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To the German Federal Ministry

the judiciary and for consumer protection

Statement

on the discussion draft of the Federal Ministry of Justice and Consumer Protection of 15.1.2020 (UrhG-E)

Draft First Act adapting copyright law to DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the digital internal market (here: DSM Directive or DSM-RL)

Berlin, 31.1.2020. EFGAMP e.V. represents the interests of memory institutions which are concerned with the collection, preservation and making accessible of the digital game heritage (here called Computer Game Preservation Organisations/ CBO).

1. general preliminary remarks

The present and here commented discussion draft (UrhG-E) aims to address the sub-areas of the DSM-RL the protection of press publications with regard to online uses (Presseverleger-Leistungsschutzrecht, Article 15 DSM-RL) and the claim to fair compensation (Verlegerbeteiligung, Article 16 DSM-RL) at an early stage in a separate legislative procedure. Since this implementation, however, also integrally affects the areas of legal permits of Articles 3 to 7 of the DSM-Directive, a statement on the present draft for

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discussion is also appropriate from the perspective of the cultural heritage institutions.

2. article 5 DSM-RL *digital and cross-border education and teaching*

2.1 Collecting societies/ claim for remuneration

Since it is not clear to us whether the implementations of Articles 3-7 of the DSM Directive mentioned in the discussion draft are meant in their final form in national law or whether they are addressed separately again, we would like to point out here that neither collecting societies exist in the field of computer games nor, to our knowledge, are they planned. In this respect, it is of essential importance for CBOs to make use of the authorisations in the educational sector provided for in the DSM Directive that these are not necessarily linked to remuneration claims for computer games which are subject to collecting society obligations. This concerns above all § 60h UrhG, which should be amended accordingly. This is also in line with the DSM-RL, which does not provide for a mandatory right to remuneration in Article 5.

An implementation of the comment made on page 19 of the discussion draft that "the obligation to pay remuneration for some of the uses permitted under article 60a UrhG-E can be maintained in article 60h UrhG" would make the legally guaranteed making available of computer games in the educational sector virtually impossible due to the lack of collecting societies.

A waiver of a remuneration claim for making computer games accessible also corresponds to the balancing of interests provided for in Recital 24 of the DSM-RL, according to which, on the one hand, no mandatory remuneration claim is provided for and, on the other hand, in the case of the use of remuneration systems it is to be ensured that 'educational institutions do not incur any administrative expense'.

2.2 Technical protection measures (TPM)

Since the exemptions granted under Article 5 of the DSM-RL are as mandatory as those granted under Article 6 of the DSM-RL, our comments and suggestions regarding the possibilities of circumvention of TPM (see

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3.1) made hereunder apply equally to the implementation of Article 5 of the DSM-RL.

2.3 Right of citation/ Percentage duplication

In the commentary on the discussion draft, page 19 states: "For computer programs, the validity of article 60a UrhG (old version) has not yet been expressly ordered. However, its validity can be derived from article 69a (4) UrhG. Consequently, implementation is only required for the newly regulated ancillary copyright of the press publisher (§§ 87 ff. UrhG-E).

In our opinion, however, the sole derivation of the validity of the educational barrier for computer programs/games via article 69a (4) UrhG is problematic, since the analogy to 'language works' established there does not do justice to the specific nature of computer programs.

This applies in particular to the provisions of Article 60a (1) and Article 60c (1) UrhG, according to which only 15% of a work may be reproduced in the context of teaching, teaching and research in order to make it accessible.

While only partial reproduction of texts and other linear media may be practical for the intended purpose, it is not so for computer programs. Even if computer programs are to be made accessible only in part, a complete reproduction is necessary for this purpose, since a computer program that has only been partially reproduced is 100 percent non-functional.

Also article 60e (4) UrhG, which according to article 60f (1) UrhG is also valid for archives, museums and educational institutions and grants a reproduction of 10 percent of the work for making it accessible on terminals, is not applicable to computer programs for the same reason.

In this context, we also advocate the validity of § 60e (5) UrhG for archives, museums and educational institutions, whereby the reproduction of computer programs should be 100 percent. In principle, digital collection items in particular can be made available effectively and promptly as mail-order copies via digital media.

A removal of the percentage restriction for computer programs is in line with Article 5 of the DSMD, as it does not explicitly provide for such a restriction. Paragraph 1 merely states there that the works in question "may be used digitally for the sole purpose of illustrating teaching and to the extent that this is justified for non-commercial purposes". Amendment 21 of the DSM

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Directive clarifies that a proportional regulation may be in conformity with the Directive, but does not make it mandatory.

3. concerning Article 6 of the DSM-Directive *Preservation of Cultural Heritage*

We welcome the fact that the definition of works in the DSM Directive Art. 6 includes computer games as a category of works for the first time. They are thus also defined under copyright law as cultural property for the preservation of which cultural heritage institutions are permitted, as a binding exception, to 'reproduce works and other objects of protection permanently held in their collections, whatever the format or medium [...] to the extent necessary for their preservation'.

