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OPINION[1]

on the Advocate General's Manuel Campos Sanchez-Bordona Opinion of 25 April 2018 in Case C-161/17 (Land Nordrhein-Westfalen v Dirk Renckhoff)

ALAI has become aware of case C-161/17 in which a question has been referred to the Court of Justice for a preliminary ruling in the case of Land Nordrhein-Westfalen v Dirk Renckhoff and in which Advocate General Manuel Campos Sanchez-Bordona delivered his Opinion on 25 April 2018.

It notes that the facts of this case are liable to give rise to an interpretation not only of European Union law but also of several articles of the Berne Convention for the protection of literary and artistic works and of the WIPO Copyright Treaty (WCT), the latter of which the European Union is also a member. It recalls in this respect that the Court of Justice has taken the position that "Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community" (judgment of 7 December 2006, case C-306/05, SGAE v Rafael Hoteles, paragraph 35).

With regard to the Berne Convention, it has been noted repeatedly, and particularly in the judgment of 26 April 2012, case C-510/10, DR, TV2 v NCB, paragraph 29, that "the European Union, although not a party to it, is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, which forms part of its legal order and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention (see, to that effect, Joined Cases C-403/08 and C-429/08, *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 189 and the case-law cited). Consequently, the European Union is obliged to comply with, inter alia, Article 11*bis* of the Berne Convention (see, by analogy, judgment of 9 February 2012 in Case C-277/10, *Luksan*, paragraph 59)" and Article 8 WCT.

ALAI wishes to contribute to the correct interpretation of the provisions of the Berne Convention and the WCT which have always guided the principles of its action. That is why it would like to submit the following Opinion on Berne articles 11*bis*, 5(2) and 10(2) and WCT Article 8.

[1] Approved by ALAI's Executive Committee on 12 September 2018.

I. Article 11*bis*(1) of the Berne Convention and its incidence on Article 8 WCT

The case of Dirk Renckhoff concerns the question whether a photograph has been made available to the public as meant in Article 8 WCT.

According to Article 8 WCT as well as Article 3(1) of Directive 2001/29, the right of making available is included in the right of communication to the public. Works may be made available to the public either by a primary communication to the public – for instance, by posting a work on a website – or by a secondary communication to the public. Secondary communication means that a communication is made by retransmitting a communication, including a work made available, already offered to the public by another party.

Article 11*bis*(1) of the Berne Convention, regarding the communication to the public by broadcasting, rebroadcasting and communication by loudspeaker and other analogous instruments provides a detailed regulation concerning primary and secondary communication of works to the public. The Berne Convention system, as recalled and confirmed in article 8 of the WCT, distinguishes between:

- on the one hand, **primary** communication to the public by wireless[2] means, i.e. initiated by the communicator (11*bis*(1)(i)); and
- on the other hand, **secondary** communication to the public, i.e.:
  - one that further transmits another communication, either by wire or by wireless means, when it is made by another organization (11*bis*(1)(ii));
  - one that is carried out by loudspeaker outside the close circle of the family and friends of the person lawfully receiving the communication (11*bis*(1)(iii)).

In the case of Dirk Renckhoff, a **primary** communication is involved. Just as the communications meant in Article 11*bis*(1), the making available right of Article 8 WCT cannot be interpreted to the effect that publication by someone on a website would confer *ipso facto* the status of secondary communications on all other subsequent communications made by other persons from another copy of the same work. There is a secondary communication only when there is a retransmission of a *communication*. In the case of Dirk Renckhoff, it was not the *communication* made by www.schwarzaufweiss that was retransmitted by Gesamtschule Waltrop. On the contrary, the school communicated the photo using a copy residing on its own site.

