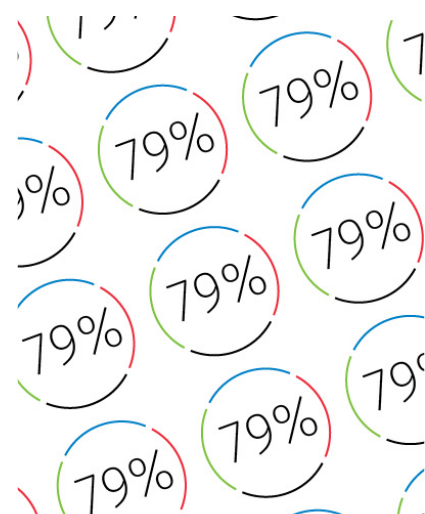
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