

**Act on the Copyright Liability of Online Sharing Content Service
Providers [Government Draft]¹**
(Urheberrechts-Diensteanbieter-Gesetz – UrhDaG [Regierungsentwurf])

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¹ Article 3 of Government Draft „Act to adapt copyright law to the requirements of the digital single market”, to transpose Article 17 DSMD (EU) 2019/ 790. The complete draft is available (in German) at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_Anpassung-Urheberrecht-dig-Binnenmarkt.html

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Part 1
General provisions

Section 1

Communication to the public; liability of the service provider

(1) A service provider (section 2) performs an act of communication to the public if it gives the public access to copyright-protected works uploaded by its users.

(2) If the service provider fulfils its obligations under section 4 and sections 7 to 11 in accordance with the high standards which are customary in the industry, taking into account the principle of proportionality, it is not liable under copyright law for an act of communication to the public. Account is, in particular, to be taken of the following:

1. the nature, audience and scope of the service,
2. the nature of the works uploaded by users of the service,
3. the availability of appropriate means of fulfilling the obligations, and
4. the costs incurred by the service provider for the means under no. 3.

(3) The service provider cannot rely on section 10 sentence 1 of the Telemedia Act (*Telemediengesetz*).²

(4) A service provider whose main purpose is to participate in or facilitate copyright infringements may not rely on subsection (2).

Section 2

Service providers

(1) 'Service providers' within the meaning of this Act are the providers of services within the meaning of Article 1 (1) (b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (OJ L 241, 17.9.2015, p. 1) which

² Section 10 of the Telemedia Act contains a safe harbour provision for hosting providers and reads as follows:

Section 10 Storage of information

Service providers are not liable for third-party information which they store on behalf of a user, provided that

1. they have no knowledge of the unlawful act or the information and, in the event of a claim for damages, they are not aware of any facts or circumstances from which the unlawful act or the information becomes apparent, or
2. they took immediate action to remove the information or block access to it as soon as they gained knowledge of it.

Sentence 1 does not apply if the user is subordinate to or supervised by the service provider.

1. have as their main purpose, exclusively or at least in part, the storage and making available to the public of a large amount of copyright-protected content uploaded by third parties,
2. organise content within the meaning of no. 1,
3. advertise content within the meaning of no. 1 for the purpose of making a profit, and
4. compete with online content services for the same target groups.

(2) 'Start-up service providers' are service providers with an annual turnover within the European Union of no more than 10 million euros whose services have been available to the public in the European Union for less than three years.

(3) 'Small service providers' are service providers with an annual turnover within the European Union of no more than 1 million euros.

(4) The turnover of start-up service providers and small service providers is calculated in accordance with the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). In each case, turnover in the previous calendar year is decisive.

Section 3

Services not covered

In particular, this Act does not apply to

1. non-profit online encyclopaedias,
2. non-profit educational or scientific repositories,
3. platforms for the development and distribution of open source software,
4. the providers of electronic communications services within the meaning of Article 2 no. 4 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36),
5. online marketplaces,
6. business-to-business cloud services, and
7. cloud services which allow their users to upload content for their own use.

Part 2

Authorised uses

Section 4

Obligation to acquire contractual rights of use; author's entitlement to direct remuneration

(1) Service providers are obliged to undertake their best efforts to acquire the contractual rights of use for the communication to the public of copyright-protected works. Service providers fulfil this obligation insofar as they acquire rights of use which are

1. offered to them,
2. are available through representative rightholders which are known to the service providers, or

3. can be acquired through collecting societies or dependent rights management entities established in Germany.

(2) Rights of use under subsection (1) sentence 2 must

1. apply to content which, by its nature, is manifestly communicated to the public by the service provider in more than minor quantities,
2. cover a considerable repertoire of works and rightholders,
3. cover the territorial scope of this Act, and
4. allow for use under reasonable terms and conditions.

(3) If the author has granted a third party the right of communication to the public of a work, the service provider must nevertheless pay the author appropriate remuneration for the contractually authorised communication to the public of the work. Section 20b (2) sentences 2 to 4 of the Copyright Act (*Urheberrechtsgesetz*) applies accordingly.

Section 5

Uses authorised by law; remuneration of the author

(1) The communication to the public of copyright-protected works and parts of works by the user of a service provider is authorised for the following purposes:

1. quotations in accordance with section 51 of the Copyright Act,
2. caricatures, parodies and pastiches in accordance with section 51a of the Copyright Act,³ and
3. other cases of communication to the public authorised by law and the reproduction required for such purpose in accordance with Part 1 section 6 of the Copyright Act.

(2) Service providers must pay the author appropriate remuneration for the communication to the public pursuant to subsection (1). The entitlement can only be asserted by a collecting society.

(3) Service providers must, in their general terms and conditions, draw the user's attention to the uses authorised by law referred to in subsection (1).

Section 6

Extension of authorisations

(1) If the service provider is authorised to communicate a work to the public, this authorisation also extends to the user, provided that the user is not acting on a commercial basis or does not generate a substantial income.

