

THE IMPLEMENTATION OF THE DIGITAL SINGLE MARKET DIRECTIVE OF 2019 IN GERMANY

SILKE VON LEWINSKI

Professeur associé (Université de Zagreb), Dr. jur.,
Institut Max Planck pour l'innovation et la concurrence, Munich

INTRODUCTION

Germany implemented the Digital Single Market Directive¹ by the Act on the Adaptation of Authors' Rights to the Needs of the Digital Single Market of 31 May 2021.² Most of its provisions entered into force on 7 June 2021 and thus met the deadline for implementation required by Article 29(1) of the Digital Single Market (DSM) Directive; the provisions implementing Article 17 of the DSM Directive entered into force only on 1 August 2021 so as to allow the stakeholders sufficient time to prepare the

1. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, O.J. L 130/92 of 17 May 2019.

2. Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, BGBl. (O.J.) I 1204 (no. 27).

practical implementation. The Act also provides for amendments to the then existing authors' rights provision regarding the so-called 'free use' (§ 24 previous version of the Author's Right Act (ARA), now deleted), which became necessary after the European Court of Justice had prohibited the application of this provision as an exception or limitation rather than as the (originally intended) delineation from an adaptation of a work, in the case 'Pelham' on music sampling.³ It also implements the so-called Online-Satcab Directive.⁴ However, this contribution only deals with the implementation of the DSM Directive.

The German legislator was under pressure to implement this directive before the summer break of the German Parliament not only in order to meet the implementation deadline under the directive, but also in order to avoid an otherwise potentially very long delay in implementation: Due to the federal elections in autumn 2021 and the possibly long time needed to establish a political coalition, the legislative procedure would have needed a complete restart. In view of the controversial discussions in particular of Article 17 DSM Directive already during the legislative procedure for the directive in the German public, this possibility of delay until after the elections was not completely excluded from the outset. Therefore, a first discussion draft from inside the ministry competent for authors' rights (the

3. CJEU Case C-476/17 of 20 July 2019 (Pelham). The core idea of the previous § 24 on "free use" was integrated in § 23 ARA on the exclusive right of adaptation, specifying that there is no adaptation if the newly created work shows sufficient distance to the used work (para. (1) phrase 2).

4. Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, O.J. L 130/82 of 17 May 2019.

Federal Ministry of Justice and for Consumer Protection) concerned mainly two issues seen as more urgent than the others, namely the press publishers' right and publishers' participation in revenues inside collective management organizations (CMOs) according to Articles 15 and 16 DSM Directive, with related provisions. Indeed, the press publishers' right had already existed in Germany beforehand but later was considered inapplicable by the European Court of Justice (ECJ); it thus simply had to be reestablished on the basis of the directive. Also, Article 16 DSM Directive was to reestablish the previous situation and thereby considered as urgently necessary to enable the survival of CMOs that include publishers in addition to authors. This discussion draft on a 'First Act on the Adaptation of the Author's Right to the Needs of the Digital Single Market'⁵ was then followed by a discussion draft on a 'Second Act on the Adaptation of the Author's Right to the Needs of the Digital Single Market',⁶ which included the remaining provisions of the DSM Directive and those regarding § 24 ARA.

In general, discussion drafts serve at getting initial reactions by stakeholders before the competent ministry would issue its official draft of the head of unit inside the ministry. This draft of the head of unit of the ministry

5. Entwurf eines ersten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarktes vom 15.1.2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf;jsessionid=EAB7B9FA975151E45FE04F9A4288CC64.2_cid289?blob=publicationFile&v=1.

6. Entwurf eines zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarktes vom 24.6.2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf;jsessionid=5BA45EC5931522A8D4609ABC9693D1C8.2_cid289?blob=publicationFile&v=2.

was then issued on 13 October 2020 and combined all matters previously treated separately in Discussion Drafts nos. 1 and 2.⁷

For reasons that will be set out in the context of Article 17 DSM Directive, it took quite a long time thereafter, namely four months, until the Government adopted its governmental bill on 3 February 2021.⁸ The Parliament thus had very little time for debate between March and May 2021.⁹ Finally, on the recommendation of the Legal Affairs Committee,¹⁰ the Parliament voted on it on 20 May 2021 and the Second Chamber (Federal Council/Bundesrat) on 28 May. The Act was then proclaimed on 31 May 2021.

Article 1 of the Act on the Adaptation of the Author's Right to the needs of the Digital Single Market contains amendments to the ARA, while its Article 2 modifies the Act on CMOs, and Article 3 introduces an entirely new and separate 'Act on the responsibility of service providers regarding the author's right for the sharing of online content', which implements Article 17 DSM Directive. Articles 4 and 5 deal with modifications to the law on injunctions and on entry into force, respectively.

7. Referentenentwurf of 13 October 2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf;jsessionid=DE220836DBAB308DB889088731215812.2_cid289?__blob=publicationFile&xv=7.

8. Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarktes, Bundesrats-Drucks. 142/21 of 12 February 2021, <https://dserver.bundestag.de/brd/2021/0142-21.pdf>, and Bundestags-Drucks. 19/27426 of 9 March 2021, <https://dserver.bundestag.de/btd/19/274/1927426.pdf>.

9. For the details on the legislative procedure, see <https://dip.bundestag.de/vorgang/.../273942>.

10. Bundestags-Drucks. 19/29894 of 19 May 2021, <https://dserver.bundestag.de/btd/19/298/1929894.pdf>.

I. EXCEPTIONS AND LIMITATIONS UNDER THE DSM DIRECTIVE AS IMPLEMENTED

1. Text- and Data-Mining (TDM)

Article 3 DSM Directive introduced an exception for text and data mining for the purposes of scientific research, while its Article 4 provided a broader exception for any other purpose provided that rightholders have not expressly reserved their rights in an appropriate manner. Before implementation, Germany already provided for a TDM exception for scientific, non-commercial research, subject to a number of conditions, including a statutory right to equitable remuneration (§§ 60d and 60h previous version ARA). § 60d ARA has been modified by integrating the definitions of ‘text and data mining’ and of the benefitting research organizations according to Article 2(1) DSM Directive (§ 60d (2) ARA). It also closely takes over Article 3(2), (3) DSM Directive (§ 60d (5), (6) ARA).

Unlike the text of the directive, § 60d also covers by the exception individual researchers who do not pursue commercial purposes (§ 60d(3) no. 2. ARA), and in this respect maintains the previous provision on TDM. The Explanatory memorandum bases this extension of the exception beyond Art. 3 DSM Directive on Article 5(3)a Information Society Directive 2021/29, which continues to be applicable in the version set out in Article 24(2)b DSM Directive, in connection with Article 25 DSM Directive.¹¹ For the

11. Explanatory Memorandum of the Governmental Bill, <https://dserver.bundestag.de/btd/19/274/1927426.pdf> p. 95.

same reasons, the new version of § 60d maintains, in its paragraph 4, an exception also to the right of making available regarding the copies made under the TDM-exception, if such copies are publicly made available to a specifically limited circle of persons for their joint scientific research or to individual third persons for the purpose of monitoring the quality of scientific research; however, as soon as the joint scientific research or the monitoring of its quality have been terminated, also the act of making available to the public must be terminated. In contrast, the statutory remuneration right for TDM under the previous law was not maintained, due to Recital 17 phr. 2 DSM Directive, even if authors had argued that this recital could still allow such remuneration right under certain circumstances. Indeed, at least for situations of the TDM exception that go beyond those of Art. 3 DSM Directive, a statutory remuneration right (based on Art. 5(3)a Information Society Directive) could have been maintained. One will have to see whether the harm due to legally permitted TDM will turn out to be limited, as stated in that recital.