Since a **primary** communication is involved, it is the criterion of **article 11*bis*(1)(i)** that must be observed.. In this case, all that matters is to determine whether there is communication to the public; there is no other condition to be fulfilled. Therefore, the circumstances taken into account by the Advocate General are irrelevant, namely:

- the "incidental" nature of the work in relation to the student's presentation (67);
- the absence of an intention to widen the circle of persons able to see the photograph (68);
- the fact that Mr Renckhoff had consented to communication on the travel magazine's website (70);
- the question whether awareness of the need to obtain the photographer's consent could be required of the student and her teacher (70); and
- the fact that the transmission's intended **public** was not "**new**" or could not be

[2] Article 8 of the WIPO Treaty expressly includes communication by wire.

characterized as forming a "wider circle" (95).

As it is sufficient for a primary communication[3] to be to the "public", the Advocate General's Opinion is wrong to try and rely on the concept of a *new* public, thereby introducing in EU copyright law an additional condition which the Treaties do not lay down, which reduces considerably the protection that the Treaties seek to provide and which contradicts their objectives of offering a uniform and secure basis for international copyright.

The introduction of the new public condition conflicts with the universal principle that copyright is a right effective *erga omnes*. It follows that, in the case under consideration, the authorization granted by Renckhoff to www.schwarzaufweiss to communicate his photo does not correspond to an authorization given to Gesamtschule Waltrop. Even if the public is the same in both cases, the Berne Convention system requires that a new and separate authorization be given by the author to the third party wishing to carry out an act of primary communication. An authorization given to one person is valid only in the relationship with that person, and not with third parties.

II. Article 5(2) of the Berne Convention

Can a professional person be required, when publishing a work on the Internet, to reserve his copyright, to mention his name as the author or to warn the public that use of the work is prohibited in order to avoid appearances to the contrary? This seems to be what the Advocate General is suggesting in his Opinion (paragraphs 75, 78, 82, 85 and 104 to 106).

ALAI considers it necessary, however, to respect the fundamental principle expressed in article 5(2) of the Berne Convention, which provides that the enjoyment and the exercise of the rights shall not be subject to any formality.

III. Article 10(2) of the Berne Convention

Under article 10(2) of the Berne Convention:

"It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

Lawful use is thus confined to use by way of illustration for teaching. This criterion is adopted by Directive 2001/29 in its article 5(3)(a) and respected in the German law. In addition, both the Convention and the Directive expressly refer to national law; apart from that, the exception is

[3] For ALAI's view that other conditions such as "new public" also should not apply to secondary communications, see the Provisional Opinion of 27 March 2017, approved by ALAI's Executive Committee on 17 May 2017, on the Right of communication to the public and the Advocate General's Opinions in Filmspeler Case C-527/15 and Ziggo Case C-610/15, see p. 4 and 5 (see: http://www.alai.org/en/assets/files/resolutions/170327-opinion-filmspeler-ziggo.pdf); ALAI Report and Opinion (2015) on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet (see: http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion- 2.pdf) ; ALAI Opinion (2014) on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public (see: http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf) and ALAI Report and Opinion (2013) on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet (see: http://www.alai.org/en/assets/files/resolutions/making-available-right-report- opinion.pdf).

optional.

From the viewpoint of the Convention, the crucial question is whether communication on a website that is *accessible to all internet users* and not restricted solely to the school community can still be characterized as use *by way of illustration for teaching* and whether such use is compatible with fair practice.

Communication of a work on a website open to everyone, even if it is made by a school, doubtless exceeds the scope of a broadcast by way of illustration for teaching. Therefore, article 10(2) cannot justify it.

In its preamble, the 1996 WIPO Copyright Treaty recognizes the need to introduce new international rules in order to provide adequate solutions to the questions raised by the development of digital technology and the Internet. In particular, the preamble to the WIPO Treaty recognizes the need to maintain **a balance** between the rights of authors and the larger public interest, particularly **education**, research and access to information, as reflected in the Berne Convention.

Yet the rule in Berne article 10(2) was not modified when the new treaty was adopted. The informed reaffirmation of the international consensus in this regard is thus recent.

On the other hand, communication on a school's website with more restricted access might prove, for its part, to be perfectly compatible with the Convention's norms. ALAI considers that the cited provisions adequately enable a solution to be achieved that ensures a balance between the fundamental right of authors and the right to education enshrined in article 14(1) of the Charter.
