ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

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DRAFT[1] OPINION[2] on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market[3]

1. ALAI[4] wishes to express its views on certain aspects concerning the practical application of Article 17 of Directive 2019/790.

2. ALAI notes first of all that Article 17, paragraph 1 of Directive 2019/790 places the use of protected content by providers of online content sharing services in the orbit of the right of communication to the public or the right of making available to the public.

From the same text, it follows that a provider of online content sharing services must "therefore" obtain authorisation "from the rightholders" referred to in Article 3, paragraphs 1 and 2 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[5], for example by concluding a licensing agreement, in order to communicate or make available to the public works or other subject-matter.

ALAI recalls that the Court of Justice, in paragraphs 33 to 34 of its judgment of 16 November 2016 in Case C-301/15, Soulier/Premier Ministre, stated in that regard that "it is important to emphasise that the rights guaranteed to authors by Article 2(a) and Article 3(1) of Directive

[1] Subject to approval by the next Executive Committee of the ALAI.
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[3] *OJ* L 130, 17 May 2019, p. 92 et seq. (hereinafter: Directive 2019/790).
[4] ALAI, the International Literary and Artistic Association, is an independent learned society dedicated to studying and discussing legal issues arising in connection with the protection of the interests of creative individuals. Founded in 1878 by the French writer Victor Hugo to promote the international recognition of the legal protection of authors for their intellectual work, ALAI fulfils its purpose by fostering the wider international dissemination of works so as to enrich the heritage of humanity. This objective was initially achieved at the end of the 19th century with the adoption of the Berne Convention for the Protection of Literary and Artistic Works. Since then, ALAI continues to play a key role in the preparation of international legal instruments related to copyright and performers' rights, specifically by organizing congresses and study days dedicated to the in-depth analysis of every aspect of copyright. For more information about ALAI please visit our webpage: www.alai.org.
[5] *OJ* L 167, 22 June 2001, p. 10 et seq. (hereinafter: Directive 2001/29).

2001/29 are *preventive* in nature, in the sense that any reproduction or communication to the public of a work by a third party requires *the prior consent* of its author […] It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work."[6]

Since the second sentence of the first paragraph of Article 17 of Directive 2019/790 expressly stipulates that the provider of online content sharing services must obtain authorization from "rightholders", it is not the legislator who can create the required authorization by means of a legal license.[7]

Consequently, ALAI considers that the prior authorisation required by Article 17, paragraph 1 can be provided only by the rightholders themselves and cannot be derived from a forced authorisation resulting from a non-voluntary licence imposed by a national legislator. This also follows from the concept of the exclusive right as anchored in international copyright conventions, which clearly distinguish between exclusive rights and mere rights to obtain equitable remuneration.

3. Since the mechanism of Article 17 of Directive 2019/790 is based on the primary principle of prior authorization, a provider of online content sharing services (hereinafter: provider) will be liable for unauthorized acts of communication to the public, including making available to the public, of works and other protected subject matter. This liability is only partially mitigated by the rule in Article 17, paragraph 4, which contains a "specific liability mechanism".[8] This mechanism still obliges providers to undertake their best efforts to obtain authorization in accordance with Article 17, paragraph 4, under a), and to ensure the unavailability of works under the conditions set out in Article 17, paragraph 4, under b). Furthermore, according to Article 17, paragraph 4, under c), providers will be liable unless they demonstrate that, in any case, "they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)."[9] Thus, it is the legal system of Article 17 itself that demonstrates in a positive way that the exclusive right enjoys priority as a matter of principle. The exclusive right is the basic rule. This

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[6] See, in this sense also, judgments of 15 March 2012 in Case C-135/10, SCF/Del Corso, paragraph 75; of 31 May 2016 in Case C-117/15, Reha/GEMA, paragraph 30; of 8 September 2016 in Case C-160/15, GS Media/Sanoma, paragraph 28; of 26 April 2017 in Case C-527/15, Brein/Wullems, paragraph 25; of 14 June 2017 in Case C-610/15, Brein/Ziggo, paragraph 20; of 7 August 2018 in Case C-161/17, Nordrhein-Westfalen/Renckhoff, paragraphs 16 and 29; comp. for the rights of performers the judgment of 14 November 2019 in Case C-484/18, Spedidam v. Institut National de l'Audiovisuel, paragraph 38.