(2) If the user is authorised to communicate a work to the public via a service provider, this authorisation also extends to the service provider.

³ This provision is newly introduced under Article 1 of the Act transposing Directive 2019/790 of which this law forms Article 3. It reads as follows (working translation):

“Section 51a Caricature, parody and pastiche

The reproduction, distribution and communication to the public of a published work for the purpose of caricature, parody and pastiche are authorised, provided that the extent of the use is justified by the specific purpose. The authorisation under sentence 1 includes the use of an illustration or other reproduction of the work used, even if it is itself protected by copyright or a related right.”

Part 3

Unauthorised uses

Section 7

Qualified blocking

(1) Service providers are obliged, in accordance with section 1 (2), to ensure, as far as possible, by blocking or removal (blocking) that a work is not communicated to the public and will in future not be available for this purpose, as soon as the rightholder so requests and provides the information required for such purpose.

(2) Measures pursuant to subsection (1) may not result in the unavailability of content uploaded by users if the use is authorised by law or does not infringe copyright. Sections 9 to 11 apply if automated procedures are used.

(3) Service providers must immediately inform the user of the blocking of the content uploaded by the user and must advise the user of the right to lodge a complaint in accordance with section 14.

(4) Start-up service providers (section 2 (2)) are not required to comply with subsection (1) as long as the average monthly number of unique visitors to the service's websites does not exceed five million.

(5) It is rebuttably presumed that small service providers (section 2 subsection (3)) are not obliged under subsection (1) with a view to the principle of proportionality.

Section 8

Simple blocking

(1) Service providers are obliged, in accordance with section 1 (2), to terminate the communication to the public of a work by blocking as soon as the rightholder so requests and gives a duly substantiated notice of the unauthorised communication to the public of the work.

(2) Section 7 (2) sentence 1 and (3) applies accordingly.

(3) Service providers are only obliged to block future unauthorised uses of the work in accordance with section 7 after the rightholder has provided the information required for such purpose.

Part 4

Uses presumably authorised by law

Section 9

Communication to the public of uses presumably authorised by law

(1) In order to avoid disproportionate blocking by automated procedures, uses presumably authorised by law must be communicated to the public up until the conclusion of a complaints procedure (section 14).

(2) It is rebuttably presumed in respect of user-generated content which

1. contains less than half of a work or several works by third parties,
2. combines the part or parts of a work referred to in no. 1 with other content, and

3. uses the works of third parties only to a minor extent (section 10) or is flagged as legally authorised (section 11),

that its use is authorised by law in accordance with section 5 (uses presumably authorised by law). Images may be used in their entirety in accordance with sections 10 and 11.

(3) Service providers must immediately inform the rightholder of the communication to the public and must advise the rightholder of the right to lodge a complaint in accordance with section 14 in order to have the presumption under subsection (2) reviewed.

Section 10

Minor uses

The following uses of works are deemed to be minor within the meaning of section 9 (2) sentence 1 no. 3, provided that they do not serve commercial purposes or only serve to generate insignificant income:

1. uses of up to 15 seconds in each case of a cinematographic work or moving picture,
2. uses of up to 15 seconds in each case of an audio track,
3. uses of up to 160 characters in each case of a text, and
4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic.

Section 11

Flagging of uses authorised by law

(1) If user-generated content is to be blocked automatically when being uploaded and does not constitute minor use as per section 10, service providers are obliged

1. to inform the user about the rightholder's blocking request,
2. to also inform the user when providing the information pursuant to no. 1 of the need to have legal permission pursuant to section 5 for the communication to the public, and
3. to enable the user to flag the use as authorised by law pursuant to section 5.

(2) If user-generated content is to be blocked automatically only after it has already been uploaded, subsection (1) applies, with the proviso that the content is deemed to be a use presumably authorised by law for 48 hours even without any flagging pursuant to subsection (1) no. 3.

Section 12

Remuneration by service providers; liability

(1) Service providers must pay the author appropriate remuneration for the communication to the public of uses presumably authorised by law under sections 9 to 11. The entitlement can only be asserted by a collecting society.

(2) Service providers are not liable under copyright law for the communication to the public of uses presumably authorised by law under sections 9 to 11 until the conclusion of a complaints procedure, at the latest until the expiry of the time limit for a decision on the complaint (section 14 (3)).

(3) In the case of minor use (section 10), the user is not liable under copyright law for the communication to the public of uses presumably authorised by law until the conclusion of a complaints procedure under section 14.

Part 5

Legal remedies

Section 13

Legal remedies; access to the courts

- (1) Participation in complaints procedures under sections 14 and 15 is voluntary for users and rightholders.
- (2) Participation in alternative dispute resolution pursuant to sections 16 and 17 is voluntary for users, rightholders and service providers.
- (3) The protection of authors against distortion of their work under section 14 of the Copyright Act remains unaffected.
- (4) The right to appeal to the courts remains unaffected.

