



## ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

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### Further reflections

#### **on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means**

ALAI has learned that EU Member States have put a number of questions to the Legal Service of the Council regarding Article 13 and Recital 38 of the Commission Proposal for a Directive on copyright in the Digital Single Market<sup>1</sup>. ALAI herewith offers some assistance on the basis of its previous reflections and Resolution adopted on 18 February 2017 (hereinafter “ALAI Resolution”, see: <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf> ).

The first question relates to the compatibility of Article 13 with the Charter of Fundamental Rights of the European Union (hereinafter “Charter”). First, legislators generally have quite some discretion in the way how they want to balance the different human rights of the Charter, and there is no indication that this discretion as chosen in Article 13 would be in conflict with the Charter. Article 13 as proposed by the Commission rather is envisaged as a tool to reestablish the fair balance, also aimed at by the CJEU, between authors’ human rights in their works and the other mentioned human rights; currently, the value of making available works to the public in the situation covered by Article 13 is not fairly shared (see the ALAI Resolution, in particular II). Also, the obligation to take measures “such as” content recognition technologies only result from dialogue with the right holders and must be appropriate and proportionate according to Article 13, so that there is no possible conflict with other human rights.

Question 2 asks whether it is “appropriate to modify” the way in which Article 14 of the Directive on electronic commerce<sup>2</sup> is applied horizontally, just for copyright. In the first place, it has to be stressed that Article 13 (as also Recital 38) does not modify the application of Article 14 of the Directive on e-commerce, but clarifies its interpretation in conformity with the case law of the CJEU for the particular situation covered by Article 13. It does so by specifying, for the particular kind of Internet Service Providers (hereinafter “ISP”) covered by

<sup>1</sup> COM(2016) 593 final, Brussels, 14 September 2016.

<sup>2</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), *Official Journal L 178*, 17/07/2000, p. 1-16.

Article 13, the conditions for the application of the status of host under Article 14 of the Directive on e-commerce, by giving examples for an “active role”, following the l’Oréal v. e-Bay case of the CJEU<sup>3</sup>. Recital 38 well reflects the case law of the CJEU on the “active role” and brings a useful clarification (see, e.g., on confusion between “active role” and knowledge criteria by some national courts, the ALAI Resolution, IV. 1). There is thus no change of the current legal situation, but a welcome clarification of its interpretation, in line with the CJEU, for a particular situation as described in Article 13.

Question 3 concerns the relation with Article 15 of the Directive on e-commerce, which prohibit general monitoring obligations for ISPs. The ALAI Resolution has explained in more detail that there is no conflict between Article 13 and Article 15 of the Directive on e-commerce; in particular, only appropriate and proportionate measures, after consultation with right holders (and thus individualised/specific rather than general), are to be taken (see for more detail the ALAI Resolution, IV. 3). Such measures are already practiced in part.

Question 4 inquires whether it is sufficient to “provide access to the public” (as mentioned in Article 13 and Recital 38) to constitute an act of communication to the public. As the CJEU has stated several times, and according to the underlying international law, the right of making available, which is at stake in Article 13/Recital 38, applies to the mere provision of access and does not necessarily require an actual transmission, as also stated in an earlier ALAI Opinion.

Of course, the Commission’s proposal does not contain or even envisage a full definition of “communication to the public”, including all possible criteria (as established by the CJEU so far); however, it simply refers to the particular case of service providers as described in that proposal and clarifies that they typically commit an act of communication to the public (see also the ALAI Resolution, IV. 2). It thereby does not mean to replace the case law of the CJEU, but corresponds to the interpretation by the CJEU of this term in different cases (including some decided after the Commission proposal was issued, in particular The Pirate Bay case of the CJEU<sup>4</sup>) and is in conformity with the underlying international law.

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<sup>3</sup> Judgment of the Court (Grand Chamber) of 12 July 2011, Case C-324/09: L’Oréal SA and Others v eBay International AG and Others.

<sup>4</sup> Judgment of the Court (Second Chamber) of 14 June 2017, Case C-610/15: Stichting Brein v Ziggo BV and XS4All Internet BV.