Statement

on the discussion draft of the Federal Ministry of Justice and Consumer Protection on a Second Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market

Status: 15 July 2020

game - Association of the German Games Industry

Friedrichstraße 165
10117 Berlin

www.game.de

Contact

Dr. Christian-Henner Hentsch
Head of Legal & Regulatory Affairs

T+49 30 2408779-22
henner.hentsch@game.de

Maren Schulz
Head of Public Affairs

T+49 30 2408779-15
maren.schulz@game.de

Opinion on the draft discussion on a second act to adapt copyright law to the requirements of the digital single market

On 24 June 2020, the Federal Ministry of Justice and Consumer Protection (BMJV) published a discussion draft on the adaptation of copyright law to the requirements of the digital internal market and provided an opportunity to comment until 31 July 2020. The game - Association of the German Games Industry supports the quickest possible implementation of the underlying EU directive and urges a uniform design throughout Europe. Neither of these objectives will be achieved by this discussion draft.

We are the association of the German games industry. Our members are developers, publishers and many other players in the games industry such as esports organizers, educational institutions and service providers. As co-organizer of gamescom, we are responsible for the world's largest event for games. We are the central contact for media, politics and society and answer questions about market development, game culture, media competence and, of course, copyright. Our mission is to make Germany the best games location. Copyright law as investment protection for the development of computer games is one of the most important location factors and has a direct impact on investment decisions for Germany as a location for games.

In principle, the games industry would like to see a digital single market and a Europe-wide harmonisation of copyright. In this respect, the games industry has already demanded a rapid implementation of Directive 2019/790 on copyright in the digital internal market (DSM Directive) in its statement of 6 September 2019[1] to the Federal Ministry of Justice. We are therefore surprised that, after almost a year, there is now only a discussion draft and no official draft yet. This is not a normal procedure, as a discussion draft with a hearing is not provided for in the Federal Government's common rules of procedure. In view of the time remaining until the next federal election and the discontinuity that this will bring, this intermediate step will mean a further loss of time. Unfortunately, this makes it more likely that the deadline for implementation will be exceeded as a result of the BMJV's action. The short deadline punctually at the beginning of the summer holidays with holiday-related

[1] https://www.game.de/wp-content/uploads/2019/09/game-Stellungnahme-DSM-Richtlinie.pdf.

absences - especially during the corona crisis - also threatens to prevent the appropriate participation of the associations, if it is seriously desired.

In terms of content, the main criticism is that this proposal for transposition by the Federal Ministry of Justice and Consumer Protection virtually thwarts the actual goal of completing the digital internal market by numerous deviations from the directive and regulatory solo efforts. For example, the de minimis exemption for user-generated content (Section 6 UrhDaG-E) is neither provided for in the DSM Directive nor coordinated with other Member States. In the case of the measures to prevent over-blocking, which we very much welcome in principle, the ministry is pushing ahead regardless of the ongoing stakeholder dialogue provided for in the Directive and is unilaterally creating facts. The obligation for platforms to license is also interpreted in a very idiosyncratic way, in that the rights must be offered or made available through a collecting society. This reverses the rule-exception relationship into its opposite. And in copyright contract law, too, the possibility of a flat-rate remuneration only under provisions ignores the compromises reached in the trialogue and once again a German special path is taken here. As much as the German games industry is open-minded towards the goal of harmonising the regulations in copyright contract law at the high German level of protection, it is unnecessary and hardly conducive to achieving this goal that the Federal Ministry of Justice and Consumer Protection again goes beyond the jointly agreed standards.

From the perspective of the games industry, the tendency towards forced collectivisation is also irritating. With generously designed guidelines for the free use of games content or voluntary licensing to preserve the cultural games heritage, the industry has so far found solutions that are flexible, in line with its interests and, above all, workable. The games industry does not need a collecting society for this purpose. We explained these approaches in detail in our statement in August 2019 and asked for their consideration. We are now irritated that the draft chooses an egalitarian approach without necessity and wants to enforce collecting societies as a collective solution. The special features and modern approaches of our industry are not taken into account by this approach and are made virtually impossible by the legal exemptions and pre-flagging. All this will in many cases be to the detriment of users who have so far been able to use games content without any problems and free of charge. Where up to now there has been no problem for rights holders and users, the Federal Ministry

is creating problems with this draft - with possible worldwide implications. For this reason, we as a game unfortunately see ourselves forced, despite previously reserved criticism and even fundamental support for the DSM Directive and its regulations, to vehemently oppose this "discussion draft" and demand a comprehensive revision.

We make the following comments on the new provisions of the discussion draft:

I. General preliminary remarks on the draft law

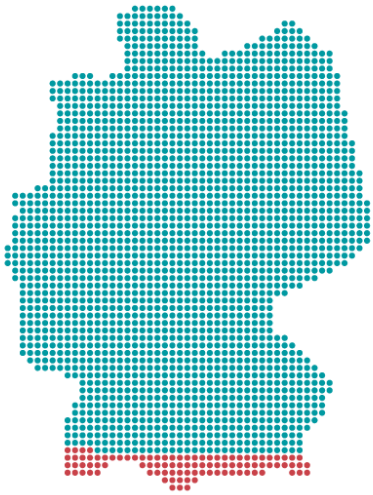
The games industry is a rapidly growing media industry with highly innovative business models. In 2019, revenue from games and games hardware in Germany will increase by 6 percent to more than 6.2 billion euros.[2] Germany is indeed of great importance as a sales market worldwide. However, the production of computer games - and thus also the creation of value - takes place largely abroad. By 2018, the share of German game developments in the German market as a whole will have fallen to just 4.3 per cent, with a further downward trend. In 2017 the share was still 5 percent. Correspondingly, games developments from Germany were only able to generate revenues of 135 million euros on the domestic market, which is around 6 percent less than last year. In the case of PC and console games, the share of productions from Germany was even only 1.1 per cent. At present, not a single so-called AAA title is produced in Germany.

These developments make it clear how urgently the framework conditions for the games industry in Germany need to be improved in order to finally be internationally competitive. The introduction of nationwide games funding last year is an important first step with which the federal government wants to ensure financial planning security. However, the legal framework conditions and especially copyright law are at least as important as the skilled workers. German copyright law, with its many legal exceptions - in comparison with other European countries - and the mandatory requirements of copyright contract law, grants developers and publishers of computer games fewer rights and is thus clearly at a disadvantage from an investment point of view compared with all other European legal systems. In this respect, a harmonisation of copyright law in Europe would at least reduce this disadvantage of the German production location, so that other location conditions can again come into play and the funding can take effect. In view of the excessive regulation proposals in platform liability, in copyright contract law and also in collective rights management, this harmonisation aimed at with the DSM Directive is being thwarted and once again reinforces the impression that rightholders with possible investments in Germany do not have a good legal framework. This could result in lasting damage to the image of

[2] Cf. sales figures of the game industry association at https://www.game.de/marktdaten/deutscher-games-markt-waechst-weiter/.

