Kluwer Copyright Blog

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

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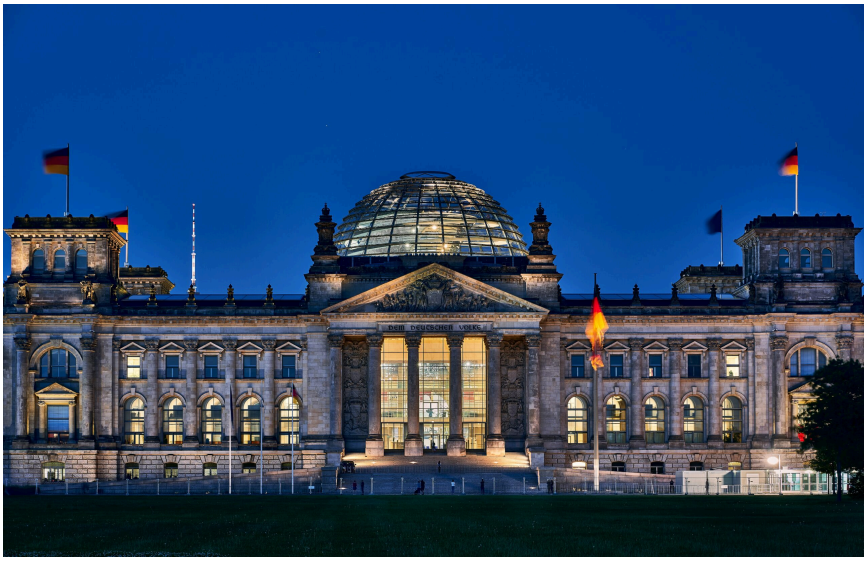
Part I of this post discussed the changes to copyright contract law and the new text and data mining exemption provisions that formed part of the 2021 copyright law reform. Part 2 explores further exemptions for users of works, new aspects of the right of communication to the public and the press publishers' 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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2. Further exemptions for users of works (continued)

b) Teaching

The 2021 copyright law reform also saw the exemption provisions concerning teaching purposes being updated in line with the requirements of the DSMD, specifically to implement Article 5 of the DSMD. Overall, however, only moderate changes needed to be made; the implementation was effected through selective amendments to Section 60a and Section 60b UrhG.

The legislative amendments firstly concerned the elements of the exemption provisions in Section 60a(3) first sentence UrhG. Until now, a reliance on the exemptions, in particular for the use of

works intended for teaching in schools, as well as the graphic recordings of musical works, was either not possible or only possible under very narrow conditions. Now, all limitations listed in Section 60a(3) first sentence UrhG to the exemptions under Section 60a (3) second sentence UrhG only apply if licences for the respective uses are readily available and visible and they meet the needs and special circumstances of educational establishments. As such, the exemption is reduced to a priority for individual licensing. One must, however, take into account that the national legislature also introduced, in Sections 51 et seqq. VGG, an extended collective licensing mechanism, something which is set out as optional under EU law (see below). As licences formulated broadly under such a mechanism are easily visible and readily available, from a practical perspective in most cases an application of the exemptions in Section 60a(3) first sentence UrhG will suffice. However, as the overall contract concerning reproductions in schools of 20 December 2018 between the Laender and various rightholders and collecting societies grants corresponding rights of use in any case, the changes in this regard are, at least for the time being, virtually irrelevant (see Section 2 No. 2 of the overall contract, available here). When producing teaching materials while relying on the exemptions set out in Section 60b UrhG, it additionally remains the case that – as in the old legal situation – the exemptions in Section 60a(3) first sentence UrhG necessarily apply. The reference in Section 60b(2) UrhG has been updated accordingly.

The implementation of the DSMD also creates the conditions for an uncomplicated online use of works for teaching or training purposes. The reason for this is that Section 60a(3a) UrhG enshrines the country of origin principle for these uses. If works within a secure electronic environment are used for exempt teaching or training purposes, their use is deemed to have occurred solely in the Member State in which the educational institution is established. Access to teaching materials in Germany which is initiated by foreign educational institutions is therefore not detrimental.

c) Preservation of cultural heritage

Moreover, the 2021 copyright law reform also promotes the preservation of cultural heritage. This is based on Article 6 and Article 8 of the DSMD. Specifically, this means that acts of reproduction for the purposes of preserving copies of works within the scope of Sections 60e, 60f, 60h UrhG may, from now on, also be made by commercial organisations in the field of cultural heritage. However, the making of copies for the purposes of cataloguing, indexing or making available remains reserved, even after the reform has come into force, for non-commercial organisations.