A new § 44b ARA implements Article 4 DSM Directive, including the definition of TDM. It largely follows Article 4 DSM Directive. As regards the possibility of rightholders to reserve their rights in an appropriate manner, § 44b(3) phr. 2 ARA determines that, in case of works available online, rightholders may do so only in machine readable form, thereby relying on Recital 18 subpara. 2 phr. 2 DSM-Directive.¹²

12. Explanatory Memorandum, *op. cit.*, p. 89.

2. Digital and Cross Border Teaching Activities under Article 5 DSM Directive as implemented

Article 5 DSM Directive basically provides for a mandatory exception to the rights of reproduction and communication / making available to the public in digital form for the purpose of illustration for teaching, to the extent justified by the non-commercial purpose and under further conditions. Member States may decide not to apply this exception for specific uses or types of works where suitable licenses are easily available on the market, such as for schoolbooks or sheet music. They are also free to decide whether to grant a statutory remuneration right where the uses are covered by the exception. Germany already provided an exception for illustration for teaching in § 60a ARA, which only needed to be adapted to the compulsory conditions of Article 5 DSM Directive.

Accordingly, and since Germany wanted to continue not to apply the exception in particular to works that are exclusively suitable, intended and labeled for teaching in schools as well as for sheet music,¹³ it had to restrict this exemption to the conditions under Article 5(2) DSM Directive (in particular: easy availability of suitable licenses). Furthermore, a new paragraph (3a) had to be added to the existing § 60a ARA in order to implement the legal fiction that, in the case of a use through secure electronic environments in an EU Member State or other Contracting Party of the EEA,¹⁴ the use is deemed

13. For details, see § 60a(3) ARA.

14. The Explanatory Memorandum, *op. cit.*, mentions that for non-EU EEA Parties, the EEA Joint Committee first must have adopted the DSM Directive, see p. 95.

to occur only in the Member State where the educational establishment is established.

All other provisions of the existing § 60a ARA on the exception for teaching are maintained, even if they go beyond Article 5 DSM Directive. For example, the exception under § 60a(1) no. 3 ARA continues to apply to uses made for third persons to the extent that this serves to present lessons and results of teaching or learning at the educational establishment. As the Explanatory Memorandum sets out, this is justified by Article 25 DSM Directive as well as Article 5(3)a) and, for the distribution right, Article 5(4) Information Society Directive.¹⁵ Other details are based on recitals of the DSM Directive, such as the maintained restriction of permitted uses of up to 15 % of a work, which in addition must have been published. Also the statutory right to equitable remuneration permitted under Article 5(4) DSM Directive is maintained in § 60h ARA. § 60h(3) phr. 1 ARA specifies that this right is subject to mandatory collective administration and that the remuneration may be calculated as a flat rate remuneration or as use-related remuneration that may be based on a representative sample of uses.

3. Preservation of Cultural Heritage as implemented

Article 6 DSM Directive provides for a mandatory exception to the reproduction right to the benefit of cultural heritage institutions that may make copies of works and other subject matter permanently held in their collections for purposes of preservation, to the extent necessary. German law

15. Explanatory Memorandum, op. cit., p. 92.

already provided for an exception to the reproduction right for preservation, among other purpose, in favor of public libraries, archives, film- or audio-heritage institutions as well as publicly accessible museums and even educational institutions. In fact, in 2018, when Germany restructured all exceptions for teaching, scientific research and certain institutions, it assembled those in favor of public libraries on the one hand and archives, museums and educational institutions on the other in § 60e and § 60f ARA, respectively. This structure has been kept and only minor amendments to the extent necessary to comply with Article 6 DSM Directive were made.

This concerns essentially the extension of the existing exception for purposes of preservation to publicly accessible libraries, archives or film- or audio-heritage institutions as well as publicly accessible museums that pursue commercial purposes.¹⁶ Also, the extension of this exception to computer programs and databases protected by the related right (*sui generis*-right under Directive 96/9/EC) was necessary. While § 60h(2) ARA was amended to explicitly exclude from the statutory remuneration right in context with limitations also the reproduction for the purpose of preservation made by commercial institutions, the Explanatory Memorandum observes that such reproductions are exempted from the obligation to pay a remuneration taking into account the three-step-test under Article 7(2) phr. 1 DSM Directive and Article 5(5) Information Society Directive.¹⁷

16. §§ 60e)(6) and 60 f)(3) ARA; Article 6 and Art. 2 no. (3) DSM Directive do not distinguish between institutions that do, or do not pursue commercial purposes, unlike Article 5 Information Society Directive.

17. Explanatory Memorandum, *op. cit.*, p. 100.

As regards the common provisions in Article 7(1) DSM Directive on the relation between contracts and exceptions, § 60g(1) ARA already provided that rightholders could not rely on agreements that prohibit or restrict permitted uses under §§ 60a to 60f ARA to the detriment of the beneficiary of the exception and thus did not need to be amended. In respect of the relation of the exceptions under Articles 3 - 6 of the DSM Directive and technological protection measures (Article 7(2) phr. 2 DSM Directive), the existing rules in § 95b(1) and (3) ARA had to be adapted.

II. OUT OF COMMERCE-WORKS AND EXTENDED COLLECTIVE LICENSES AS IMPLEMENTED

1. Overview

Articles 8-11 DSM Directive oblige Member States to enable CMOs to conclude non-exclusive, non-commercial license agreements for certain rights in out of commerce-works or other subject matter to cultural heritage institutions under a number of conditions, even if not all rightholders covered by the licenses have mandated the CMO – a particular case of a collective license with an extended effect. Article 12 DSM Directive on the general possibility of collective licensing with an extended effect is, in contrast, facultative. In Germany, the Act on CMOs already contained provisions similar to those on out-of-commerce works under the DSM Directive, namely for the reproduction and making available of literary works that were out of print ('vergriffen') in favor of particular establishments such as public libraries.¹⁸ In implementing

18. § 51 Act on CMOs previous version.

Articles 8-12 DSM Directive, the new rules on extended collective licenses, which Germany has decided to implement, are combined with those on out of commerce-works in a common Section 5 on ‘collective licenses with extended effect’, starting with the general rules in § 51 Act on CMOs, followed by §§ 52-52c Act on CMOs regarding out-of-commerce works. The former rules on out-of-print works thereby have been adapted to those of the DSM Directive (and were supplemented by an exception pursuant to Art. 8(2), (3) DSM Directive in §§ 61d-61f ARA, see further below).