Germany as a business location, which would directly undo the efforts of the Federal Government in terms of funding and contribute decisively to the weakening of Germany as a games and thus digital location.

Umsatzanteil deutscher Spieleentwicklungen fällt auf 4,3 Prozent im heimischen Markt



Gesamtmarkt

Deutsche Entwicklungen 2018

4,3%

= **135** Mio. €

von **3.148** Mio. €
insgesamt

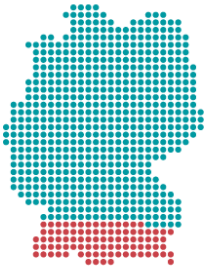
2017*
5% = **144** Mio. €
von **2.864** Mio. €
insgesamt

PC- & Konsolenspiele (Datenträger & Download)

2018
1,1% = **11,6** Mio. €
von **1.066** Mio. €
insgesamt

2017
0,97% = **11,5** Mio. €
von **1,183** Mrd. €
insgesamt

Online-/Browser-Games



2018
13% = **74,4** Mio. €
von **575** Mio. €
insgesamt

2017
17% = **90** Mio. €
von **529** Mio. €
insgesamt

Mobile Games

2018
3,2% = **48,6** Mio. €
von **1.507** Mio. €
insgesamt

2017*
3,7% = **42,6** Mio. €
von **1.152** Mio. €
insgesamt

www.game.de

*Methodikwechsel zu 2018 bei der Datenerhebung von Mobile Games
Quelle: Berechnungen auf Grundlage des GfK Consumer Panels, GfK Entertainment, App Annie, Befragungen und Hochrechnungen. © game 2019

For the business models of the games industry, copyright law is the most important basis on which a complex work is created with sometimes several thousand creatives from almost all trades of copyright law and subsequently evaluated on different platforms and differentiated monetization models. According to the decision of the European Court of Justice,[3] games are complex works which contain both works under § 2 UrhG (German Copyright Act) and computer programs protected by copyright. Accordingly, the opinion only refers to the copyright-protected content in games, such as story, game and level design, characters, sound and featured music as well as texts and translations, but also to ancillary copyrights for film producers, sound carrier manufacturers and organisers of esport tournaments. Software is correctly excluded according to the DSM guidelines.

Via providers for sharing online content, the protected works are now used on a massive scale and made publicly available as Let's Plays, Walkthroughs and for parodistic purposes and for the transmission of users' Esport tournaments. According to the 2018 [4]JIM study, about one third of all YouTube content is Let's Plays and the Twitch platform streams almost exclusively games content. Facebook now also features numerous videos with game content and screenshots from games. All of these uses have so far been permitted by the rights holders of the games industry. Because Let's Plays and other uses are seen by publishers as a marketing tool, there is no interest at all in licensing that requires payment - neither to users nor to service providers. It is much more important, however, that the games are not used in a context that is damaging to the image. This is ensured by guidelines in which use is permitted or permitted or tolerated, provided that, for example, there is no political instrumentalisation, mixing with competing products or placement in an environment of discrimination, pornography or gambling. These guidelines have been established and proven, and are generally accepted as a sub-legal solution in the interest of the interests of the company. In our view, all these interrelationships are not taken into account in the draft discussion. The guidelines are in danger of being undermined and thus rendered superfluous by the licensing obligation via collecting societies, the minor exception (Art. 6 UrhDaG-E) and pre-flagging (Art. 12 UrhDaG-E). The draft therefore creates problems where none have existed before.

[3] http://curia.europa.eu/juris/document/document.jsf?docid=146686&doclang=DE.
[4] https://www.mpfs.de/fileadmin/files/Studien/JIM/2018/Studie/JIM2018_Gesamt.pdf.

In addition, the games industry, together with other partners and with the support of the German government, is currently establishing the International Games Collection[5] in Berlin, which probably has the most comprehensive collection of games in the world. game and its members support this by granting the collection and its sponsor the necessary rights to create the catalogue and make it publicly available on the basis of an association declaration. Further steps have been discussed and should be tackled together. The Computerspielemuseum[6] in Berlin is a fundamental part of this project. Other institutions specifically dedicated to the preservation of the cultural heritage of computer games are not relevant in Germany. There are also numerous platforms such as Good Old Games[7], which have taken up the trend towards retro-gaming and offer games from times gone by. With the revival of World of Warcraft Classic[8] last year, even a title from more than 15 years ago became a box office hit again. All these developments and forward-looking efforts are not seen in the blanket implementation of the European legal requirements on Extended Collective Licences (ECL) and out-of-commerce works. Against this background, the power to issue ordinances for the definition of cultural heritage institutions and the representativeness of collecting societies must be viewed with particular scepticism because of the indirect restriction of fundamental rights, which should be made mandatory by a parliamentary act. All in all, these proposals for regulation are not only disappointing, but may also lead to rights owners in the games industry no longer proactively seeking solutions in future, but passively waiting until - from their point of view - the legislator regulates everything differently and independently of the functioning practice.

All in all, the numerous exceptions and limitations to exploitation rights in this discussion draft give the impression that the conflict between legal certainty for users and the protection of intellectual property and investment is all too often resolved in a general and one-sided manner. From the perspective of the games industry, however, many regulations are neither necessary nor appropriate when weighing up fundamental rights and public interests, as outlined above. We therefore have considerable constitutional reservations, and the compatibility of the de minimis exepmtion in particular with the list of exemptions in the

[5] https://www.internationale-computerspielesammlung.de/de/.
[6] http://www.computerspielemuseum.de/.
[7] https://www.gog.com/.
[8] https://worldofwarcraft.com/de-de/wowclassic.

InfoSoc Directive and with the three-step test in this Directive and numerous international agreements is more than questionable in our view. The Federal Ministry of Justice and Consumer Protection is thus threatening to do users a disservice by promising more than can ultimately be delivered.