The use of out-of-commerce works is also affected by the 2021 copyright law reform. Under Section 61d(1) first sentence UrhG, for-profit cultural heritage institutions (see Section 60d(3) No. 1 UrhG) are now in principle permitted, at least for individual non-commercial purposes, to reproduce unavailable works from their inventory or make them available to the public. A work is deemed to be unavailable if a complete copy of it is not offered to the general public via any standard distribution channel (Section 52b VGG). Thus, there is a difference in terminology regarding the term out-of-commerce that had previously been used in German law and is still used in Sections 53, 60a, 60c, 60e UrhG: This only covers works which are no longer available but were at least once commercially available.

An exemption provision on the use of unavailable works was introduced into the German Copyright Act. This has a bidirectional relationship with the expanded collective licensing

mechanism for the use of unavailable works set out in Sections 52 et seqq. VGG (see Section 61d(1) second sentence UrhG), which is a subject which should be covered elsewhere.

d) Caricature, parody and pastiche

In practice, the newly introduced exemption provisions for caricature, parody and pastiche will be quite relevant (Section 51a UrhG). While the exemptions for caricature and parody had already formerly been part of the German free use exemption, the German legislator decided that it was time to explicitly implement these exemptions into the German Copyright Act. The pastiche exemption was newly introduced into German law and did not exist beforehand.

What exactly the term “pastiche” refers to is unclear. While in literature and linguistics the imitation of a particular style is known as a “pastiche”, this understanding cannot be applied in the same way in relation to copyright matters. The reason for this is that style is not an element of a work which is eligible for copyright protection. In order for it to be deemed that the right of exclusivity of the author or another rightholder has been impacted, at least a copyright protected part of the work has to be recognisably appropriated. One possible understanding would be that a “pastiche” is a stylistic imitation which also uses creative elements of an existing work which do qualify for copyright protection, as an intentionally employed artistic device – a sort of “altered quotation” as a form of derivative work creation which seeks to produce an association to the existing work, such as a contrast or homage (see Stieper, GRUR 2020, 699, 702; ZUM 2021, 776, 779; Legislative Draft, GERMAN BUNDESTAG Printed Paper 19/27426, p. 91.). The German Legislative Draft Documents also suggest that every form of derivative artistic creation, like remixes or mashups, shall fall within the scope of Section 51a UrhG (GERMAN BUNDESTAG Printed Paper 19/27426, p. 91).

3. Adaptation and free use according to CJEU “Pelham”

One major part of the German copyright reform 2021 was not exclusively driven by the implementation of the DSMD. In view of the CJEU case law in “Pelham” (CJEU C-476/17), the German legislator decided to delete the whole of Section 24 UrhG, which provided for a free use (adaptation) exemption. The exemption for a free use (adaptation) has now been included in Section 23(1) 2nd sentence UrhG (new version) and is now deemed to exist if the newly created work maintains a sufficient degree of (visual) distance for the work used. When determining whether the degree of difference is “sufficient” in a broader sense, the so-called “Verblassensformel” (model for determining whether an appropriated element pales into insignificance) or “Blässetheorie” (theory of how appropriated elements can fade into insignificance) can (apparently) still be used as under the old legal situation. However, the limits of the scope of protection of the right of reproduction as harmonised under Article 2 of Directive 2001/29/EC (InfoSoc Directive) can only be drawn where the creative elements of the existing work can no longer be recognised in the new work (CJEU C-476/17 paras. 31, 36, 37, 39 – Pelham, in the context of the phonogram producer’s right (with the same basis in EU law in Article 2 InfoSoc Directive)).

4. New aspects of the right of communication to the public

It was not only the implementation of the DSMD but also the implementation of the Online SatCab Directive, passed alongside it, which made amendments to copyright law necessary. The latter directive was also transposed into national law in the course of the 2021 copyright law reform. Section 20b UrhG, which was previously only applicable to cable retransmission, has been revised to be technology neutral. It is now in principle applicable to all forms of retransmission of a broadcast work (see Section 20b(1) first sentence UrhG). Moreover, the country of origin principle is also extended to cover ancillary communication to the public via a broadcasting company's online services. This means services which transmit the company's programmes simultaneously on the internet or which make protected content, which has already been contained in broadcast programmes, available to the public for a limited time (Section 20c UrhG). However, the new acts of exploitation this allows are very minor. Greater practical significance can be found in the provision on direct injection (Section 20d UrhG); that provision stipulates that in the case of a direct injection, both the broadcasting organisation and the signal distributor are parties to a single act of communication to the public. While the direct injection process is not very widespread, the situation is different in other European countries, hence it remains to be seen how the technical processes will further develop here in Germany in the medium term.

