Kluwer Copyright Blog

The EU DSM Copyright Directive: Implementation in Germany 2021 – Part I

Jan Bernd Nordemann, Jonathan Pukas, Julian Waiblinger (NORDEMANN) · Monday, January 16th, 2023

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In the last year, the German Copyright Act has experienced what is probably its most substantial reform since it first came into force in 1966. The reason for this was the implementation of the DSM Copyright Directive 2019/790/EU (DSMD) and Directive 2019/789/EU (Online SatCab Directive). Secondly, the legislature felt obliged, in response to certain CJEU case law, to make deep structural changes to the right of adaptation in the German Copyright Act. The liability of OCSSPs for uploads of platform users, as outlined in Art. 17 DSMD, was implemented into a separate legislative act, the German Copyright Service Provider Act, called in German "UrhDaG" (see III. below). All German copyright laws affected by the reform are available in an official English

translation here (UrhG, UrhDaG, VGG.)

I. Extensive changes to the German Copyright Act

The majority of the changes in the course of the 2021 copyright law reform have undoubtedly been made to the Copyright Act, the so-called UrhG (English translation here). Various aspects of the rules were slightly modified (such as Section 32 et seqq. UrhG) or comprehensively updated (such as the right of free adaptation as per Section 24 UrhG (old version)).

An overview of the most important changes is provided in this post. Part 1 discusses changes to copyright contract law and the new text and data mining exemption provisions. Part 2 will cover further exemptions for users of works, new aspects of the right of communication to the public and the press publishers' right. It also addresses changes to the German Collecting Societies Act (VGG) and copyright liability of online content sharing service providers.

1. Changes to copyright contract law (Sections 32 et seqq. UrhG)

In order to implement the copyright contract rules of Articles 18 et seqq. of the DSMD, German copyright contract law, as set down in Sections 32 et seqq. UrhG, was completely reworked. However, the amendments have not affected the basic structure of these provisions. The reason for this is that the model for the DSMD rules was the German copyright contract law provisions. However, as a whole the balancing of affected interests within the DSMD fell, in contrast to the non-harmonized and still remaining or former national rules, marginally in favour of authors. As such, they have been able to profit from a slightly strengthened legal position in Germany since the copyright law reform came into force in 2021.

a) Appropriate remuneration

It remains the case that Section 32(1) second sentence UrhG ensures authors receive appropriate remuneration when granting exploitation rights. The assessment of whether remuneration provisions are appropriate can continue to draw from collective remuneration rules (Section 36 UrhG) even after the 2021 copyright law reform came into force (Section 32(2) first sentence UrhG).

In comparison to the previous legal situation, remunerating an author through a lump sum remuneration agreement has become slightly more difficult. This issue is now regulated in Section 32(1) third sentence UrhG. Firstly, it is necessary for any lump sum remuneration agreement to be justified by the special circumstances which exist in the industry concerned. Moreover, even a lump sum remuneration agreement must ensure that the author receives an appropriate share of the expected total earnings from the use of their rights.

b) Contractual amendment (“bestseller paragraph”)

The so-called “bestseller paragraph”, Section 32a UrhG, has also been reworked in the course of the implementation of Article 20 of the DSMD. An author’s right to demand a later amendment to a remuneration arrangement no longer requires that there is a gross disproportion between the agreed remuneration and the appropriate remuneration. It now suffices if the agreed remuneration proves to be “disproportionately low”. According to the explanatory memorandum to the Act, this is intended to lower the threshold for claims for additional remuneration in favour of the author (Legislative Draft, German Bundestag Printed Paper 19/27426, p. 80).

c) Extensive transparency obligations

One area which has seen particularly extensive changes is the transparency obligations for the holder of the exploitation rights set forth in Section 32d, Section 32e UrhG (vis-à-vis authors) and Section 79(2a) UrhG (vis-à-vis performing artists). Under Section 32b UrhG, these obligations are now stipulated as imperative law.