2. Out-of-commerce Works (Unavailable Works)

a. Unavailability

As the Directive (see Recital 37 phr. 1) also covers works that have never been available in commerce, the German law, unlike the German version of the Directive, uses the term ‘nicht verfügbar’ (‘unavailable’, similar to the French term ‘indisponible’) instead of the formerly used word ‘vergriffen’, which implies that a work has been on the market beforehand.¹⁹ Accordingly, the previous provisions of the Act on CMOs were extended to works that have never been in commerce. In addition, they were extended to all kinds of works. Also, the register for out of commerce-works that had been established with the German Patent and Trademark Office under the previous rules will be closed on 31 December 2025, since a new portal with the European Union

19. Explanatory Memorandum, op.cit., p. 127, on § 52b VGG-E.

Intellectual Property Office (EUIPO) will take over corresponding tasks under Article 10 DSM Directive.²⁰

§ 52b(1) Act on CMOs defines unavailable works as those which are not offered to the public in a complete version through any customary channel of commerce. Moreover, § 52b(2) Act on CMOs establishes an irrebuttable presumption that a work is unavailable once a cultural heritage institution has tried, without success, to find offers in customary channels of commerce briefly before the information given by a CMO in the EUIPO's portal. According to the Explanatory Memorandum, this presumption serves to implement Recital 38 phr. 3 DSM Directive, so as to avoid an obligation of a cultural heritage institution to verify repeatedly whether a work is unavailable; a ministerial order under § 52d no. 6 Act on CMOs may specify the reasonable effort to be made by such institutions.²¹

In addition, works that have been published in books, journals and the like are unavailable only if they were last published at least 30 years before the CMO has informed about the planned licensing in the EUIPO's portal. This 'moving wall' replaces the fix date of 1 January 1966, which had been provided in the earlier German regulation of out of commerce works. Such a moving wall could also be introduced for other kinds of works by a ministerial order on the basis of § 52d no. 6 Act on CMOs, which may also regulate ways to take into account of moral rights in case of unpublished works.

20. For transitional provisions on the use of the previous register, see the § 141 Act on CMOs.

21. Explanatory Memorandum, pp. 127.

b. Extended Collective License

§ 52 Act on CMOs regarding Extended Collective Licenses of Unavailable Works implements the obligation of a CMO to grant licenses also on behalf of an outsider once the CMO concludes an agreement on the use of unavailable works of its repertoire with a domestic cultural heritage institution.²² § 52a Act on CMOs specifies the conditions for the effectiveness of such an extended collective license for unavailable works. § 52c Act on CMOs implements Article 8(7) subpara. 2 DSM Directive (on representativeness of the CMO regarding sets of works from third countries), and § 52d Act on CMOs empowers the Ministry of Justice and for Consumer Protection to regulate by an order different details, such as the representativity of CMOs; conditions for the reasonable effort to ascertain the availability of works; conditions for the respect of moral rights of unpublished works; and the use of work series from third countries. § 52e Act on CMOs makes applicable the provisions on unavailable works (as well as on extended collective licenses in general) to all related rights and their owners under the ARA.

It is also worth mentioning that any CMO having its seat in the EU or the EEA, which manages the rights of outsiders under the provisions on unavailable works and extended collective licenses, needs a permission for this activity in Germany by the German Patent and Trademark Office;²³ the Explanatory Memorandum justifies this requirement by the high demands

22. See also Explanatory Memorandum, *op.cit.*, p. 146 - 147, on § 52 VGG-E.

23. §§ 77(2) no. 3 Act on CMOs. § 77(1) Act on CMOs requires such permission in general for domestic CMOs and CMOs from outside the EU or the EEA.

put on CMOs in case of extended collective licensing, as set out in Recital 34 phr. 1 DSM Directive.²⁴

c. Exception

As regards out of commerce works, only Article 8(2), (3) DSM Directive (exception to apply where no relevant CMO exists) is implemented outside the Act on CMOs, namely, in the section on exceptions in favor of certain institutions in the Author's Right Act (§ 61d ARA), supplemented by the possibility for the Federal Ministry of Justice and for Consumer Protection to issue orders in relation to the exercise and consequences of an objection of a rightholder to the use as well as to information obligations of the cultural heritage institution (§ 61e ARA). In order to achieve the purpose of informing the public on an extended collective license for an unavailable work or a permitted use thereof in the online portal of the EUIPO, § 61f ARA introduces a new exception to the rights of reproduction and making available to the public in favor of CMOs, cultural heritage institutions and the EUIPO.²⁵

In addition, and although the Directive does not require so, § 61g ARA renders ineffective any agreements on the permitted uses of unavailable works under § 61g ARA and § 61f ARA to the detriment of the beneficiaries of the limitations. It follows the same approach as taken in § 60g(1) ARA in relation to other exceptions for cultural heritage institutions. The Explanatory

24. Explanatory Memorandum, *op.cit.*, p. 128-129.

25. The Explanatory Memorandum, pp. 102, refers to Art. 10(1) DSM Directive as legal basis.

Memorandum clarifies that an objection to the use by a rightholder is not considered such an agreement.²⁶

3. Extended Collective Licenses under Art. 12 DSM Directive as implemented

§§ 51, 51a and 51b as well as 52d and 52e Act on CMOs implement Article 12 DSM Directive on extended collective licenses, which is facultative for Member States but was considered useful by the German legislator for massive uses of a multitude of works and high transaction costs in case of individual licensing. Accordingly, a CMO may (i.e., it is not obliged to) license rights also in works of outsiders, if the conditions in particular of § 51a Act on CMOs are fulfilled; in particular, § 51a(1) no. 2 implements Article 12(2) DSM Directive²⁷ by the very short condition that obtaining an authorization for use from all relevant outsiders by the user or the CMO is unreasonable. In implementing Article 12(3)d) DSM Directive on the information obligations, § 51a(1) no. 4. c) Act on CMOs specifies that the CMO must, within at least three months before licensing, announce on its website among others which kinds of use, kinds of works and groups of rightholders are to be covered by extended collective licenses.

In implementing Article 12(3)a) DSM Directive on the sufficiently representative nature of a CMO, § 51b Act on CMOs determines that a

26. Explanatory Memorandum, op.cit., p. 103, on § 61g UrhG-E.

27. Art. 12(2) DSM Directive sets out as conditions of application that there must be ‘well defined areas of use, where obtaining authorization from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned ...’.

CMO is representative if it manages, on the basis of contracts, rights to be subject to a collective license for a sufficiently big number of rightowners. In addition, it establishes a rebuttable presumption that a CMO that has obtained a permission from the German Patent and Trademark Office for collective management under § 77 Act on CMOs is representative. This presumption is based on the fact that under § 79(1) no. 3. Act on CMOs, such permission requires a certain economic basis for the collective management and therefore a considerable number of rightowners and rights. Thereby, the legislator wanted to ensure that CMOs in fact make use of extended collective licenses.²⁸ § 52d Act on CMOs empowers the competent Federal Ministry of Justice and for Consumer Protection to regulate by order in particular the exercise and legal consequences of an objection of outsiders; the question of whether the acquisition of rights would be unreasonable; details on information obligations; the appropriateness of the period before the works are used under the extended collective license; and the question of whether CMOs are representative.