II. Implementation of Article 17 of the DSM-RL in the UrhDaG-E

From the point of view of the games industry, the redistribution of liability by Art. 17 DSM-RL is in the interests of users and the goal of a legally compliant use of social media platforms by users is expressly supported. The implementation in a new core law basically makes it possible to remain close to the provisions of the DSM-RL and to establish uniform provisions for platforms and rights holders throughout Europe. This would also make it easier to incorporate the results of the ongoing stakeholder dialogue (Recital 71). Unfortunately, in many places the discussion draft goes beyond the requirements of the Directive, which is why the advantages of such an approach are not used. In this case, incorporation into the Copyright Act would be preferable, also in order to avoid frictions with regard to exploitation rights.

Overblocking, i.e. the deletion and blocking of legitimate content by upload filters, must also be avoided urgently and as far as possible, according to the full conviction of the developers and publishers of games. However, this requires an appropriate balancing of interests, which in particular excludes abuse and takes into account sub-legal best practices. In this respect, there is still considerable room for improvement in the discussion draft, for which we would be happy to make concrete suggestions if you are interested.

§ 1 Public communication, responsibility

According to the explanatory memorandum, § 1 UrhDaG-E is a lex specialis to Art. 3 InfoSoc-RL. This gives rise to legal uncertainties as to whether previously granted rights of use for the communication of works to the public on platforms will continue to exist due to the new exclusive right. Otherwise, many rights chains would be interrupted and until re-licensing, many works could not be used and exploited in a legally secure manner. Even if this is not the case prima facie, at least a clarification in the explanatory memorandum would be desirable. In order to avoid uncertainties and possible frictions, it would be preferable to locate the definition in Section 19a UrhG as a new paragraph 2 - as proposed in our statement of September 2019. If necessary, the pending decision of the ECJ in the "Uploaded" case would also have to be taken into account. Also the recently published consultation of the EU Commission on the implementation of Art. 17 (stakeholder dialogue) addresses this issue and the results should definitely be taken into account.

With regard to Section 1 (2) UrhG, the question arises as to whether different standards of proportionality will apply to service providers under the UrhDaG-E than to host provider liability according to the established case law of the Federal Court of[9] Justice and the European Court of Justice[10] and to what extent "spillover effects" can be expected here. Here, it would be useful to include a reference in the explanatory memorandum to the Act as to whether uniform standards for proportionality apply and whether reference can be made to previous case law. Incorporation into the UrhG and in particular into Section 19a UrhG would certainly create more continuity and thus also more clarity.

We expressly welcome the clarification in § 1 (4) UrhDaG. In addition, so-called "sharehosters" should also be included in the definition of service provider. Precisely because large quantities of copyright-protected works are stored and also organised via such services in order to then make them unlawfully accessible to third parties, it should be ensured that such piracy tools cannot invoke the liability privileges of Section 10 German Telemedia Act. When defining the scope of application, it should therefore be ensured that they are not covered by the negative definition, but that they do make a public communication within the meaning of Section 1 (1) UrhDaG-E. Accordingly, we propose a corresponding addition in the

[9] Judgement of 12 July 2012 - I ZR 18/11, BGHZ 194, 339 marginal no. 21 et seq. - Alone in the Dark; judgement of 15 August 2013 - I ZR 80/12.
[10] ECJ, 12 July 2011 -C-324/09, WRP 2011, 1129 et seq. - L'Oreal/ebay; ECJ, 24 November 2011 -C-70/10, MMR 2012, 174 et seq. - Scarlet/SABAM and ECJ, 16 February 2012-C-360/10, WRP 2012,429 et seq. - Netlog/SABAM.

explanatory statement to Section 1 (4) UrhDaG-E. The explanatory memorandum could also explicitly mention cyberlockers who also publicly reproduce copyrighted works on a large scale, which are uploaded by a network of professional uploaders and in some cases fall neither under the start-up exception nor that for small and medium-sized enterprises.

§ 2 Service provider

The literal implementation of Recital 62 in § 2 UrhDaG-E is appropriate. The characteristic "organizing" in para. 2 no. 1 does not correspond to the term "structuring" used in the DSM-Directive without further justification.

The DSM-RL speaks in Recital 62 of the "most important purpose", so that the proposal for implementation in § 2 (1) no. 1 UrhDaG-E falls short of the wording ("to pursue exclusively or at least also as the main purpose"). In our interpretation, however, both according to the DSM-RL and according to § 1 UrhDaG-E user forums connected to a sales platform, in which users share screenshots or mods, are not service providers in the sense of this Directive or this Act. For more legal certainty a clarification in § 3 UrhDaG-E would be desirable.

The exception for small platforms with a turnover of less than one million euros (§ 2 (3) UrhDaG) is also not found in the DSM Directive, but is acceptable from the point of view of the games industry.

§ 3 Services not covered

The services not covered in the discussion draft in § 3 UrhDaG correspond to the requirements of the DSM-RL. The explicit rule examples are useful from the user's point of view and provide clarity. In view of the numerous exceptions to liability in the UrhDaG-E and due to the lack of licensing for games content, responsibility under Section 10 TMG also appears preferable from the perspective of the games industry. The new liability regime should therefore only apply to the few relevant service providers "who play an important role in the market for online content" (Recital 62). This should also include user forums for games.

§ 4 Contractual rights of use

As already mentioned, the games industry has not licensed its rights to service providers up to now, but usually grants users rights of use directly via guidelines, in part tolerating and

permitting the use of these rights. Here the extension in § 9 para. 2 UrhDaG-E basically ensures that the rights continue to apply, which is also desired by the games industry. Licensing by the service providers and the "acquisition" of contractual rights of use has not yet been in the interest of most publishers. Games publishers do not even want to negotiate licences with the platforms, because it is to be feared that, given the large number of games publishers in relation to platforms with a strong market position, no individual usage agreements will be concluded which take into account the special features of the respective work title. But because Let's Plays are used as a marketing tool, individual placement and thus the respective guideline with its provisions is of enormous importance. Therefore, the control through the unilaterally changeable guidelines is of great advantage to the users. If the conditions for the playback of Let's Plays and Walkthroughs are now dictated one-sidedly by the large platforms, the tried and tested system - which has so far worked without problems for the benefit of all - will be called into question.

It is therefore all the more surprising that the proposal, which goes far beyond the requirements of the DSM-RL, exempts service providers from liability as long as they are not offered rights of use. Moreover, according to § 4 (2) UrhDaG-E these rights of use must include a representative repertoire. On the one hand, this means that service providers can only be claimed by right holders if they have offered their rights for licensing - which is something games publishers do not want - and on the other hand, they must join forces to form a representative repertoire, which is against their interests for games publishers due to the individual guidelines and the different marketing strategies. Moreover, because of the diversity of the industry they are also forced into the system of collective rights management by collecting societies. In fact, without a collecting society, it will no longer be possible in future for games companies to assert claims against platforms.

