German Implementation of Article 18

Background

The German plenary (Bundestag) has adopted the Act to adapt copyright law to the requirements of the Digital Single Market (Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes] on 20 May 2021. It is available as prepublication including the changes made during the discussions in the legal committee; this will be subject to further editing (without further changes on the substance expected). This Act provides wide-ranging changes for instance in the substantial part of the Copyright Act e.g. introducing further provisions on contracts of authors and performers new exception on parody; deletion of unspecified "free use " exception (following the CJEU decision in case C 476/17); introducing provisions on extended collective management (following Article 12 DSM Directive); and introducing provisions on the responsibility of service providers (following Article 17 DSM Directive). The main discussions at the meeting related to the provisions of "Uploadfilters"; only the MP from Leftist opposition party, Die Linke, Petra Sitte, stressed that there should have been more balance between platforms and exploiters on one side and artists on the other.

The Act consists of three titles; (1) general changes to the German Copyright Act, (2) collective management, and (3) service providers.

The third title (a new act in addition to the general German Copyright Act) is called Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG) translated as Act concerning copyright -related responsibility of service provider for the sharing of online content – "Copyright - Service Provider Act".)

Scope

Service providers providing access to user uploaded content are communicating to the public (Section 1):

Service providers subject to this act are defined as service providers for user uploaded content with the limitation for start-ups and smaller service providers provided in the DSM Directive (Section 2). As provided in the Directive certain services such as not-for-profit online encyclopaedias are exempted from the scope of the Act (Section 3).

Sections 4, and 7 – 11 of the Copyright - Service Provider Act lay down conditions concerning the liability of service providers. If service providers fulfil these conditions in line with industry standards they are generally not liable for the copyright status of the content uploaded by users.

Direct remuneration for performers, Section 4 UrhDaG

Section 4 is the key provision for our purposes; paragraph 1 states that service providers have to undertake best efforts to obtain the required rights (outlining the possible sources for such rights including collective management organisations). Paragraph 3 states that in case the author has transferred the right to a third party the service provider has to pay adequate remuneration (angemessene Vergütung) to the author. There are some (new) limitations in case the third party is a CMO or a distributor but this seems to not be relevant for performers. Paragraph 4 expressly states that this right is unwaivable and can only be exercised through a CMO.

Text (prepublication): free and not official translation

1) A service provider is obliged to make the best possible efforts to acquire the usage rights for the communication to the public of works protected by copyright. The service provider fulfills this obligation, provided that he acquires rights of use, which

1. are offered to him.

2. are available through representative rightsholders that the service provider knows, or

3. can be acquired through national collecting societies or related institutions.

2) Usage rights according to paragraph 1 sentence 2 must

1. apply to content that the service provider reproduces publicly in more than negligible amounts,

2. comprise a substantial repertoire with regard to works and rights holders,

3. cover the territorial scope of this law and

4. enable use under reasonable conditions.

3) If the author has granted to a third party the right to communicate a work to the public, the service provider must nonetheless pay the author adequate remuneration for the public reproduction of the work for contractual uses. Sentence 1 does not apply if the third party is a collecting society or the

author engages the third party as a digital distributor. [note: according to Section 21, this also applies to performers which in Germany refers to musical and AV performers).

4) The author cannot waive the direct remuneration claim under paragraph 3 and can only assign this to a collecting society in advance. It can only be asserted by a collecting society.

As an aside there are limitations for the responsibility for small uses (e.g. 15 seconds of a song, Section 10) which are nevertheless subject to adequate remuneration by CMOs (Section 5 (2)).