III. ARTICLE 13 DSM DIRECTIVE ON LICENSES FOR VIDEO ON DEMAND PLATFORMS

Article 13 DSM Directive obliges Member States to provide prospective parties on an agreement for licensing the making available of audiovisual works on video on demand platforms. Some form of mediation in order to facilitate licensing agreements. In implementing this article, the newly introduced § 35a ARA simply states the possibility of rightowners and the relevant users of

28. Explanatory Memorandum, *op.cit.*, p. 123 (on paragraph 2 of §§ 51b VGG-E).

audiovisual works through video on demand-services to resort to mediation or other voluntary extra-judicial procedures for dispute resolution in particular during contractual negotiations. The explanatory memorandum explains that the law itself does not stipulate any particular body for this purpose because there already exist many such mediation bodies and parties should have the possibility to make their own choice. In relation to the notification obligation under Article 13(2) DSM Directive, the explanatory memorandum refers to several websites where such bodies may be found.²⁹

IV. ARTICLE 14 DSM DIRECTIVE ON PHOTOGRAPHS OF WORKS OF VISUAL ART IN THE PUBLIC DOMAIN

According to Article 14 DSM Directive, ‘when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation.’ German law provides a related right for makers of photographs that are not works (§ 72 ARA) and, as also required by EU law, a related right for producers of moving images (which are not works), § 95 ARA. The situation of Article 14 DSM Directive was subject to litigation in Germany, which ended up with a judgement by the Federal Court of Justices (BGH).³⁰ In this judgement, the BGH not only

29. Explanatory Memorandum, op.cit., p. 84-85, referring to p. 84, where the following websites with information on available mediation possibilities are indicated in the first and second full paragraph: https://www.bmjv.de/DE/Startseite/Startseite_node.html ; <https://www.dgmediation.de/> ; <https://www.disarb.org/werkzeuge-und-tools/dis-regeln> ; <https://www.deutsches-medienschiedsgericht.de/en/> ; <https://www.wipo.int/amc/en/mediation/> .

30. BHG of 20 December 2018 – I ZR 104/17 (OLG Stuttgart), GRUR 2019, 284.

recognized that the photography of a painting was a photograph protected by the related right under § 72 ARA, but also rejected the theory expressed by a part of the legal doctrine, according to which the scope of protection should be teleologically reduced to the effect that photographs of public domain artworks would not be covered by the related right. It rejected in particular the argument that otherwise, author's right protection would in fact be prolonged beyond 70 years p.m.a., since the licensee of the photographers (often a museum) could prohibit others from taking pictures of artworks when being admitted to the museum, and could at the same time circulate only its own photographs. The BGH argued that the public may well get access to the public domain work (in the museum), even if not through the concrete photograph.³¹

In fact, the justification for granting a related right in photographs does not change according to the object photographed and its features (in particular, whether it is protected or in the public domain); the achievement of the photograph is the same in both cases. In order to facilitate access to public domain works in public museums or similar institutions, one could have rather obliged these public institutions to allow everyone to make photographs in their collections, as many museums today already do. Accordingly, the BGH decision respected the inner logics of related rights protection, which also applies to other related rights. In fact, also in the case of other related rights, such as for phonograms or broadcasts, the protection does not depend on whether the works recorded on a phonogram or broadcast are protected or in the public domain.

31. BGH, *op.cit.* Recitals 28-30.

However, Article 14 DSM Directive has introduced this reduction of protection for any material resulting from an act of reproduction of public domain visual art works, which are now, according to the implementation in § 68 ARA, no longer protected by any related right under Parts 2 and 3 (which include in particular the related rights for photographs and moving images). However, the legislator did not integrate this provision into the provisions on the scope of the related rights themselves, but – in a systematically doubtful way – into the section on the duration of the author’s right (§ 68 ARA). Notably, the law, based on the DSM Directive, introduces the notion of ‘visual art’ (‘visuelle Werke’), which, according to the Explanatory Memorandum, is broader than the traditional term for art works used in the Author’s Right Act and in the German translation of Article 14 of the DSM Directive (‘bildende Kunst’/fine arts). The Memorandum concludes from Recital 53 of the DSM-Directive that Article 14 aims at facilitating access to cultural heritage and, in particular, all art works that can be visually perceived and refers to the annex to § 61a ARA on orphan works, where the term ‘visual works’ already has been used and determined to include works of fine art, photography, illustrations, design and architecture works and drafts of such works.³² It follows only from the Explanatory Memorandum that this restriction of protection also applies to existing photographs of public domain works; this is justified by Article 26(1) DSM Directive.³³ It is not clear, how this approach to include existing photographs and other reproductions that have already acquired protection relates to the principle of well-acquired rights based on the fundamental right of property. Also, since these rights have mostly been subject to licensing

32. Explanatory Memorandum, op.cit, p. 104-106.

33. Explanatory Memorandum, op.cit., p. 105.

contracts before 7 June 2021, these acquired rights should not be affected according to Article 26(2) DSM Directive. Accordingly, this implementation (as well as Article 14 DSM Directive itself) may raise some open questions – also in practice, since a reproduction of a public domain work by means of a photographic work is protected, so that a distinction will have to be made between reproductions of public domain works that are mere photographs or photographic works.

V. PRESS PUBLISHERS' RIGHTS (ARTICLE 15 DSM DIRECTIVE)

A press publisher's right concerning online uses similar to that set out in Article 15 DSM Directive had already existed in Germany since 2013.³⁴ However, due to the pressure on many press publishers by Google, which had threatened publishers to delete publications from the results on Google News, many publishers granted a gratuitous license to Google, which also publicly refused to pay for exploitation of the new right and to negotiate any license with the relevant CMO. In the framework of litigation with the CMO VG Media, a preliminary question to the Court of Justice resulted in the answer that the provisions on the press publisher's right should have been notified to the European Commission under Directive 98/34/EC; in lack of such notification, they were not applicable.³⁵ Not least given the experience of German press publishers of their weak bargaining position towards the

34. See *S. von Lewinski*, News from Germany (Part I – Legislative Developments in Germany from 2011 until the end of 2017, RIDA 2018, Vol. 255, p. 79 et seq., and §§ 87f-78h ARA, previous version.

35. ECJ Case C-299/17 of 12 September 2019 (VG Media).

main prospective licensee, Google, they aimed for a stronger position through European harmonization and promoted the introduction of a similar press publisher's right at the EU-level.

In fact, Article 15 DSM Directive has a similar structure and content as had the previous German provisions; however, since there are differences in detail, the existing §§ 87f – 87h ARA were amended and extended to the new §§ 87f –87k ARA. The extensions include a new definition of 'press publication' close to that of Article 2(4) DSM Directive (although the word 'press publisher' is used instead of 'service provider') and the previous definition of a press publisher (as the one who produces a press publication) has been taken over; also the definition of 'information society service' according to Article 2(5) DSM Directive was introduced newly. The rights of press publishers are set out in § 87g ARA, which also clarifies (as under previous law but unlike in the directive) that the publisher's rights can be transferred and that certain rules on licensing apply. In relation to exceptions and limitations, a general reference to those applying to the author's right under Part 1 Section 6 ARA for analogous application (§ 87i ARA) follows a legal technique applied also to most other related rights in German law; this provision also makes applicable by analogy the general provision on the presumption of right ownership under § 10(1) ARA. Provisions on technical protection measures and rights management information did not need to be separately introduced, since the existing ones already are applicable to all related rights. The duration of two years was extended as compared to the previous rules (§ 87j ARA).

As regards the right of authors to receive an appropriate share of the revenues from the press publisher's rights under Article 15(5) DSM Directive, German law has extended this (already previously existing) right in a share to related rights owners (for example, makers of simple photographs or film stills), and further specified the share, namely by a minimum of one third of those revenues; a deviation from this minimum is permitted only if established through common remuneration standards under § 36 ARA or collective agreements with trade unions. In addition, the right to a share of those revenues is subject to mandatory collective administration (§ 87k ARA). These specifications may be useful and do not raise any conflict with the directive. For the scope of application, § 127b ARA specifies that the press publisher's right does not only apply to press publishers established in a EU-Member State but also to those established in another Member State of the EEA.