Section 14

Internal complaints procedure

- (1) Service providers must make available to users and rightholders an effective, free and expeditious complaints procedure in respect of the blocking and the communication to the public of protected works.
- (2) Complaints must be substantiated.
- (3) Service providers are obliged to immediately
 1. notify the complaint to all the parties involved,
 2. give all the parties involved the opportunity to comment, and
 3. decide on the complaint, at the latest within one week after its submission.
- (4) If, following a review by a natural person, a trustworthy rightholder declares that the presumption under section 9 (2) is to be rebutted and that the continued communication to the public substantially impairs the economic exploitation of the work, the service provider is, in derogation of section 9 (1), obliged to immediately block the work up until the conclusion of the complaints procedure.
- (5) Decisions on complaints must be made by impartial natural persons.

Section 15

External complaints body

- (1) Service providers may use a recognised external complaints body to fulfil their obligations under section 14.
- (2) The decision on the recognition of an external complaints body is taken by the Federal Office of Justice in agreement with the German Patent and Trade Mark Office. In all other respects, the provisions of the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*) concerning the recognition of an institution of regulated self-regulation apply accordingly to the requirements and to the procedure for recognition.

Section 16

Alternative dispute resolution by private arbitration bodies

(1) Rightholders and users may call upon a private law arbitration body for the alternative dispute resolution of disputes regarding the blocking and the communication to the public of a protected work by a service provider and regarding rights to information (section 19).

(2) The provisions of the Network Enforcement Act concerning private law arbitration bodies apply, with the proviso that the Federal Office of Justice, in its capacity as the competent authority, takes the decision on the recognition of a private law arbitration body in agreement with the German Patent and Trade Mark Office.⁴

Section 17

Alternative dispute resolution by an official arbitration body

(1) The Federal Office of Justice is to establish an official arbitration body in agreement with the German Patent and Trade Mark Office.

(2) The official arbitration body is only competent if there is no private law arbitration body in accordance with section 16. Section 16 (1) applies accordingly.

(3) The provisions of the Network Enforcement Act on the official arbitration body apply accordingly.⁵

Part 6

Final provisions

Section 18

Measures against abuse

(1) If an alleged rightholder repeatedly requests that the service provider block a work belonging to a third party as the rightholder's own work or a work in the public domain, the service provider must exclude the alleged rightholder from the procedures under sections 7 and 8 for an appropriate period of time.

(2) If an alleged rightholder intentionally or negligently requests that the service provider block either a work belonging to a third party or a work in the public domain as the rightholder's own work, then said rightholder is obliged to compensate the service provider and the user concerned for the resulting damage.

(3) If a rightholder repeatedly and wrongly demands the immediate blocking of uses presumably authorised by law during the complaints procedure referred to in section 14 (4), the rightholder must be excluded from that procedure for an appropriate period of time.

(4) After an abusive blocking request in respect of works in the public domain or works whose use is authorised by anyone free of charge, service providers must ensure, to the best of their ability and in accordance with section 1 (2), that these works are not blocked again.

(5) If a user repeatedly and wrongly flags a use as authorised by law, service providers must exclude the user, for an appropriate period of time, from the possibility of flagging authorised uses.

⁴ The Network Enforcement Act (https://www.bmiv.de/DE/Themen/FokusThemen/NetzDG/NetzDG_EN_node.html) is currently being revised on this point.

⁵ Cf Footnote 4.

(6) If a service provider repeatedly and wrongly blocks authorised uses, an association entitled to make a claim under section 3a of the Injunctions Act (*Unterlassungsklagengesetz*) may claim injunctive relief against the service provider.

Section 19

Rights to information

(1) Rightholders may demand information from service providers regarding the use of their repertoire authorised by contract pursuant to section 4.

(2) Rightholders may request appropriate information from service providers regarding the mode of operation of the procedures for blocking unauthorised uses of their repertoire pursuant to sections 7 and 8.⁶

Section 20

Person authorised to receive service in the Federal Republic of Germany

Section 5 (1) of the Network Enforcement Act applies accordingly to the service provider's obligation to appoint a person authorised to receive service in the Federal Republic of Germany.

Section 21

Application to related rights

This Act also applies to related rights within the meaning of the Copyright Act and to their rightholders.

Section 22

Mandatory law

The provisions of this Act may not be derogated from by contract.

⁶ The following subsection (3), which currently does not form part of the draft Act, was notified to the Commission under Directive (EU) 2015/1535 on 26 January 2021; upon expiry of the standstill period provided for under Directive (EU) 2015/1535, it is to be included as subsection (3) of section 19 of this Act:

(3) Under section 60d (2) of the Copyright Act, service providers are required to grant authorised persons access to data on the use of procedures for the automated and non-automated detection and blocking of content for the purpose of scientific research, insofar as this does not conflict with the overriding interests of the service provider meriting protection. Service providers are entitled to reimbursement of the costs thereby incurred in a reasonable amount. (unofficial translation)