

25th July 2020

Sehr geehrte Damen und Herren,

Opinion on Zweites Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarkts, published by the Federal Ministry of Justice and Consumer Protection on 24 June 2020

LIBER (Ligue des Bibliothèques Européennes de Recherche – Association of European Research Libraries) is the voice of Europe’s research library community. For nearly 50 years, we have worked to meet our mission of enabling world class research in Europe. We do this by representing the interests of our institutions, their universities and their researchers in several key areas including copyright law. Over 450 national, university and other libraries are part of LIBER and our wider network.

Please find our comments below:

Articles 8-12

We welcome the draft proposal, and in particular welcome the ability to publish previews. We would like to focus on the following issues in our submission:

1. When to use a CMO and when to use an exception?

Given the public policy underpinning the legislation – namely to increase the availability of in-copyright / 20th century works online – we remain concerned that the central issue of when to use a CMO and when to use the fallback exception remains very unclear.

This will cause confusion, and disincentivise the investment by cultural heritage institutions in mass digitisation of 20th century works. Investing in digitising and putting collection items online is very expensive and time consuming for institutions and the more barriers put in their way, the less chance there is that an institution will decide to undertake digitisation. Given that many cultural heritage institutions are small, and many lack legal expertise, the already complicated nature of the legislation will we fear, be further compounded by the lack of clarity around when to use the exception and when not to for many types of works.

The draft legislation requires a significant number of rightsholders (eine erhebliche Anzahl von Berechtigten) to have given a mandate to the CMO in order for it to be able to offer GLAMs licences in line with Articles 8-12.

We believe this formulation may well cause confusion in terms of trying to determine whether a CMO is representative or not given the unique nature of library and archive collections. Obvious questions around the mandate include:

- What percentage is 'significant'?
- Must they be significant for the type of collection being digitised? e.g. If digitising 1930s poetry must the mandate given be significantly representative of 1930s poets? If digitising German folk music must the mandate be representative of German folk musicians?
- How representative is the CMO of the work being digitised? e.g. Other than potentially composers very few CMOs by definition will represent unpublished works, and often there can be a significant and discordant mismatch between the type of works represented by a CMO, and the works being digitised. For example do CMOs represent Samizdat or other grey literatures? Do music collecting societies represent oral histories? Do music CMOs represent wildlife or ethnographic recordings?

Quoting from the [library guide](#) LIBER co-authored with other library groups on this central issue to the success of Articles 8 – 12:

Definition of where the exception applies or not: this will be crucial in determining how effective the Directive is. A clear line will help ensure that as few works as possible end up in limbo, with no possibility to use the exception, but also no CMO willing to offer a licence on terms with which libraries or other cultural heritage institutions could agree. On the basis of survey work, it seems that in reality, even if in many countries there are a full set of CMOs for different types of work, they relatively rarely offer licences to libraries and other cultural heritage institutions for the types of rights covered by the Directive.

It will be important that cultural heritage institutions repeatedly underline Article 8(3), cross-referencing to Article 8(1)(a) which makes it clear that the exception only applies when the CMO **firstly** is representative **and** in addition does have the rights to offer cultural heritage institutions a licence to put commercially available materials on the open web. **The majority of collecting societies are currently unlikely to have both such rights.**

Another key factor in this will be to ensure that definitions of 'types' of work are clear. For example, mixing up leaflets or letters with books may lead to a lot of works that were never intended to be commercially exploited falling under the same licensing regime as that for commercial books. Similarly, placing posters in the same 'type' as visual arts could have a similar effect. Clear definitions will help here, both through law/regulation and through subsequent stakeholder dialogues.

Such clear categories will also make it easier to define whether CMOs are representative. It will be important for some countries to avoid a situation where a CMO which represents only a small share of creators is able to collect money on behalf of all. For example, creators of most unpublished works, such as letter-writers and diarists, are predominantly not members of CMOs, but members of the general public.

At the same time, well-governed, representative CMOs often offer a cost-effective means for libraries and other cultural heritage institutions to clear rights when this is necessary, and have confidence that the money they pay will go to the original creators.

Timely licences: CMOs are likely to make the case that they are close to be able to offer a licence for out-of-commerce works. In such instances it would be advisable for the legislature to set a specific period of time within which a licence must become available. We believe that such an intention should be formalised in writing and a period of 12 months from such a written statement should be sufficient for a licence to be put in place. If no licence is in place by the end of this period, then the exception should apply.

Recommendations:

- i) To avoid confusion, the government should decide when a CMO is representative of a certain category of work or not. This process should be undertaken in close collaboration with GLAMs and CMOs.
- ii) A time limit should be placed on a CMO that the government views as being potentially representative, beyond which if no licence is forthcoming the exception can be used. Without this we are concerned the matter of whether to use a licence or an exception could leave a GLAM in limbo for many years.

2. Remuneration for the exception

We are concerned that the remuneration requirement does not reflect the realities of the nature of many of the collections especially those which were never created for commercial purposes. We believe that the commercialisation of non-commercial materials associated with archives raises many issues:

- i) Oral histories as just one example of unpublished materials that are never made for commercial purposes, and where the subject matter is sometimes sensitive. Forcing commercialisation of something that is usually created for educational purposes will create we predict many issues downstream for cultural heritage organisations. Examples of oral histories include survivors of war, people talking about their jobs and hobbies, views on politics, interviews with survivors of well-known diseases (e.g. AIDS, and in the future the corona virus), people talking about their own personal experiences etc.
- ii) Who will receive the money for wildlife recordings, personal letters, company archives, samizdat, traditional folklore and music etc?
- iii) We can see significant downsides for cultural heritage institutions where the commercialisation of materials is forced by having the requirement to pay royalties – from budget issues within the GLAM through to not least issues with donors who do not think it appropriate for money to be paid for the use of their works, the works they donate, or the works they loosely represent as being representatives of a particular community.

Recommendations:

- i) Removing the remuneration requirement in § 61d (5) UrgH-E.