VI. PUBLISHERS' RIGHT TO PARTICIPATE IN REVENUES FROM STATUTORY REMUNERATION RIGHTS ADMINISTERED BY CMOS (ARTICLE 16 DSM DIRECTIVE)

Article 16 DSM Directive allows Member States to provide that, under certain conditions, a publisher has the right to a share in the revenues from statutory remuneration rights. This provision may be best understood against its background, a German court decision that did no longer permit the long standing practice of the CMO VG Wort to distribute a share of revenues from statutory remuneration rights to publishers, based on agreed distribution schemes.³⁶

³⁶ BGH, 21 April 2016, GRUR 2016, p. 596 f. For more detail on this court case, see *S. von Lewinski*, News from Germany (Part II – Developments in German Jurisprudence from 2011 until early 2019), RIDA Vol. 260, April 2019, pp.46-47.

Since this participation of publishers and thus a common CMO of authors and publishers was considered as essential for a future-proof existence of VG Wort as a robust CMO, and not least to take into account relevant case law of the ECJ,³⁷ the German government proposed to the European Commission that a provision be included in the then planned DSM Directive in order to allow the continuous participation of publishers in CMOs.

Accordingly, the German implementation of Article 16 of the DSM Directive in §63a(2), (3) ARA and §§ 27a and 27b Act on CMOs mainly reestablishes the previous, longstanding situation in which publishers may receive a share from the author's statutory remuneration rights if an author has licensed a right (such as the reproduction right) to a publisher and this right is subject to a limitation (such as for private use) combined with a statutory remuneration right. § 63a(2) ARA further determines that such remuneration right must be asserted by a common CMO of authors and publishers. Germany also has chosen the option under Article 16(2) DSM Directive and applies § 63a(2) ARA also to the remuneration right for public lending (§ 63a(3) ARA). Since Germany provides statutory remuneration rights in context with many limitations of exclusive rights, this implementation is of a vital importance for the existing German CMOs, which regularly include publishers; as set out in the Explanatory Memorandum, the further existence of the CMO VG Wort as a common CMO of authors and publishers would otherwise have been in doubt.³⁸ Where an author has not licensed a right in his or her work to a publisher, he continuously may agree to a participation

37. See in particular ECJ Case C-277/10 of 9 February 2012 (*Martin Luksan v Petrus van der Let*) ; ECJ Case C-572/13 of 12 November 2015 (*Hewlett-Packard v Reprobel*)

38. Explanatory Memorandum, *op.cit.*, p. 104.

by the publisher in the revenues from a statutory remuneration right and the public lending right (§ 27a Act on CMOs).

German law also specifies, as allowed by Recital 60 subpara. 2 phr. 3 DSM Directive, a minimum share for authors in the case that publishers have a right to participate in the revenues from statutory remuneration rights including the public lending right: The newly inserted § 27b Act on CMOs provides for a minimum share for authors of two-thirds of such revenues; however, given the autonomy of CMOs in decision making, they may deviate from this rule. In fact, most pre-existing distribution schemes of CMOs provided for at least two-thirds (often 70%) in favor of authors, while one could in certain cases also find shares of 50 % in relation to the shares of publishers.

VII. ONLINE CONTENT-SHARING SERVICE PROVIDERS (ARTICLE 17 DSM DIRECTIVE)

1. Legislative history

The implementation of Article 17 DSM Directive in Germany provoked most of the criticism as compared to the implementation of the other provisions, which often only required minor modifications. Even as regards the legislative procedure, it was unusual that (only) the discussion draft for the implementation of Article 17 DSM Directive was also published in English language on the website of the competent Ministry of Justice and for Consumer Protection.³⁹ This

39. Entwurf eines zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarktes vom 24.6.2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler

fact seems to indicate that the ministry thereby wanted to influence other Member States to follow its own very particular approach. Despite some severe criticism of the discussion draft from different sides, the then following draft of the Head of Unit of the above ministry of 13 October 2020 only slightly changed certain provisions as compared to the discussion draft.⁴⁰ It was also somewhat unusual that the draft for a long time had been kept secret within the competent ministry, headed by a Social Democrat, and that even the coalition partner, the Christian Democrats, was excluded during the initial phase of drafting the implementation provisions. Before the Governmental Bill was adopted – namely, only on 3 February 2020 – long discussions between the coalition partners had to take place to bridge the gap between the respective positions.

In particular, the Christian Democrats did not agree to the UUC exceptions for ‘minor uses’ introduced in the ministry’s draft. The proposal for those exceptions was rooted in a declaration for the protocol made by Germany when the Directive was adopted, according to which Germany’s intention was to avoid overblocking or ‘upload filters’ as much as possible; at the time of adoption of the Directive, the words ‘upload filters’ or ‘overblocking’ were buzzwords used in lobbying in particular by the service providers that would become primarily liable and that raised strong opposition to Article 17 with many consumers (whom they however did not tell that such ‘filters’ were already used without major problems for consumers). The compromises reached in

[Binnenmarkt.pdf;jsessionid=5BA45EC5931522A8D4609ABC9693D1C8.2_cid289?blob=publicationFile&v=2.](#)

40. Referentenentwurf of 13 October 2020, [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf;jsessionid=DE220836DBAB308DB889088731215812.2_cid289?blob=publicationFile&v=7.](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf;jsessionid=DE220836DBAB308DB889088731215812.2_cid289?blob=publicationFile&v=7)

the Governmental Bill in part improved the situation for rightowners slightly; still, the UUC exceptions, though no longer appearing as exceptions, still play a role in the framework of the complaint procedure available for rightowners. The following steps of the legislative procedure went fast, so that the law implementing the DSM Directive was adopted on 28 May 2021 and enacted on 31 May 2021. Most provisions entered into force on 7 June 2021, while the provisions implementing Article 17 only entered into force on 1 August 2021, so as to leave stakeholders the practical possibility to adapt to the new rules.

2. General Remarks

The German legislature has chosen the unusual way of implementing Article 17 DSM Directive in an act separate from the Author's Right Act, namely the Act on the Author's Rights-related Liability of Service Providers for Sharing Online Content (Author's Rights' Service Provider Act; in German: Urheberrechts-Diensteanbieter-Gesetz / UrhDaG). This is unusual and was probably unnecessary because the law deals with particular questions of primary liability of particular actors who perform the act of making available works and other subject matter to the public according to § 19a ARA; it is thus closely related to the Author's Rights Act. However, by the choice of a separate act, the ministry, as explained in its discussion draft, wanted to justify the introduction of UUC exceptions for 'minor uses' in this context, by arguing that the making available right dealt with in Article 17 DSM Directive would not be the same making available right as that covered by the Information Society Directive, so that the exhaustive list of exceptions and

limitations under that Directive would not be relevant for this ‘sui generis’-right of making available. Therefore, new exceptions that were not in the list could be introduced, according to the ministry.