Here it becomes particularly clear that the discussion draft has not understood or does not want to understand the special mechanisms and interests of the games industry. This is despite the fact that games content accounts for about one third of all content on YouTube and almost all content on the Twitch platform and is also a growing share on Facebook.

§ 5 Uses permitted by law that cannot be checked by machine

If § 5 UrhDaG-E merely represents a reference norm, there is nothing to object to this. However, it could also be further-reaching in the sense that, because of the omission of the characteristic "published", the permission also applies to non-published works for the following limits. This would considerably impair the personal rights as well as the exclusive exploitation and this would in no way be proportionate in this blanket statement. In this respect, a clarification in the standard text that only published works protected by copyright may be used would be very important.

§ 6 Automatically verifiable legally permitted uses

With regard to the novel minor exception in Section 6 UrhDaG-E, it must be admitted that this approach apparently provides more legal certainty for the legal practitioner. However, it is not convincing in this form and is definitely in need of improvement.

Thus, it is initially surprising that public communication is permitted for non-commercial purposes, because according to § 1 UrhDaG-E, public communication is made by the service providers, who by definition all do so for commercial purposes - as a basic requirement for the financing of advertising. This would therefore not be based on the public reproduction by the platform to which the use is permitted, but exclusively on uploading by users. However, it should also be noted here that let's players in particular generate considerable income with their videos via the revenue stream and thus usually publish them for commercial purposes. It should at least be made clear in the explanatory memorandum to the Act that § 6 UrhDaG-E does not apply to uploaders who participate in the advertising revenue.

Dogmatically, the question arises as to whether § 6 UrhDaG-E is a determination of content or a restriction due to the sui generis right. In both cases, however, a weighing of interests is mandatory for constitutional reasons. In this case, however, aspects of personal rights such as the right of first publication and the right against distortion are not taken into consideration. The three-step test provided for in the Info-Soc Directive and several international treaties is also not taken into account. Compatibility with the list of restrictions in the Info-Soc Directive is also more than questionable. From the EU Commission consultation already cited above on the implementation of Art. 17, it is clear from the questions on consents that although this provision is a lex specialis, it is not a sui generis right. Furthermore, the questions under IV. make it clear that the catalogue of restrictions of

the InfoSoc Directive applies. All in all, the impression is created here that, for political reasons, such extensive permission is being suggested, and it is accepted that this regulation cannot stand. Once again, more is being promised than can be kept, and the role of spoilsport is being blamed on the courts.

The proposed barrier is not convincing in practical terms either. For example, the explanatory memorandum of the law refers to the usual business practices of the film industry to make excerpts of works available free of charge for advertising purposes. However, this overlooks the fact that the advertising environment is of decisive importance in the case of games, in particular who is allowed to make an initial review of a newly published title. The publication was not one-sided, but always with a contractual obligation or through the aforementioned guidelines. It is precisely these agreements that are made impossible by the precedence of a mandatory barrier. Even if, according to § 6 (2) UrhDaG-E, the legal permission is only applicable if no contractual right of use exists, it has already been explained that there is no interest in granting rights of use to service providers and, with regard to the users, it is to be expected that they will no longer seek consent because of the legal permission. As much as the goal of legally compliant use is shared, this ill-considered and impractical construction is highly problematic.

The threshold values are also much too high. On the one hand, they do not fit in with the de minimis[11]case law of the European Court of Justice, and on the other hand, the evaluation of a work is sensitively affected here. For example, 20 seconds of a running picture often already correspond to a trailer in which a new computer game is presented. And through the exception for photographs in § 6 (1) no. 4 UrhDaG-E, public access to virtually all screenshots is permitted, for example on Facebook. This makes it clear that the marketing tools and the functioning of social media are not sufficiently understood. However, if games, because they are complex works and contain characters, game design and brand logos in addition to films and running images, sound track, texts and photographs, should not be covered by this barrier, this regulation would at best be ineffective for games content.

[11] Fair compensation and De Minimis ECJ of 05.03.2015 - C-463/12 - Copydan Båndkopi.

§ 7 Right to direct remuneration for contractual uses, appropriate remuneration for permitted uses

Even if games publishers have no interest in licensing with the service providers, the fundamental question arises as to why the remuneration for uses according to § 4 UrhDaG-E and for the legal restriction of § 6 UrhDaG-E should only be due to the authors. This is because the authors have so far been remunerated primarily by the users of their works, who have been considerably impaired in their exploitation, particularly by the barrier in exploitation. This could lead to considerable distortions between authors and their partners, who will de facto deduct the direct remuneration from the contractual remuneration. Neither games users nor games authors are represented by a collecting society, so that here too there is once again a de facto compulsion for the collecting society.

Furthermore, it seems to have been overlooked that due to the application of the limitations to ancillary copyrights (§ 22 UrhDaG-E) it should be ensured that the holders of these rights are also entitled to remuneration according to § 7 UrhDaG-E.

§ 8 Identification of permitted uses

The labelling of permitted uses is to be welcomed in principle and can provide more transparency and legal certainty. However, it must also be ensured that the labelling is not abusive. Although there are specifications as to when a work can be blocked or removed despite labelling, there are no sanctions for abusive labelling - apart from a possible temporary exclusion, on which the service provider can decide. Moreover, the service provider is exempted from liability in the case of labelling (§ 6 UrhDaG-E). This creates an incentive for users to always indicate that use is permitted when uploading. This reverses the rule-exception relationship as provided for in the DSM-RL and makes enforcement of the law disproportionately difficult. If a user marks a work as permitted, he or she should at least be registered in order to assert any claims for information.

At this point, it should be noted that according to the most recent ruling of the ECJ,[12] the copyright information claim only refers to the address (address). However, the Member States are free to extend this to e-mail and IP addresses and even to the account details. In view of the significant improvement in the position of users as a result of the DSM Directive

[12] ECJ of 09.07.2020 - C-264/19.

and the low liability risk, this would be entirely reasonable. In any case, this information is indispensable for the prosecution of organised crime in the field of copyright law, and the Federal Ministry of Justice and Consumer Protection could make it clear here that clear violations of the law can still be prosecuted.