[7] In the judgment of 29 July 2019 in Case C-516/17, Spiegel/Beck, paragraph 89, the Court of Justice carefully distinguishes (in a different but sufficiently similar context) between the case of an authorisation by the rightholder himself and other cases: "Thus, it must be held that a work, or a part of a work, has already been lawfully made available to the public if it has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation."

[8] Recital (66) of Directive 2019/790.

[9] It goes without saying that the provisions of Article 17, paragraph 4, under b) and under c), read in conjunction with Article 17, paragraph 8, cannot give rise to any general monitoring obligation, thus remaining in line with Article 15, paragraph 1, of the Directive 2000/31/EC on electronic commerce, recital (47) of which reminds us that "Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature." The same recital expressly adds that this prohibition "does *not* concern monitoring obligations in a specific case".

principle is justified by the urgent interests of the rightholders. If it were to be tolerated that the work in question should remain accessible to the public until the rightholder proves the merits of his or her action, they would incur irreparable damage.

Nevertheless, without adequate counterbalance, this rule governing copyright and confirmed by Directive 2019/790 risks unduly constraining the fundamental right of freedom of information. It carries the risk that, in order to avoid liability, providers may systematically block access to works or remove them from their sites. The European legislator has given due consideration to the balance between these interests. This is why the final part of Article 17 contains two rules aimed at avoiding abuse. Firstly, Article 17, paragraph 7, aims at safeguarding the application of exceptions and limitations to copyright. Second, Article 17, paragraph 9, obliges providers to establish an expeditious and effective complaints handling and redress mechanism available to users.

4. Paragraph 7 of Article 17 of Directive 2019/790 aims at ensuring, in general, the continued availability of works or other subject matter covered by an exception or limitation. However, it places particular emphasis on the exceptions of quotation, criticism, review, caricature, parody or pastiche.[10] These exceptions, even if they have been made mandatory, do not constitute subjective rights. It is important to distinguish between, on the one hand, the level of the law which gives concrete expression to fundamental rights in the form of an author's property right and exceptions to this right in favour of users and, on the other hand, the level of fundamental rights including the fundamental freedoms of users, which must be weighed against the no less fundamental right that protects the author's intellectual property. But this balancing will have to be done within copyright law, in an adequate manner and in the same way as in the case of other exceptions and limitations, according to existing legal norms.

According to the Court of Justice, such a balancing exercise will have to be proportionate and based on an interpretation which allows a fair balance to be struck between the various fundamental rights protected by the Union's judicial framework (e.g. judgments of 29 July 2019 in cases C-516/17, Spiegel/Beck, C-469/17, Funke/BRD and C-476/17, Pelham/Hütter). If the aim is indeed to safeguard the useful effect of the exceptions and limitations thus established and to respect their purpose when they are implemented,[11] it must also be borne in mind that Directive 2001/29 is concerned with the establishment of a high level of protection for authors and the good functioning of the internal market.[12] In addition, the principle that a derogation from a general rule must be interpreted strictly must be applied.[13] Lastly, the submission of exceptions and limitations to the three-step test must be respected.[14]

5. The first sentence of Article 17, paragraph 9, of Directive 2019/790 provides that Member States shall provide for the establishment by providers of "an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of

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[10] Article 17 paragraph 7, second sentence; recital (70) of Directive 2019/790.

[11] CJEU 29 July 2019, C-516/17, Spiegel/Beck, paragraphs 36, 55; CJEU 29 July 2019, C-469/17, Funke/BRD, paragraphs 51, 71.