This approach raised strong criticism; in fact, it is only the question of primary liability of the particular service providers that has been regulated in Article 17 DSM Directive rather than the nature of the right itself, which is still based on Article 3 of the Information Society Directive as well as Article 8 WCT and Articles 10 and 14 WPPT.⁴¹ Another special feature of the German implementation of Article 17 DSM Directive is the fact that the implementation of the – admittedly long – Article 17 DSM Directive covers 22 articles and shows an impressively high degree of detail, in particular, as regards rules on blocking, complaint procedures and redress mechanisms. The advantage may be that it brings more legal security for practice than an implementation closer to the wording of the Directive would have done, but at the same time it results in a high degree of complexity.

Another characteristic feature of the implementation is its inventiveness, which includes its structure, the concept of ‘presumably authorized uses’ as part of the blocking provisions, and different statutory remuneration rights. It tries to find a balance between the different interests especially within the rules on blocking measures; yet, it is still controversial in that the intention

41. For the criticism see, for example, ALAI, Second Opinion on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market of 18 September 2020, p. 2, https://www.alai.org/en/assets/files/resolutions/200918-second-opinion-article-17-dsm_draft_en.pdf; Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on the right in the Digital Single Market, COM (2021) 288 final, p. 1.

to avoid overblocking or upload filters as much as possible seems to shift the balance in favor of users. Also, it is still criticized that in part, it arguably may not comply with the Directive and go beyond Article 17 DSM Directive.

3. Article 17(1) and (4) DSM Directive / The Main Obligation of Online-Content Sharing Service Providers (OCSSP)

While the Directive in its Article 17(1) clearly states that, since OCSSPs as described perform an act of making available to the public and therefore have to obtain an authorization from the rightholders for such making available, the German law⁴² - the UrhDaG – only stipulates that the OCSSP performs an act of public communication, but directly continues with the statement that the OCSSP is not responsible if it makes best efforts to obtain the authorization according to § 4 UrhDaG and if it fulfills the obligations in the framework of blocking of contents according to §§ 7-11 UrhDaG (§ 1(2) UrhDaG). Accordingly, in contrast to Article 17(4) of the Directive, which states that the OCSSP is in principle responsible for the act of making available unless it shows having made best efforts, etc., the German law from the outset limits the obligation to obtain an authorization to an obligation to make certain best efforts in this regard and in the framework of blocking measures further specified by the law.

In particular, § 4(1) UrhDaG specifies that the obligation to make best efforts is fulfilled under the following conditions: The OCSSP only needs to

42. Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten („Urheberrechts-Diensteanbieter-Gesetz“, UrhDaG).

acquire rights of use that (1) are offered to it (so that it may remain passive instead of seeking authorizations); or (2) are available through representative rightholders known to the OCSSP; (3) or can be acquired through CMOs or dependent management entities established in Germany. Accordingly, the OCSSP does not need to seek authorization from individual rightholders, but only from CMOs, from or ‘representative’ rightholders (a term that may be subject to different ways of interpretation) known to the OCSSP.

In addition, the obligation to make best efforts to acquire the necessary rights is limited to the following kind of rights of use that must be acquired: These rights must (1) concern content which, by its nature, is communicated to the public by the OCSSP in more than negligible quantities; (2) cover a substantial repertoire in terms of works and rightholders; (3) cover the territorial scope of the UrhDaG; and (4) allow the use on the basis of reasonable terms (§ 4(2) UrhDaG). Accordingly, not only individual rightholders but also smaller repertoires seem not to be protected and from the outset fall outside the scope of the obligations of the OCSSP, which raises doubts as to the compatibility with the Directive; also the European Commission in its guidance follows a flexible approach based on a case by case-analysis rather than a rigid system as implemented in German law.⁴³ Furthermore, the term ‘reasonable terms’ will certainly lead to litigation and, finally, to the determination of the contents of license agreements as to their ‘reasonableness’ by the courts.

43. Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on the right in the Digital Single Market, COM (2021) 288 final, p. 9.

In cases where a license agreement has been concluded between an OCSSP and, as will usually be the case, a licensee of the author, the OCSSP still has the obligation directly to pay the author for the contractual use under the license agreement an equitable remuneration for the communication of the work to the public. The author may not waive this direct remuneration right and may assign it in advance only to a CMO; the right can only be asserted through a CMO (§ 4(3), (4) UrhDaG). Although this separate, direct remuneration right for authors (and by reference also for performing artists and photographers protected by a related right) has not been provided in the context of Article 17 of the Directive, it is certainly covered by its Article 18 on an appropriate and proportionate remuneration inside contracts.

This remuneration right follows the idea first set out in Article 4 EC Rental Right Directive 1992/100/EEC (Article 5 of the consolidated version of the directive, no. 2006/115/EC), which aims at remedying the often unbalanced bargaining position of authors and performers in individual contracts with their licensees, by outsourcing the question of remuneration to a CMO (with its stronger bargaining position) and making the remuneration right unwaivable.⁴⁴ Accordingly, this direct remuneration right to the OCSSP does not apply if the author has granted the communication right to a CMO or to a company for digital distribution (§ 4(3) phr. 2 UrhDaG).

44. On this concept, see, for example, S.v.Lewinski, *Collectivism and its Role in the Frame of Individual Contracts*, in: Jan Rosén (ed.): *Individualism and Collectiveness In Intellectual Property Law*, Cheltenham 2012, 117 – 127; idem, *Commentary on Art. 4 Rental Directive 1992*, in: Walter/S.v.Lewinski, *European Copyright Law: A Commentary* (Oxford 2010), 6.4.1 ff.; idem, *A model that may indeed help*, in: S.v.Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs. other approaches* (ALAI 2015 international congress), Berlin 2016, 187 – 191.

This model indeed has been applied not only to the rental right but also in some other cases, such as to the cable retransmission right in Germany and the making available right in Spain, as it has been promoted in particular by the Society of Audiovisual Authors and by performing artists in their campaign ‘fair internet’ to be applied to additional rights. The approach of the German legislator of applying it to the situation covered by Article 17 of the directive seems appropriate and should be beneficial to authors and performers.

4. Exceptions and Blocking Measures

§ 5 UrhDaG provides for the exceptions of quotation, caricature, parody, and the (in Germany new) exception for pastiche, as required under Article 17(7) of the Directive; in addition, it refers to all applicable exceptions under the Author’s Right Act. Beyond the obligations of the Directive, but not prohibited by it, § 5(2) UrhDaG provides a statutory remuneration right for the utilization of works for caricatures, parodies, and pastiche to be paid by the OCSSP to the authors who – as is frequent under German law – cannot waive this remuneration right and can transfer it in advance to, and assert it through, a CMO only. Such a combination of exceptions and limitations with statutory remuneration rights to be administered through CMOs is quite common in Germany under authors’ rights; still, here, it only applies in the context of uses covered by Article 17 of the Directive. It may also be questionable how such remuneration may be established in practice, given the need to assess the existence and frequency of caricatures, parodies, and pastiche on OCSSPs’ platforms.

In addition to those exceptions, the first discussion draft for the law implementing Article 17 of the Directive contained a provision on new exceptions to the communication right as regards contents of a limited extent, such as excerpts of a film or a soundtrack of 20 seconds. After strong criticism of this proposal, which was considered by many as not being compliant with the Directive, the Governmental Draft finally deleted the proposal of such exceptions but reintroduced the same concept in the framework of blocking obligations (and thus also of the responsibility of the OCSSPs).