§ 9 Extension of permits

The implementation of the extensions in a separate paragraph (§ 9 UrhDaG-E) is to be welcomed and is of great importance with regard to the guidelines for games companies. However, Recital 69 is only insufficiently implemented in § 9 (2) UrhDaG-E, which limits the extension to cases in which users "act for non-commercial purposes, for example if they share their content without the intention of making a profit or if the profits that the uploaded content brings in are not significant in relation to the covered copyright-relevant acts of the users covered by these licences. "This requirement of the DSM-RL is immensely important with regard to professional let's players and should be transferred from the explanatory memorandum to the text of the standard.

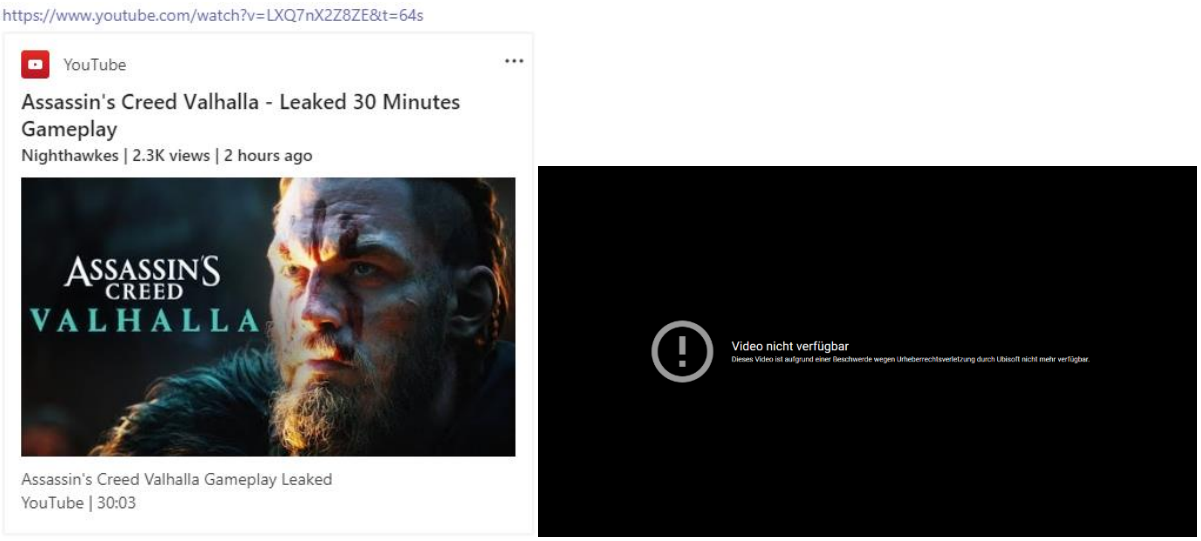
§ 10 Blocking of unauthorised use

Even if the requirement of information as a prerequisite for blocking unauthorised uses does not result from the DSM-RL, from the point of view of the games industry this is not possible in practice in any other way and therefore makes sense. In fact, however, this does not change anything with regard to the liability requirements according to § 10 TMG, according to which a Stay-Down only has to take place after a Notice. The problem here is what information must be provided. Here, the service provider can, in case of doubt (also in an abusive manner), refer to the fact that the information is not sufficient. In addition, games as interactive and dynamic works, unlike static works such as films or music, are difficult to identify with fingerprinting or watermarking.

In § 10 (2) and (3) UrhDaG-E, the DSM-RL is interpreted in an excessive manner, as the Directive is simply not to be applicable to start-ups. An exclusion from any blocking obligations cannot be inferred from it. Therefore, § 10 TMG would apply and a blocking obligation can occur under these conditions.

§ 12 Blocking and removal if marked as permitted use

The de facto reversal of the burden of proof without any noticeable consequences holds considerable potential for abuse. Especially for leaks from pre-release games, this mechanism hardly provides any means of preserving the exclusivity of a work. Especially in the case of computer games, which unlike films are not static, information to prove a 90% match can hardly be provided. Therefore, an obvious infringement of rights can only be established in a very few cases. Correspondingly, in the case of labelling, removal or blocking is only possible after a lengthy procedure. Especially with leaks it has to be done quickly and based on the current copyright law this is possible so far, as recently with a leak to an expected blockbuster from the successful Assassin's Creed series by Ubisoft.



In order to prevent such misuse, in addition to the reference to the protection of the author against distortion of the work in § 13 (3) UrhDaG-E, at least an extension to the right of first publication according to § 12 UrhG is required.

III. Implementation of Article 12 of the DSM-RL in §§ 51 to 51b VGG-E

From the point of view of the games industry, collective licenses with extended effect can be a sensible solution for other industries, but they are not for games. Collective licences can facilitate the acquisition of rights in a fragmented rights-holder landscape in which exploitation rights are often not in one hand or are even not managed, thus making works

usable in the first place. In the games industry, however, rights are administered centrally by publishers and there are always clear contacts who are also responsible for exploitation.

It is correct that collective licences with extended effect according to Art. 12 DSM-Directive are designed as a possible instrument on an optional basis. The games industry in general has no interest in collective management and will therefore object to any use via this instrument. The tendency to restrict freedom of contract and the granting of individual rights is also questionable in principle from the point of view of developers and publishers. In the games industry in particular, individual and dynamic solutions via digital rights management are practiced and proven, so that a blanket solution via collecting societies seems unnecessary, analogous and not innovative.

§ 51 Collective licences with extended effect

The provisions for collective licences with extended effect and for unavailable works under Sections 51 et seq. VGG-E are not relevant for the games industry because no collecting society administers relevant rights. Moreover, outside games companies will object to the granting of rights under § 51 (1) VGG-E at any time.

§ Article 51a Representativeness of the collecting society

With regard to the representativeness of collecting societies, Section 51a VGG is susceptible to abuse from the perspective of the games industry. Thus, an unspecified "substantial number" of rightholders should be sufficient to be able to grant rights to a plurality of outsiders, which the rightholders must first have applied against them. Precisely because games content accounts for a large share of the content of social media platforms, the portfolio may be attractive for existing collecting societies. If a considerable number of rights owners, possibly considered by the collecting society to be only more than 10, can be won over to a management contract, all outsiders will be forced to object to the use. This reverses the rule-exception ratio under very limited circumstances. Even more overshooting is the provision under § 51a VGG-E, according to which there is a rebuttable presumption of representativeness if only one collecting society offers rights from the games sector. From the industry's point of view this is tantamount to forcing the industry to have its own collecting society, just to avoid licensing these rights.