This is particularly important for the preservation of the CBOs' collections, as they are to a large extent located on obsolete media that are constantly losing their ability to reliably store the data stored on them. Copying and storing them on up-to-date and therefore secure data media is the only way to protect collections from loss.

Against the background of the possibility already contained in article 60e (1) of the German Copyright Act of making technical modifications necessary for preservation, the clarification now provided in the UrhG-E by the addition of the second sentence in article 69d (2) that copies of computer programs are permissible for the preservation of cultural heritage is an important and necessary step towards the implementation of the DSM-RL.

However, we would like to draw attention to two further aspects which have so far been insufficiently or not at all taken into account in the German Copyright Act or the German UrhG-E, but which are relevant for a future-proof design of copyright law with regard to the preservation of originally digital cultural assets:

3.1 Technical protection measures (TPM)

According to Article 7(2) sentence 2 DSM-RL, Member States have to ensure that users can access and use TPM-protected content in accordance with the new mandatory exceptions. This is particularly true for content acquired under contract and made available on the Internet (which was not the case under the previous legislation).

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As representatives of memory organisations wishing to use the exceptions provided for in the DSM-RL for works permanently in their collections, we are concerned about disproportionate technical protection measures that go beyond what is necessary to protect the security and integrity of the systems. This is all the more true as the computer games in the CBO's collections in particular are to a large extent a) protected by TPM, b) stored on obsolete and expiring data carriers, c) out of print to a large extent, and d) considered to be orphaned due to the dynamic nature of the market and the relatively young age of the industry.

Recital 7 of the DSM-RL stresses that right holders should first be given the possibility to remove TPMs that prevent the use of the derogation. However, the case where each time a TPM is found, a voluntary amendment would have to be requested by the cultural heritage institutions, e.g. for necessary conservation measures, could prove problematic for the above-mentioned reasons in terms of long delays and considerable effort. Thus, for the preservation of the digital collection and its exceptional access granted under the DSM-RL, it is absolutely necessary to ensure, in the context of the renewal of article 95b UrhG announced in the Commentary to the ErhG-E, that such a process is quick and simple in order to exclude that cultural heritage institutions are confronted with unreasonable delays and undue expense.

(In our opinion, this puts into perspective the comment made in the UrhG-E that "there is *no need to adapt the already existing provisions of the UrhG on supplementary protective provisions (§§ 95a ff. UrhG) and on sanctions and remedies in case of infringement of rights (§§ 97 ff. UrhG)"* even though we understand that this statement is meant primarily with regard to the implementation of Articles 14 and 15 of the DSM-RL).

3.2 Preservation of complex digital works also requires the use of other technical components

Recital 25 DSM-RL rightly refers to the new challenges of digital technologies. However, we are disappointed to note that the DSM-RL does not sufficiently facilitate solutions necessary for the preservation of original digital cultural objects. We therefore urgently call for more attention to be paid to the problem that originally digital works can only be kept permanently accessible with the help of emulators. In addition to computer games, this also applies to websites or digital works of art. In order to be able to keep these genres of work accessible, hardware and software is required which may also be protected by copyright and which do not

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regularly form an integral part of the collections of cultural heritage institutions.

To make a digital work consisting of ones and zeros usable for humans, a complex process is necessary, which requires several translations using hardware and software. A work created for processing on an obsolete and no longer available operating system (e.g. MS DOS) can only be made usable if the operation of this obsolete operating system is imitated by software (e.g. by the emulator "DOSBox"). This is called emulation and requires the reconstruction of software (components) and hardware, which also requires reproduction actions. With the help of the so-called emulation software, the original software (e.g. WordPerfect or a computer game) can then be executed to make the actual digital work accessible. The required original software and hardware may also be outdated and no longer available on the market (e.g. because the manufacturer no longer exists), which may require emulation of the software and hardware if the memory organization is no longer able to maintain a working copy or functioning historical hardware systems by other means.

In order to keep original digital works in historical collections permanently accessible, it is therefore not sufficient to be allowed to reproduce/migrate these works yourself. The emulation of outdated hardware and software is also essential. This software imitation sometimes requires the reproduction of existing hardware and/or software components. The software articles of the copyright law (decompilation, reverse engineering) are not sufficient to do this without the consent of the copyright holder.

It is therefore necessary to extend the scope of the conservation exception so that cultural heritage institutions can also carry out acts of reproduction in respect of protected works (hardware and software) which are not part of the collection but which are necessary to make the digital works in their collections available for consultation. This derogation extension is allowed under Article 25 of the DSM-Directive, as it remains within the limits of Article 5(2)(c) of the InfoSoc Directive (2001/29/EC). Article 25 of the DSM-Directive provides that Member States may also define the exceptions in the DSM-Directive more broadly, provided that this is compatible with the exceptions in the Copyright Directive. Article 5(2)(c) of the InfoSoc Directive (2001/29/EC) allows reproduction by heritage institutions 'in specific cases', so that the exception can be extended. In our view, the extension of the derogation proposed here also passes the three-step test under Article 7(2) of the DSM-Directive.