The blocking obligations according to §§ 7-12 of the UrhDaG are regulated in great detail and complexity. As previously, OCSSPs are under the obligation of simple blocking on request of a rightholder who has to submit a sufficiently motivated indication of an unauthorized public communication of a work (§ 8 UrhDaG). For a qualified blocking, the 'stay down' obligation, the rightholder also has to make a request; in addition, he must make available the necessary information (§ 7(1) UrhDaG). This 'stay down' obligation is however not applicable to 'start ups', as under Article 17 (6) of the Directive. In addition, the German legislator has created a new category of 'small service providers', defined by an annual turnover in the EU of up to 1 Mio. Euro,⁴⁵ for which the law establishes a rebuttable presumption that they are not covered by the 'stay down' obligation (§ 7(5) UrhDaG). Even if Article 17(5) of the Directive establishes the proportionality principle, on which the legislator relies for this privilege for an additional category of service providers,⁴⁶ one may have doubts about the compatibility of this provision with the Directive,

45. § 2(3) UrhDaG.

46. Explanatory Memorandum, *op. cit.*, p. 131.

which explicitly has excluded only start up service providers according to Article 17(6) of the Directive from the ‘stay down’ obligation. Based on an argument *e contrario*, it seems that under the Directive, service providers other than start ups should not be excluded (or even presumed to be excluded) from this obligation.

In addition, the interests of users have been strongly taken into account in the case of automatic blocking procedures: the obligation of qualified blocking (‘stay down’) is replaced with a stay up obligation until the termination of the complaint procedure in the case of so-called presumably permitted uses under § 9(2) UrhDaG: The law establishes a rebuttable presumption that the use is legally permitted under § 5 UrhDaG (on exceptions and limitations) under the following conditions: The relevant user-generated content must (1) contain less than half a work by a third party or of several works by third parties; (2) combine the work parts according to no. 1 with other content and (3) make only minor use of works of third parties according to § 10 UrhDaG or are marked as legally permitted by users according to § 11 UrhDaG. § 10 UrhDaG on minor uses of third party content reflects the corresponding, previous provision on new exceptions in the first discussion draft, which thus has been transformed into a basis (together with the just mentioned conditions) for a legal presumption that these uses are covered by an exception under § 5 UrhDaG, with the consequence of the abovementioned ‘stay up’ obligation (§ 7(2) in connection with § 9 (1) UrhDaG).

The minor uses according to § 10 UrhDaG are defined as uses not for commercial purposes or uses that serve only to generate insignificant income,

if they extend to up to 15 seconds each of a cinematographic work or moving images, or of a sound track, or up to 160 characters per text or 125 kilobytes per photographic work, photograph or graph. Although technically speaking, § 10 UrhDaG on minor uses is no longer a provision on exceptions (that would not be permitted under the Directive), its effect is similar until the complaint procedure has been terminated, which is required to be maximum one week. It is doubtful whether it is justified to presume that a use is for example a parody or caricature only based on the length of an excerpt and the combination with other content. At the same time, even an excerpt of 15 seconds of a film or soundtrack may cover essential parts thereof and thus damage the rightowners especially where these excerpts may then go viral, so that one week becomes a very long period. Given that such use will often be more damaging to rightowners than to users, who may, if an exception in fact applies, still upload the combined content one week later, one may doubt whether this provision is compatible with the Directive.

Under § 11 UrhDaG, in case of an automatic blocking request, the OCSSP is obliged to inform the user of the rightholder's blocking request and about the necessity of a legal permission under § 5 UrhDaG and it must enable the user to designate the use as legally permitted under that provision. Both in the case of minor uses under § 10 UrhDaG and the designation as 'permitted use' by a user under § 11 UrhDaG, and under the further conditions of § 9(2) UrhDaG on presumably permitted uses, the OCSSP is not only obliged to leave the contents online, but is also not responsible for a possible infringement of the right of the rightholder (§ 12(2) UrhDaG) until the complaint procedure has ended and at most until one week after

the complaint was deposited. As a balancing factor in favor of authors, § 12 (1) UrhDaG provides for an unwaivable right to equitable remuneration for authors for the uses that are presumed to be permissible according to §§ 9-11 UrhDaG. As is the case for the statutory remuneration right in the context of the limitations under § 5 UrhDaG, the remuneration right under § 12 (1) UrhDaG can be transferred to, and asserted through, a CMO only and has to be paid by the OCSSP.

Furthermore, § 14 UrhDaG provides for the rightholder a so-called red button in the framework of the internal complaint procedure of the OCSSP: The OCSSP has to inform the rightholder about the continuing public communication and about the right to rebut the presumption of a permitted use in a complaint procedure (§ 9(3) UrhDaG). According to § 14(4) UrhDaG, the rightholder may then, with his complaint, declare a rebuttal of the presumption under the following conditions: He must be trustworthy and there must have been an examination by a natural person; in addition, the rightholder must declare that the presumption under § 9(2) UrhDaG is to be rebutted and that the continued communication to the public of the work significantly impairs the exploitation thereof. In this case, the OCSSP must immediately block the communication to the public until the complaint procedure has been concluded.⁴⁷

In addition, the UrhDaG allows an OCSSP to make use of an external body for the complaint under § 14 UrhDaG (§ 15 UrhDaG) and also refers to

⁴⁷ The procedure must be concluded at the latest within one week after the deposit of the complaint, § 14(3) no. 3 UrhDaG.

the possibility of private and public alternative dispute settlement by the parties (§§ 16, 17 UrhDaG). Moreover, worth mentioning are rules on measures against abusive blocking requests by right owners or abusive designations as 'permitted uses' by a user or unjustified blocking measures by OCSSPs (§ 18 UrhDaG). The rules of the UrhDaG also apply to all related rights, while its § 4 (3) on the direct, statutory right to equitable remuneration only applies to those of performers and photographers (§ 21 UrhDaG).

VIII. COPYRIGHT CONTRACT LAW (ARTICLES 18–23 DSM DIRECTIVE) AS IMPLEMENTED

Articles 18–23 DSM Directive provide for minimum harmonization in respect of certain copyright contract rules, in particular regarding remuneration, transparency, and the right of revocation in case of lack of exploitation. German copyright law has a long tradition of taking care of the needs of authors in their relations to their licensees and was already quite advanced before implementation of the DSM-obligations; indeed, Articles 18-23 of the DSM Directive largely have been inspired by German law, which therefore only needed minor modifications, all the more since stronger protection, which existed in many regards in German law, is allowed by Articles 18–23 DSM Directive to remain.

1. Appropriate and Proportionate Remuneration (Article 18 DSM Directive)

In the Act of 2002 on strengthening the position of authors in their contractual relations⁴⁸ German law already had provided for a novel system to ensure that authors and performers could claim an equitable remuneration under their licensing contracts and for this purpose could rely on so-called common remuneration standards established on the basis of negotiations between associations of authors and associations of users of works or individual users, such as publishers.⁴⁹ Accordingly, there was no real need to modify German law; the legislator simply considered useful a clarification that even a lump sum payment must ensure an appropriate share of the perspective overall revenue from the use and must be justified through the specifics of the sector.⁵⁰

2. Contract Adjustment Mechanism (Art. 20 DSM Directive)

Also Article 20 DSM Directive deals with an equitable remuneration, though in situations known under the catch word ‘bestseller clause’. The preexisting § 32a ARA already addressed this situation where the agreed license fee later turns out to be disproportionate. In implementing Article 20 DSM Directive, the former condition of a striking disproportion was weakened to a

48. See in particular §§ 32, 36 ARA and *S. von Lewinski*, News from Germany (Part I – Legislative Developments in Germany from 2011 until the end of 2017, RIDA 2018, Vol. 255, p. 90f. and 94 ff.

