

Message 202

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Forwarding of the response of the Member State notifying a draft (Germany) to request for supplementary information (INFOSUP) of Commission.

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4. 2021/0038/D - SERV60

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6. Question 1. The Commission departments would like to ask the German authorities to explain the objectives being pursued by the notified draft.

Response:

As outlined in the formulation aid explanatory notes, social media, in particular upload platforms, are of increasing importance for the creative ecosystem and so also for copyright law and the formation of public opinion.

The objective of the notified draft is therefore to create more transparency about the functioning of upload platforms, thus enabling independent research into whether, how and to what extent upload platforms

– evaluate user behaviour in respect of content protected by copyright or related rights, preselect such content in a user-specific manner and display it to other users;

– recognise content protected by copyright or related rights;

– distribute such content or prevent the distribution of certain content with reference to (alleged) infringements of copyright;

– and how platforms ensure that users can rely on exceptions and restrictions, in particular by using quotes, criticising and submitting reviews, creating caricatures, parodies and pastiches.

The notified draft is part of the transposition of Article 17 of the Digital Single Market Directive in the draft act on the liability under copyright law of online content-sharing service providers (Copyright Service Provider Act (UrhDaG), hereinafter: draft UrhDaG). The notified § 19(3) of the draft UrhDaG is intended to enable, for scientific purposes, access to information about how Article 17 Digital Single Market Directive impacts the use of filter technologies, how the protection offered by copyright is implemented, whether structural 'overblocking' might occur and whether freedom of expression and information and artistic freedom could be impaired.

For such studies, research organisations are reliant on information from the upload platforms on the procedures they use.

Question 2. The Commission departments would like to ask the German authorities to explain the scope of the notified draft, including whether online content service providers established outside Germany are covered by the obligation to grant access to data for the purpose of scientific research.

Response:

The question contains two sub-questions.

Firstly, about the scope of the notified draft.

In response to this, it can be said that the scope of the proposed § 19(3) of the draft UrhDaG relates to 'service providers'. Transposing Article 2 point 6 subparagraph 1 of 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 (Single Digital Market Directive), the term 'service provider' is defined in § 2 and § 3 of the draft UrhDaG, inter alia, by reference to 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 regulations on information society services.

Secondly, whether online content service providers established outside Germany are covered by the obligation to grant access to data for the purpose of scientific research.

The provisions contained in the draft UrhDaG, i.e. not only the provision on access to data for the purpose of scientific research, apply – at least insofar as service providers offer or provide their services in Germany – not only to domestic service providers, but also to those based abroad. In particular, no other result arises from § 3 of the Telemedia Act (TMG), which transposes the country of origin principle under Article 3 of the e-Commerce Directive, including for service providers based in other Member States. According to the e-Commerce Directive, the country of origin principle applies to what is known as the 'coordinated field'. In accordance with letters h and i of Article 2 of the e-Commerce Directive, this term encompasses the requirements to be met by service providers as defined in this Directive, in particular with regard to their behaviour and liability. However, the 'field of copyright' is horizontally excluded from the field coordinated by the country of origin principle (see § 3(4) point 6 of the Telemedia Act (TMG) and Article 2 point j and Article 3(3) e-Commerce Directive in conjunction with the Annex to the Directive). The notified provision is an annex provision that is factually attributable to copyright, which is also covered by this field exception.

Question 3. In the notification message, the German authorities state that the beneficiaries of the new obligation are 'research organisations (including their affiliated researchers) who carry out scientific research, provided that they do not pursue commercial purposes or they reinvest all profits in scientific research or operate within the framework a public interest mission recognised by the State' and refer to Article 2(1) of Directive (EU) 2019/790. The Commission departments would like to better understand whether there would be a permit or review procedure to identify these research organisations and, if so, which authorities would be responsible for it.

Response:

No permit or review procedure is foreseen to identify these research organisations. With respect to the provision concerning access to data pursuant to § 19(3) of the draft UrhDaG, the legal definition of the term 'research organisations' pursuant to Article 2(1) Digital Single Market Directive (EU) 2019/790 is used, which applies within the framework of the provision on text and data mining for the purposes of scientific research (Article 3 Digital Single Market Directive (EU) 2019/790). Like the provision on text and data mining (Article 3 Digital Single Market Directive (EU) 2019/790), the provision on access to data pursuant to § 19(3) UrhDaG does not provide for a permit or review procedure for the research organisations authorised by it. If a dispute arises over the authorisation to access information, it shall be resolved through the usual legal channels between the parties concerned.

Question 4. The German authorities are asked to confirm whether the notified draft and the obligations contained therein will also apply to service providers established outside German territory.

Response:

As explained in the response to question 2, all the provisions contained in the draft UrhDaG apply not only to domestic service providers, but also to those based abroad if they offer or provide their services within the scope of the draft UrhDaG. The scope of § 19(3) draft UrhDaG relates to 'service providers' as defined in § 2 and § 3 of the draft UrhDaG transposing Article 2 point 6 subparagraph 1 of the Digital Single Market Directive (EU) 2019/790. We also refer the reader to the explanation given to question 2.

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