5. The new related right for press publishers (Sections 87 et seqq. UrhG)

A further addition has been the introduction of a new related right for press publishers in Sections 87 et seqq. UrhG.

The subject matter protected by the new related right is press publications as per Section 87f(1) UrhG, namely collections comprising mainly written works of a journalistic nature which may also contain other works or other subject matter protected under the German Copyright Act and which also meet other cumulative requirements. The holder of the right is the press publisher, meaning the person that produces the press publication (Section 87f(2) UrhG). A press publisher thus has the exclusive right to make their press publications available to the public and to reproduce them, in full or in part, for online use by providers of information society services (Section 87f(3) UrhG). The related right thus also covers – unlike the original copyright protection – making available to the public or reproducing small parts of the press publications which are not eligible for copyright protection or which would not qualify as press publications in themselves.

However, in order to ensure freedom of information exists, especially on the internet, press publishers are not granted their exclusive right without limitation. Section 87g(2) UrhG stipulates that the rights of the press publisher do not include, in particular, the facts contained in the press publications. Moreover, private or non-commercial uses by individual users, the creation of hyperlinks to the press publication and the use of very short extracts from a press publication are permitted even without the consent of the rightholder. What constitutes "very short" with regard to extracts is, however, not clarified.

As the related right for press publishers only contains economic elements, it is transferable in full, as per Section 87g(3) UrhG. When applying the related right, however, it must always be taken into account that it may not be asserted to the detriment of the author or another holder of related rights whose work or other protected subject matter are contained in the press publication (Section

87h(1) UrhG). In the end, the right lapses just two years after the press publication was first published (Section 87j UrhG).

II. Changes to the German Collecting Societies Act (VGG): Extended collective licensing agreements

In addition to the extensive changes to the German Copyright Act (UrhG) made as part of the 2021 copyright law reform, the German Collecting Societies Act (VGG) was also affected by the legislative revisions. The underlying reason was the CJEU judgment in "Soulier" (CJEU C-301/15), which made it necessary to enshrine in Union law the legal fiction of a right to license the use of out-of-commerce works provided for in Section 51 VGG (old version). The European legislature fulfilled this task with Articles 8-11 of the DSMD. At a national level, these led to a comprehensive reworking of Section 51 VGG (old version), the legislative content of which can now be found in Sections 52 et seqq. VGG. Moreover, a mechanism for general extended collective licences was introduced in Article 12 of the DSMD. This has been implemented in Sections 51 et seqq. VGG.

Under Section 51 VGG, collecting societies can, under certain circumstances, grant licences to use works which are not part of their repertoire. One requirement is that it would be unreasonable to expect the user or the collecting society themselves to obtain permission to use the work from all rightholders concerned who have not concluded rights management agreements with the collecting society. It is necessary, however, that the collecting society granting the rights is representative (Sections 51a(1) No. 1, Section 51b VGG). Only then is the collecting society entitled to grant extended collective licences.

The special extended collective licence mechanism for the use of unavailable works, as located in Sections 52 et seqq. VGG, could apply under gradually less and less stringent requirements. In this regard, the collecting society may only grant licences to certain privileged licensees, namely cultural heritage institutions (Section 52a(1) first sentence, No. 3 VGG). An essential criterion in this respect is also that the collecting society is representative (Section 52a(1) first sentence No. 1 VGG). If that is not the case, however, the exemption provision in Section 60d UrhG applies (on this point, see above). Within the relevant set of provisions of Section 51 et seqq. VGG, the representativeness requirement is therefore of paramount importance (see Pukas, ZUM 2021, 912 et seqq.).

In both cases, the rightholder that is outside the collecting society can lodge an objection to the use with the collecting society itself or with the EUIPO (Section 51(2), Section 52(2) VGG). As the objection does not affect any claims for remuneration (Recital 48(2) DSMD), the objection will only apply ex nunc. If an objection is received, the ongoing use of a work must be ended within a reasonable time limit.

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

At the time that the DSMD 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, the DSM 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. For details please see here for a Kluwer Copyright Blog Post by Julian Waiblinger and Jonathan Pukas of 28 February 2022.

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