49. On case law between 2011 and 2019 see, for example, *S. von Lewinski*, News from Germany (Part II, op.cit.), pp. 35–38.

50. See the new third sentence of § 32(2) ARA.

disproportionately low remuneration as compared to all subsequent revenues from the exploitation; accordingly, protection for authors and performers is thereby improved.⁵¹ As before, the contract adjustment can be claimed irrespective of whether the parties initially estimated or could have estimated what would be the final revenues. Also as before, the claim may be directed not only to the direct contractual partner but also to his or her licensee.⁵²

3. Transparency Obligations (Article 19 DSM Directive)

Although the previous §§ 32d and 32e ARA already provided a right of an author to claim information on the frequency of use and resulting revenues as well as accounting towards his contractual party (§ 32d) and his sublicensee (§ 32e), the main modification due to Article 19 DSM Directive consists in a change from such a right to information to an obligation of the contractual party without request by the author; a request of the author towards the contractual party is only still necessary as regards the name and address of the sublicensee and, beyond Article 19 DSM Directive, as regards accounting (§ 32d(1a) ARA). A request is also still needed if directed to the sublicensee.

The relation to the sublicensee is (and was previously) separately regulated in § 32e ARA, which only had to be slightly modified: A new second sentence was added to § 32e(1) ARA, according to which the author can request information and accounting from the sublicensee only if his or her own contractual partner has not fulfilled his or her own transparency

51. § 32a(1) ARA.

52. § 32a(2) ARA.

obligation under § 32d ARA within three months of the due date, or if the information is not sufficient in respect of the use by the sublicensee and the related revenues and advantages. As under the previous law and now justified by Article 19(3) DSM Directive on the proportionality principle, the right to request information and accounting towards a sublicensee is restricted to those third parties that essentially and from an economic point of view determine the uses in the license chain or from whose revenues or benefits the disproportionately low remuneration under § 32a(2) ARA⁵³ follows (§ 32e(1) ARA). As before, it is sufficient for the assertion of the request for information or accounting to submit verifiable facts indicating clearly that the conditions for the request are fulfilled (§ 32e(2) ARA).

Germany has made use of the possibility under Article 19(4) DSM Directive not to apply the transparency obligation under certain conditions, as was the case under the previous law; only the transparency obligation in respect of the bestseller clause even in case of non-significant contributions had to be reestablished according to Article 19(4) DSM Directive. The proportionality principle of Article 19(3) DSM Directive is, as before, integrated into § 32d(2) no. 2 ARA. The transparency obligations towards the licensee and the sublicensee under §§ 32d and 32e ARA may be deviated from only on the basis of a collective bargaining agreement or the common remuneration standard under § 36 ARA (which is established by associations of authors with exploitation enterprises); for this case, the law establishes a legal presumption that both such agreements and standards provide for

53. 'Bestseller clause' according to Art. 20 DSM Directive.

similar standards of transparency as those prescribed by law (see paragraph 3 of §§ 32d and 32e ARA).

Beyond the obligations of the Directive, the German legislator has reinforced the transparency obligations towards the contractual partner and the sublicensee by a flanking measure, which takes into account that the obligation to give the prescribed information could be systematically disregarded by exploitation companies, which would result in the need of the author to request such information and thus not bring about the provided change from a request-based to an obligation-based model. Therefore, for individual contracts, the new § 36d ARA introduces a right of authors' associations to claim an injunction against users of works who do not fulfil the transparency obligation in several identical or similar cases; such associations must be representative of the relevant groups of authors in the meaning of § 36(2) ARA. The Explanatory Memorandum highlights the possible usefulness of this flanking measure in the case of sublicensees, in particular streaming platforms for music or audiovisual content, if such platforms systematically do not fulfil their transparency obligations towards the individual authors or performers.⁵⁴ § 36d(2) ARA addresses the regular difficulties of proving negative facts such as, in this case, the lack of providing the required information: accordingly, it is sufficient that, on the basis of verifiable facts, there is clear evidence that the conditions for the injunction under § 36d ARA are fulfilled (§ 36e(2) ARA).

54. Explanatory Memorandum, *op.cit.*, p. 85.

4. Alternative Dispute Resolution (ADR) (Article 21 DSM Directive)

While recourse to ADR has always been possible, this possibility has now been clarified in a new § 32f ARA, which covers, beyond Article 21 DSM Directive, also the remuneration rights under §§ 32 and 32c ARA. As mentioned above, the Explanatory Memorandum points to different websites where such available ADR bodies may be found and thus does not see the need for establishing a new body for that purpose.⁵⁵ § 32g ARA, in implementing in particular Article 21 DSM Directive, clarifies that authors may decide to be represented by associations of authors where disputes on rights under §§ 32-32f ARA are concerned, whether in judicial or extrajudicial procedures. In any case, the relevant law on legal services and the procedural orders apply.

5. The Revocation Right (Article 22 DSM Directive)

Germany already provided for a right of revocation for lack of exploitation, in addition to a right of revocation due a changed conviction of the author. Only slight modifications were necessary in § 41 ARA; mainly, the revocation right, which was limited to the license itself, was now extended to the exclusive nature of such license, so that in this case upon effective revocation, the exclusive license becomes a non-exclusive one.⁵⁶ Further, the revocation right has been strengthened since now, in conformity with the Directive, it is no longer necessary that the lack of exploitation would considerably affect the legitimate interest of the author (or performer). Otherwise, the existing rules,

55. Explanatory Memorandum, *op.cit.*, pp. 83-84.

56. See new § 41(5) ARA.

including restrictions of the revocation right for film works and performers participating in films,⁵⁷ have not been removed and are justified under Article 22(2) DSM Directive.

6. Other Provisions

The unenforceability of contractual provisions contrary to Articles 19, 20 and 21 under Article 23(1) DSM Directive has been implemented in context with the individual, abovementioned provisions and, in addition, continues to exist in respect of the equitable remuneration (implementing Article 18 DSM Directive). Also Article 23(2) DSM Directive is implemented directly in context with the provisions on computer programs (§ 69a(5) ARA).

Furthermore, § 32b ARA, which so far only rendered the remuneration rights under §§ 32 and 32a ARA (corresponding to Articles 18 and 20 DSM Directive) into internationally mandatory rules of international private law, has now been extended to cover also the provisions implementing Articles 19 and 21 DSM Directive as internationally mandatory rules.⁵⁸

IX. CONCLUSIONS

Most provisions of the DSM Directive have been implemented closely to those of the Directive; in respect of certain provisions, in particular the press publisher's right and copyright contract law, only minor adaptations were

57. See § 90(1) phr. 1 no. 3 ARA and § 92 ARA.

58. The Explanatory Memorandum in this context makes reference to Recital 81 phr. 2 of the DSM Directive, see Explanatory Memorandum, *op.cit.*, p. 80-81.

necessary. The most creative but also controversial part of the implementation concerns Article 17 of the Directive, which will certainly provoke quite some litigation. It will be interesting to see the effects of the application of the implemented provisions in practice.