At the heart of the relevant set of provisions is Section 32d UrhG. Under that provision, any contracting partner of an author is obliged to provide the author, at least once a year, with information as to the extent of the use of the work and the revenues and benefits earned as a result. The claim for information provided for under the old law is thus upgraded to a proactive duty on the part of holders of exploitation rights to provide information to authors. Only the obligation to provide information as to the names and addresses of any sublicensees and the obligations to provide detailed records in relation to the information supplied retain their character as claimable obligations.

The possible grounds for exemption available to the contracting partners, set out in Section 32d(2) UrhG, are slightly restricted in favour of authors. In this regard, Section 32d(2) No. 1 UrhG provides for a deviation from the transparency obligations as concerns co-authors of works who have made a merely minor contribution, if the co-author concerned does not require the information for a contractual amendment as per Section 32a UrhG. Moreover, under Section 32d(2) No. 2 UrhG, action against contracting partners is excluded – as it already was under the old law – where such action would be disproportionate. An example of this provided in the Act is where the cost and effort for the provision of the information could not be justified in light of the amount of the income earned from the use of the work. From now on, if collective remuneration rules or collective agreements deviate from the transparency obligations set out in the law, there will at least be a presumption, when interpreting the respective contractual provisions, that these afford the authors concerned a comparable degree of transparency (Section 32d(3) second sentence UrhG).

Section 32e UrhG expands the transparency obligations provided for in Section 32d UrhG, as was the case under the previous legal situation, to third parties to whom an exploitation right has been transferred or to whom further exploitation rights have been granted. Alongside logically necessary conforming changes in the wording of the provision, importantly, the claimable nature of the provision remains. In addition, under Section 32e(1) second sentence UrhG, the claim is subsidiary to the contracting partner’s transparency obligation under Section 32d UrhG. Section 32e(1) UrhG stipulates that only if such claims are not complied with within three months or the information

does not include sufficient detail as to the use of the work by third parties and revenues and benefits derived from that, can third parties also be subject to legal action.

Finally, it is also important that according to Section 133(3) first sentence UrhG the new transparency and information obligations will also apply with retroactive effect to contracts concluded prior to the provision coming into effect (7 June 2021). Limitations only exist in this regard for the area of film: for contracts concluded prior to 1 January 2008, information on the use of film works or moving pictures and the filmic exploitation of the works used in their production only has to be provided, in derogation from Section 32d UrhG, upon request of the author. If transparency obligations beyond that are not met, Section 36d(1) first sentence UrhG provides for a de facto claim for information in the form of a claim for prohibitory injunctive relief. That claim can be asserted by qualified copyright associations (Section 36d(1) second sentence UrhG).

d) More comprehensive right of revocation for authors

The right of revocation for authors (and performing artists, Section 79(2a) UrhG) on the grounds of non-exercise, as per Section 41 UrhG, has been reworked in the course of the implementation of Article 22 of the DSMD. If the holder of an exclusive exploitation right does not exercise that right or only does so to an insufficient degree, the author is entitled, as they were under the prior legal situation, either to revoke the exploitation right or simply to terminate the exclusivity of the right. In the latter case, when the revocation becomes effective, the exploitation right becomes a non-exclusive exploitation right. The special rules (Section 90(1) first sentence No. 3 and Section 92 UrhG) exempting film works from the revocation right after shooting has started remain in place.

2. Further exemptions for users of works

An important component of the 2021 copyright law reform has also been the new exemptions in favour of users of works.

a) Text and Data Mining

“Text and data mining” is described under Section 44b(1) UrhG as the automated analysis of individual or multiple, digital or digitised works in order to generate information about, in particular, patterns, trends and correlations. Prior to the implementation of the DSMD, it was only permitted, under Section 60d UrhG (old version), for the purposes of non-commercial, scientific research. Section 44b UrhG and Section 60d UrhG (new version) placed the acts of reproduction necessary for the analytic processes on a completely new copyright footing.

Section 44b UrhG is the basic provision making text and data mining generally possible for everyone, thus implementing Article 4 of the DSMD. The only requirements under Section 44b(2) first sentence and (3) first sentence UrhG are that the rightholder concerned has not reserved for itself the right of use for the purpose of non-scientific text and data mining and that the work is “lawfully accessible”.