§ Section 51b Collective licences with extended effect for unavailable works

The collective licence with extended effect for unavailable works is also not in the interest of rights holders in the games industry and they will exercise their right of opposition if necessary. So far, the industry and German cultural heritage institutions such as the International Computer Games Collection or the Computer Games Museum have cooperated in a spirit of trust and have found individual solutions for a use in line with their interests. This is in the interest of both sides. So far, a governmental requirement is not necessary and cannot know and address the special interests of the games industry. This draft law also makes this clear.

IV. Implementation of Articles 8 to 11 of the DSM-Directive in §§ 51c to 51f VGG-E and §§ 61d to 61g and §§ 69d, 69f, 69g UrhG-E

As mentioned above, the games industry is already committed to the preservation of cultural heritage in the games sector. For example, the International Computer Games Collection in Berlin, which is probably the world's most comprehensive collection of computer games, is being established with the support of the German government. The game and its members support this with an association declaration, on the basis of which many publishers have already granted the collection and its sponsor the necessary rights to create the catalogue and make it publicly accessible. The project sponsors are the game, the two association subsidiaries Stiftung Digitale Spielekultur and USK, the Computerspielemuseum in Berlin and DIGAREC - Zentrum für Computerspieleforschung/ Digital Games Research Center. There are no other institutions in Germany known to preserve the cultural heritage of computer games. All these developments and forward-looking efforts are not seen in the blanket implementation of the European legal requirements on Extended Collective Licences and out-of-print works. All in all, these proposed regulations are not only disappointing, but could also lead to a situation in which rights holders in the games industry no longer proactively seek solutions in the future, but passively wait until - from their point of view - the legislator again regulates everything differently and arbitrarily.

§ 51c VGG Unavailable works including out-of-print works

The definition of unavailable works, including out-of-print works, once again goes beyond the requirements of the DSM Directive, which in Art. 8 only regulates out-of-print works, but not

"unavailable works". In Art. 8 para. 5 of the DSM-Directive, the complete version is also not relevant. Especially in the case of games, there are many different versions or versions because of the usual extensions, DLC and other updates, so that partially outdated parts are deliberately removed from the usual distribution channels. In addition, technical standards change and therefore some games are practically no longer available without emulation. Ultimately, it is a business decision whether an evaluation is still worthwhile and a title is still being distributed or the focus is on the sequel. This entrepreneurial freedom of decision must also be taken into account with regard to the evaluation of subsequent games.

The growing trend towards retro-gaming, i.e. playing old games, is being taken up by many publishers, and games like the original version of World of Warcraft were reissued last year with great success and made available to millions of players. Platforms like Good old Games (GoG) also make many other old games playable again on new technical devices. In this respect, the question arises whether there are any computer games that are out of print at all. The trade of used games via keysellers and of old games via GoG is sufficiently established, so that these are in any case the usual distribution channels. In this respect, the problem of preserving cultural heritage in the games sector is not as pressing as it is in other cultural sectors, where the focus is much more on conservation.

The standard text of § 51c, Subsection 3, VGG-E makes it clear that the Ministry had rather the classical media in mind, because here reference is made to books, specialist journals, newspapers and magazines. However, games consist of software, game design, sound, story and characters. Whether all the individual works of a complex work are really out of print or not available is likely to be a matter of regular dispute in practice. The draft therefore only apparently creates legal certainty here. In reality, however, permissions are again suggested here and covetousness is aroused, which is subsequently denied by the courts. Understandably, this creates dissatisfaction and then again makes it possible to rectify the situation and complicate matters further. Functioning solutions are not encouraged by this.

§ Section 51e VGG / Section 61e UrhG Regulation authorisation

The power to issue ordinances for the definition of cultural heritage institutions and the representativeness of collecting societies must be viewed particularly critically because of the indirect restriction of fundamental rights which, according to the theory of materiality, must

be made mandatory by a parliamentary act. Particularly in view of the obvious ignorance of the games industry or the lack of willingness to recognise the special features, scepticism about a possible executive determination and concretisation by the Ministry is certainly understandable. Since these are long-term projects and processes and the Copyright Act has recently been amended several times in each legislature, there is nothing to be said against concretisation by means of a parliamentary act.

§ Section 61d UrhG Unavailable works

The legal permission according to §§ 61d ff. UrhG-E is consequent, but the above mentioned explanations apply all the more here. Here the relevant question arises whether cultural heritage institutions - once they are recognised as such - may use all types of works in any media genre. Even if there is a right of objection here, making computer games publicly accessible through a collection for films can be against the interests of the games industry, especially if there is a lack of expertise for the technical framing and classification. The requirement that the work used must be from the collection's stock is not sufficient, as this can simply be acquired. Here, at least as in the Directive, a "permanent stock" should be assumed. Furthermore, it is absolutely necessary to limit the use of a work to its "permanent and relevant" stock.

§ Section 61f Information on collective licences with extended effect

The title is misleading because it also refers to permitted uses pursuant to Section 61d UrhG-E. In the absence of a collecting society for games, cultural heritage institutions would thus inform about their use of computer game works pursuant to Section 61d UrhG-E. This raises the question of what incentive there is to inform about this use as soon as possible so that rights owners can object to this use. A stakeholder dialogue is currently taking place at the EU Commission with the participation of the cultural heritage institutions, which are discussing technical standards in particular. It is imperative to await the outcome or, if necessary, to implement it retrospectively.

§ Section 61g Legally permitted use and contractual authority to use

The prohibition of agreements restricting or prohibiting the permitted use of § 61d UrhG-E explicitly contradicts the provisions of the DSM-RL and the right of the right holder to object,

which is also enshrined in § 61d UrhG-E. If a rightholder can subsequently object, he should also be allowed to prohibit uses from the outset.

§ Section 69d(7) Exceptions to the acts requiring consent

The insertion of Section 69d (7) UrhG-E is probably an oversight of the wording because Section 69 UrhG has only 3 paragraphs to date. The explanatory memorandum to the Act makes it clear that the Ministry is currently considering computer games and the Computer Games Museum. Unfortunately, the interaction of all parts of a complex work and the fact that individual works are often still used and evaluated is not discussed here. Furthermore, it is only stated that this standard implements the DSM-RL. However, it does not indicate that the directive is applicable to computer programs, which is probably why the wording of the directive is - once again - exceeded here. There is also no evidence-based justification for the necessity of this barrier and the predominance of the public interest.

