



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

TELEPHONE : +32 2 740 00 05
TELEFAX : +32 2 740 00 01

Paris, 18 February 2017

Resolution

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, at its Executive Committee meeting in Paris on 18 February 2017, taking note of the work currently being conducted within the European Union, in particular following the Commission's presentation on 14 September 2016 of legislative proposals on copyright in the digital single market:

I – Noting that Articles 13 and 14 and recital 38 of the *Proposal for a Directive on copyright in the Digital Single Market* of 14 September 2016 (COM(2016)593) aim to introduce the following construction:

- 1 – Specify, when works and subject-matter protected by related rights are stored, the conditions for the application of the status of host (Article 14 of Directive 2000/31/EC) by enumerating – non-exhaustively – the facts or acts (*optimising the presentation of uploaded works or other protected subject-matter / promoting them*) which lead to the conclusion that this service provider plays an “*active role*”, precluding that status, thereby subjecting the information society service to the application of copyright (requirement of authorisation and, at the rightholder's option, of remuneration) and related rights, like any other person exploiting the right of communication to the public;
- 2 – Specify (Article 13) that information society services which store a large number of works or other protected material cannot – even if they qualify as hosts (Article 14 of Directive 2000/31/EC) – confine themselves to being merely reactive (take-down obligation after being made aware of the existence of illegal content) but must, on the contrary, be more proactive by taking “*appropriate and proportionate measures*”:

- either by entering into contracts with owners of copyright or related rights for the storage of such protected material and for making it available to the public, and by showing transparency in rendering accounts following such agreements;
 - or, in the absence of any agreement, by taking measures (“*effective technologies*”) to prevent – *ex ante* – the works or other protected subject-matter from being made available to the public;
- 3 – Specify (Article 14) that Member States must provide for transparency obligations towards authors and performers, who must receive adequate information from their contractual counterparts, in order to ensure that the system governing their remuneration is balanced; to the point of requiring (Article 15) the introduction of a contract adaptation mechanism to underpin that obligation and the establishment of a dispute resolution mechanism for issues arising from the latter principles (Article 16).

II – Endorses, on the whole, this construction and the resolve shown in this way by the European authorities to ensure that the value from making works of authorship available to the public over the digital networks is more fairly shared:

- firstly, by imposing obligations on technical intermediaries, which tried to take advantage of the uncertainty surrounding the status of certain service providers to capture much of the value attached to the appeal of works;
- secondly, by imposing measures which constitute first steps toward a fairer economic balance in the relations between authors and performers, on the one hand, and users, on the other.

III – Recalls in this regard the fundamental role of creators – without whom there would be no works to make available to the public – as well as of performers.

IV – Observes that:

- 1 – With regard to the “*active role*” played by the information society service, which prevents the latter from benefiting from the status of host, this merely reflects the strict implementation of the conclusions drawn by the Court of Justice of the European Union in the *L’Oréal* case (CJEU [Grand Chamber], 12 July 2011, *eBay v L’Oréal*, C-324/09).

The European Commission’s formulation of non-exhaustive criteria in Recital 38 of the *Proposal for a Directive on copyright in the Digital Single Market* (such as, optimising the presentation of uploaded works or other protected subject-matter / promoting them) corrects the error sometimes made by national courts of confusing the provider’s “*active role*” with the latter’s knowledge of the existence of illegal content, and to infer, incorrectly, that lack of knowledge would therefore suffice to attribute to the service the benefit of the status of a host provider. While proof of such knowledge usually establishes the service’s “*active role*” (the service is then almost playing an editorial role), it is not appropriate to draw a negative inference: in fact, ignorance of the content is not sufficient to prove a passive role. The Commission’s proposal thus not only dissociates the distinct notions of passive role on the one hand, and ignorance on the other, but also offers useful specification of the type of criteria that should be used to distinguish these notions.

- 2 – The affirmation by recital 38 of the *Proposal for a Directive on copyright in the Digital Single Market* that information society services which make works accessible to the public could be regarded as committing an act of communication to the public

merely applies the solutions advocated by international instruments (Article 8 of the WIPO Copyright Treaty of 20 December 1996) or European ones (Article 3 of Directive 2001/29/EC). However, it is welcome in view of the different interpretations that are sometimes put forward.

3 – The obligations (proactivity) incumbent upon information society services which would nevertheless qualify as hosts concern only:

- information society services which intervene in the field of copyright and related rights;
- whose activities exceed a certain volume (“*store a large number*”).

Those obligations are the result of dialogue (collaboration) to be established between rightholders and service providers.

A number of service providers already spontaneously implement some of the obligations in question. The fact of making these solutions obligatory will doubtless enable:

- measures to be introduced, failing an agreement, to prevent unauthorised content from being uploaded. Use of fingerprint systems will go beyond a simple mechanism of the “*take down / stay down*” kind prohibiting further “posting” of an unauthorised work, the removal of which has already been requested and obtained, because it will make it possible to prevent initial uploading of the content (*ex ante* blocking) following the provision of fingerprints enabling this to be done;
- better financial conditions to be negotiated, in the event of an agreement, for rightholders who will have found strong legal leverage with the adoption of the solution advocated by the Proposal for a Directive;
- better monitoring of the outcome of such agreement (transparency).

In addition, moreover, the efforts expected of service providers are not inconsistent with Article 15 of Directive 2000/31/EC which forbids imposing a general duty of supervision on the service providers covered by Articles 12-14 of the same text. First, the kinds of measures at issue are targeted, not general. Second, the adoption of these measures results from consultations between intermediaries and right holders; it therefore cannot be considered as giving rise to a « a general obligation actively to seek facts or circumstances indicating illegal activity » forbidden by Article 15. On the contrary these measures should be assimilated to the « appropriate and proportionate » steps that the Court of Justice of the European Union, having accepted the principle of their application, allows to be imposed on service providers, leaving to the service providers the choice of which measures to impose.

4 – The whole construction enables virtuous circles to be created, offering the conditions for the development of a new market from which each player (authors, performers, producers, broadcasters, service providers, consumers, etc.) stands to benefit.

V – Considers however:

- that the proposed construction would be stronger and more effective if the solutions put forward in recital 38 were enshrined in an Article of the future directive;
- that certain translations of recital 38 (particularly the French and German versions) would gain from being redrafted in that they are likely to mislead readers concerning the place of the right of communication to the public.