Under Section 44b(3) second sentence UrhG, any reservation of rights of use in the case of works available online is only valid where it is in machine-readable form. In this respect, it only ever applies ex nunc. In any case, any copies of the works concerned must be deleted as soon as they are no longer required for the analytic processes (Section 44b(2) second sentence UrhG). Moreover, there is no obligation to pay remuneration for such use.

Section 60d UrhG now expands the above basic provision in favour of users who are pursuing scientific research purposes while observing the statutory requirements. Exemptions are provided firstly for research organisations, meaning higher education institutions, research institutes or other entities which conduct scientific research as long as they are not pursuing commercial ends, they reinvest all profits into scientific research, and they are working in the public interest on the basis of a state-approved mandate (Section 60(2) UrhG). Secondly, libraries, museums, archives and institutions in the field of cinematic or audio heritage, as well as individual researchers pursuing non-commercial purposes are able to benefit from the provisions. There is a restriction in relation to research organisations, however, according to which they lose their exemption if they work together with private enterprises which exert a certain degree of influence or have preferential access to the research findings (Section 60d(2) third sentence UrhG). Conversely, museums and archives are not bound by this. Text and data mining which takes place within the scope of commercial research is, however, only possible at all on the basis of the basic provision in Section 44b UrhG.

If a user of a work benefits from the expanded exemption provisions in Section 60d UrhG, it is now possible for them to store the copies, produced for the purposes of data analysis, permanently, in derogation from Section 44b(2) second sentence UrhG (Section 60d(5) UrhG). The storage is allowed to continue for as long as necessary for any research purposes or even just for monitoring the quality of the scientific findings.

Part 2 of this post will cover further exemptions for users of works, new aspects of the right of communication to the public and the press publishers' right. It also addresses changes to the German Collecting Societies Act (VGG) and copyright liability of online content sharing service providers.

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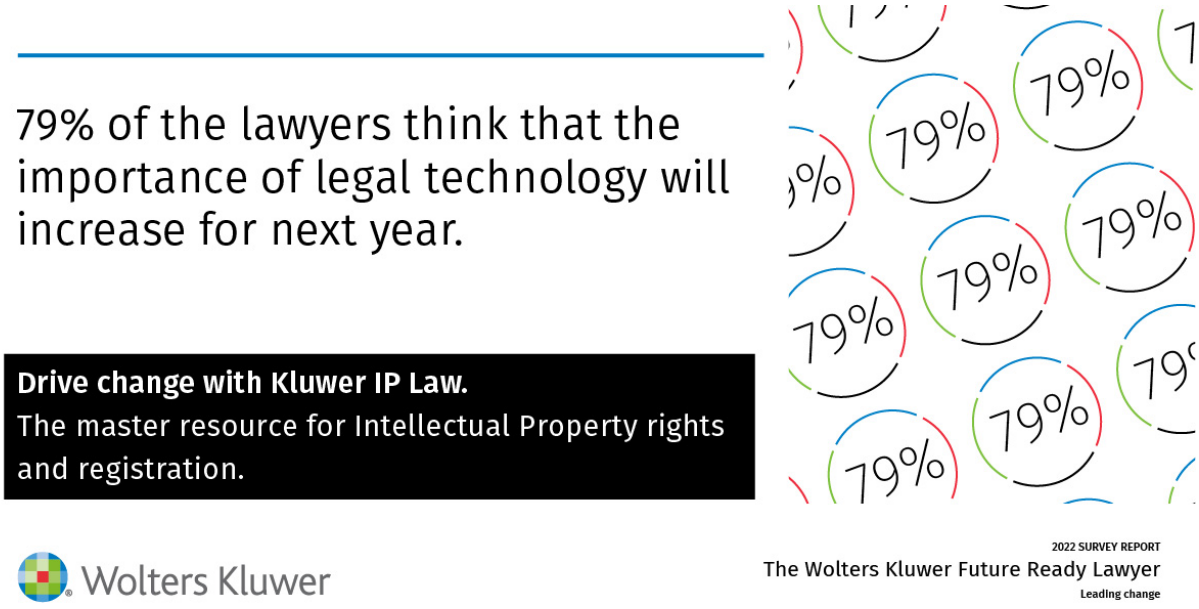

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