§ Section 69f (2) Infringements of rights

The circumvention of technical program protection mechanisms is expressly prohibited according to Art. 6 of the Info-Soc-Directive. However, the DSM-Directive does not provide any basis for deviating from this. Even if the discussion draft states succinctly without any basis that this is "in connection with the implementation of Article 8 (2) of the DSM-Directive", there is also no indication for this in the recitals. This proposed regulation is clearly contrary to European law and it is very likely that individual games companies or even the association would take legal action against it. Technical copy protection is the basis for the legally secure exploitation of computer games and any circumvention - and also any restriction of the ban on circumvention - is a direct threat to the economic livelihood of the games industry.

§ Section 69g Application of other legal provisions, contract law

The proposed additions to Section 69g UrhG are completely incomprehensible and incoherent, because the numbers 5 and 7 are not to be found in the previous standard. This is obviously an editorial error.

V. Implementation of Articles 18 to 23 of the DSM Directive in §§ 32 et seq. UrhG-E

German copyright contract law already sets the highest standards for the protection of authors throughout Europe. Harmonisation at this high level would mean that German authors would no longer be exclusively better or worse off than their European counterparts. From the German point of view, this may therefore also be seen as helpful harmonisation and the creation of a level playing field, but from an international point of view it is more likely to be seen as a weakening of the European position in global competition. Especially in the development of games, it is crucial for the publisher as the central rights exploiter to hold as many ans unlimeted rights - the IP - as possible for exploitation. Here the work-made-for-hire doctrine in Anglo-Saxon-influenced legal systems is a clear advantage over the continental European copyright systems. Also with a view to the creation of a single copyright market, it would therefore be important not to go beyond the existing rules on equitable remuneration again.

Most of the provisions in the DSM Directive on the obligation of transparency and on appropriate and proportionate remuneration are already reflected in German law. There is no further need for implementation from the point of view of the games industry, also because, for example, the regulations on appropriate remuneration or bestseller remuneration are now uniformly interpreted by the ECJ. With regard to the claim to direct remuneration and the transparency obligation, it is regrettable that the Federal Ministry of Justice has again gone beyond minimum harmonisation and - once again - chosen a special German path. In view of the 1:1 implementation to be expected in other EU countries, these proposals thus sabotage and counteract the actual aim of the directive, the harmonisation of the internal market. These extra-obligatory requirements are being closely monitored at international level in the implementation process right now, and this could ultimately be the deciding factor against an investment decision in Germany for international productions in the games industry.

§ Section 32 (2) Appropriate remuneration

The addition of a third sentence to Section 32 (2) UrhG reverses the rule-exception ratio for lump-sum remuneration in clear disregard of the compromise found in Amendment 73. According to the Directive, these may be appropriate by virtue of aus aus, but they should not

be the rule. The discussion draft seems to provide that lump-sum payments are not permissible unless they are justified by the specific characteristics of a sector. In this respect, the draft once again goes far beyond the minimum harmonisation level aimed at. No reasons for this are apparent. Unfortunately, the special features of the AV industry, including games, which were presented with great effort and a great deal of research at an information event of the AV industry on 6 March 2020 in the Bundestag in the presence of representatives of the BMJV, were not taken up. Thus, creative remuneration options such as the participation of creative people in the company through company shares or bonus payments are completely disregarded. The explanatory memorandum to the Act does not contain any justification for this excessive regulation. In addition, it creates considerable legal uncertainty and may provoke many legal disputes, as it removes the constant and established case law for no apparent reason.

§ 32a Further participation of the author (bestseller)

The entitlement to a further participation of the author is adjusted in accordance with the wording of Art. 20 DSM-Directive. The explanatory memorandum of the discussion draft notes that the threshold for a claim for contractual adaptation would be lowered compared to Art. 32a UrhG. This is surprising because the Ministry is anticipating the ECJ here, which has to interpret this undefined legal concept. There is no indication in the DSM-RL as to whether "in a striking disproportion" is a higher, lower and perhaps even the same threshold as "disproportionately low". In this respect, the wording of Section 32a UrhG may remain unchanged until the interpretation by the ECJ. If a court of instance were to come to the same opinion of the BMJV, it could interpret the provision in the light of the DSM-Directive in conformity with European law.

The proposed deletion of Section 32a (2) sentence 2 UrhG is surprising because it is not prescribed in the DSM-RL and there is no other evidence-based reason for this change. From the point of view of the computer games industry, this deletion could destroy the existence of German studios. Unlike in many other industries, the actual creation of works is not done by individual authors but by legal entities, the development studios. These employ employees or conclude contracts with freelancers. The actual financing, however, is not directly from the studios' own funds, but via publishers or other international distributors, who usually pre-finance the entire development. For this reason, the studios usually have hardly any

negotiating power and are usually dependent on the conditions set by international studios in their contractual relationships. In many cases, the studios themselves do not receive a share of the profits until the exorbitantly high revenues are achieved. Due to the lack of negotiating power, especially in the case of contracts between studios and publishers, which are often also concluded under American or Asian law, they are usually not entitled to compensation. The Studios must guarantee that no claims from third parties can be made against the Publisher. If individual authors are now able to claim the Developer Studio for revenues generated by the Publisher, the German-based Development Studios will be liable for these amounts without being able to sufficiently secure themselves in the contractual chain to be able to recover these amounts from their contractual partners. They have neither the negotiating power nor can they derive these claims from German law, as many of the contracts between the studios and the publishers are not even subject to German law.

Nor does the Directive necessarily provide that the liability of the other party should cease. Rather, the Directive stipulates that the author can assert the claims either with the contractual partner or with the third party. Insofar as he asserts them with the third party, the liability of the contractual partner can certainly be waived. In the alternative, therefore, at least a provision would be important which would allow the studio to reclaim the amounts claimed by the author from his contractual partner. Due to the different contractual regimes and the non-mandatory application in this area, a joint and several debtor settlement is regularly ruled out. In any case, the proposed regulation is half-baked and could threaten the existence of German studios. It is also inequitable, because German developer studios are exposed to unforeseeable liability risks without being able to control them at all.

§ Section 32b UrhG Mandatory application

The proposed mandatory application of the provisions on equitable remuneration and the obligation to provide information in Section 32b is certainly provided for in the DSM-Directive and in fact does not change the existing legal and judicial practice. However, this undermines the "Burdensome Approach" of the BMJV in the 2016 reform of copyright contract law, because even the envisaged GVR cannot waive these claims. This raises the question of what incentive there should be to conclude GVRs.

§ Section 32d Information and accountability of the contracting party

In Section 32d, the transparency obligation stipulated by the DSM-Directive in Art. 19 is implemented and the previous right to information becomes an obligation to provide information. It is to be welcomed that the norm remains close to the existing Section 32d UrhG in terms of content and structure. The exceptions to accountability in § 32d (1) UrhG-E largely correspond to the draft regulation on copyright contract law sent to the BMJV, which ARD, game, VAUNET (private broadcasters), ZDF, SPIO (film producers), APR (radio) and the producers' alliance (film producers) proposed, but they do not make use of the scope granted by the Directive for sector-specific features (Art. 19 (1) DSM-RL and Recital 77). With a view to the in Art. 19 (3) DSM-RL explicitly anchored principle of proportionality, it should at least be taken into account that, in view of the large number of people involved in the development of a computer game, authors of pre-existing works (sound, characters, graphic design) should only be informed in individual cases if they so request (we refer once again to our proposed regulation from May 2020).

With regard to accountability, there is no clear limitation by third party rights, data protection and trade secret protection. The explanatory memorandum to the law also fails to address these legitimate interests. The scope of accountability under Section 32d (1a) UrhG-E cannot go further than Section 259 (1) BGB.

§§ 32f, 32g, 35a UrhG

The regulations in §§ 32f, 32g and 35a UrhG-E are in our opinion of no importance for the games industry.

§ Section 41 Right of recall due to non-exercise

The right of recall due to non-exercise as stipulated in Art. 22 of the DSM-Directive correctly does not trigger a need for adaptation in Art. 41 UrhG. The author's right to choose whether to recall only the exclusive right or the right of use as a whole is in the interests of the author and allows more flexibility in terms of contractual freedom and is only to be welcomed in this respect.

§ Section 69a (5) UrhG

According to the provisions of Art. 23 DSM-Directive, Sections 32 to 32f, 36 to 36c, 40 and 41 shall not apply to computer programs. The fact that §§ 95a to 95d UrhG were not listed,

unlike previously, must again be an editorial error. In this discussion draft, such inaccuracies run through several proposals for regulations on computer programs. The explanatory memorandum to the Act also fails to provide any explanation as to why the provisions of Articles 95a to 95d should be applied contrary to Art. 7 of the Software Directive and in competition with Article 69f (2) UrhG and other provisions. Even if this is a lex specialis, at least a justification and clarification in the explanatory memorandum would be helpful.

VI. Implementation of the ECJ case law on metal on metal in §§ 23, 51a UrhG-E

The games industry welcomes the critical, parodistic and creative examination of their works and expressly supports new forms of expression such as memes. Therefore, clarification of the legal admissibility of these uses is also correct and important. Against the background of the decision of the ECJ, the parody exception needs to be adapted and a location in Section 6 UrhG within the context of the other legal exceptions is dogmatically consistent and even easier to find for the user of the law.

§ Art. 23 UrhG Processing and alterations requiring consent

In accordance with the ECJ ruling, Section 23 UrhG-E now focuses on the recognisability of a work and sufficient distance. In the interests of legal certainty, the constant case law of the European Court of Justice[13] on recognisability and the "Blaze Theory" of the Federal Court of Justice are thus also taken up.[14] The internal structure in three paragraphs and the clarity of the provision are to be welcomed.

§ Section 51a UrhG Caricature, parody and pastiche

The new barrier for caricatures, parodies and pastiches is basically to be welcomed. However, it is unclear whether this permission for the purpose of caricature, parody and pastiche refers exclusively to the creator of the respective form of use or also to the user who, for example, simply copies a meme found on the Internet and uses it to underline an expression of emotion. In this case, however, a consideration of individual cases would have to take place, so that not all memes would be allowed. This should also be taken into account with possible

[13] ECJ of 16 July 2009 - C-5/08, para. 51 - Infopaq.
[14] For example BGH GRUR 2020, 799, 800f. - Stadtbahnfahrzeug; BGH GRUR 1999, 984, 987 - Lara's daughter; BGH GRUR 1994, 191, 193 - Asterix-Persiflage.

upload filters, which may not allow all memes. Let's Plays and Walkthroughs is usually not a permitted form of use according to § 51a UrhG-E, because it is not the parody or caricature that is in the foreground here, but the discussion or explanation of a game.

If the original work is still recognizable, but has faded due to its purpose, and therefore its use is permitted, the interests of the author may still be impaired - for example, in the case of distortion or use of an unpublished work. Therefore, in order to guarantee the moral rights of the author, a final weighing of interests is required, which should at least be provided for in the explanatory memorandum to the Act. To protect unpublished works, the legal exception should only apply to published works.

VII. Implementation of the CabSat Directive in §§ 20bff. UrhG-E

The technology-neutral design of cable retransmission is to be welcomed from the point of view of the games industry and the publishers of Esport titles as well as the organisers and producers of Esport tournaments. Insofar as games content is broadcast by broadcasting companies both domestically and internationally, the authors and holders of ancillary copyrights in the games industry have not yet asserted their claims for remuneration subject to the obligation to pay a collecting society.

§ Section 20b Redirection

In accordance with the CabSat directive the forwarding is not extended to pure online transmissions. This is in line with the interests, because online formats such as Esport tournaments are conceived and exploited differently from classic TV broadcasts.

§ 20c European supplementary online service

According to the CabSat Directive, the country of origin principle applies to simulcast of broadcasting programmes and downstream use via media libraries, which is why no separate licensing is required in other EU countries and a statutory obligation to pay remuneration applies instead. This regulation only applies to television programmes for in-house productions and news, but not to the transmission of sporting events. Here it remains open whether Esport tournaments and their transmission on television are a sporting event within the meaning of Section 20c UrhG-E. Even if such formats are not currently produced by

broadcasting companies themselves, this is entirely conceivable in the near future. Unfortunately, the explicit comment and request for clarification in an upstream hearing of the BMJV was not taken into account here.

VIII. Final remarks

In view of some technical errors, many challenges in practice that have not yet been taken into account and some regulatory proposals that are contrary to European law or at least questionable, we as the German games industry hope that the Ministry will thoroughly revise this discussion proposal on the basis of the comments and will also find a more balanced political solution. In addition to the reputation of the Federal Government in the EU, the dwindling trust of the content industries in the legislative competence of the BMJV and its commitment to finding solutions that are in line with their interests and practicable, it would be fatal if supposedly user-friendly regulations from the BMJV, which are clearly contrary to European law, were to fail to stand up before the ECJ, thereby promoting frustration and political displeasure among citizens and sabotaging the European idea.