[12] CJEU 28 July 2019, C-516/17, Spiegel/Beck, paragraph 35; CJEU 29 July 2019, C-469/17, Funke/BRD, paragraph 50.

[13] CJEU 29 July 2019, C-516/17, Spiegel/Beck, paragraph 53; CJEU 29 July 2019, C-469/17, Funke/BRD, paragraph 69.

[14] CJEU 29 July 2019, C-516/17, Spiegel/Beck, paragraphs 37, 46; CJEU 29 July 2019, C-469/17, Funke/BRD, paragraph 52.

disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them". Furthermore, without prejudice to judicial remedies, Member States must ensure that extrajudicial and impartial redress mechanisms are available to users to claim the benefit of an exception or limitation to copyright or related rights.

ALAI believes that the expeditious and effective complaints and redress mechanism set out in paragraph 9 should operate as a corrective mechanism. Article 17, paragraph 9, refers to an expeditious and effective complaint and redress mechanism that is "available to users". It is therefore the text itself which indicates that this redress only comes into play when users have something to complain about. This can only happen once their content has been blocked or removed. This interpretation is confirmed by the second paragraph of recital (70) which refers to "effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright in relation to an upload to which access *has been disabled or that has been removed*." The use of present perfect tense in the passage marked in italics makes it clear that the mechanism in question will only come into play after a blocking or withdrawal.

In doing so, Article 17, paragraph 9, in no way derogates from the system created by paragraphs 1 and 4 of this article. While "this Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law,"[15] this reminder comes into play only once it is established that a limitation or exception actually applies. Only then must the exclusive rights on which the mechanism of paragraphs 1 and 4 is based yield to exceptions as a result of the expeditious and effective complaint handling and remedies provided for in paragraph 9. An approach that diverges from the Directive's complaint and redress mechanism (ex ante blocking; ex post redress) would moreover conflict with Article 41 of Annex 1 C of the Marrakesh Agreement dealing with the Trade-Related Aspects of Intellectual Property Rights of the Agreement (TRIPS) and Articles 1 and 3 of Directive 2004/48 on the enforcement of intellectual property rights.[16] It could, inter alia, entail unreasonable time-limits or unjustified delays in the implementation of the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights.

In a digital environment, where any message tends to spread like a virus, the preservation of the essence of copyright cannot accommodate a regime that tolerates the temporary dissemination of a work without the consent of the author. Allowing such online publication, without the copyright owner being able to immediately invoke the rights provided for in Article 3 of Directive 2001/29, recognized by Article 17, first paragraph, of Directive 2019/790, would result in a denial of the principles of copyright established by international conventions and, as the Court of Justice stated in the context of an earlier case, would "fail to have regard to the fair balance, […] which must be maintained in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest" (see the judgment of the Court of Justice of 7 August 2018 in Case C-161/17, Nordrhein-Westfalen/Renckhoff, paragraph 41).

ALAI further observes that this corrective mechanism can protect users from themselves,

[15] Directive 2019/790, Article 17, paragraph 9, third subparagraph.
[16] *OJ* L 157, 30 April 2004, p. 45 et seq.

avoiding situations in which private individuals could be held responsible for their reckless actions.

6. The system in Article 17 of Directive 2019/790 also contains certain elements that will reduce the need to use the expeditious and effective complaints and redress mechanism provided for in paragraph 9.

It will be in the interest of the rightholders to contribute to the proper functioning of the regime from Article 17, paragraph 4, under b), and 17, paragraph 9, in a manner that is acceptable to all interested parties, as well as to the general public. Rightholders will be able to do so by voluntarily refraining from using Article 17, paragraph 4, under b), in cases where the objective characteristics of certain broadcast content indicate with a high degree of probability a free use under the second subparagraph of Article 17, paragraph 7.

It is clear, however, that such desirable solutions will have to be developed, in accordance with the provisions laid down for this purpose in Article 17, through cooperation between providers and rightholders, taking into account the legitimate interests of users. On this point, technological solutions based on computer software or artificial intelligence are also conceivable. The dialogue between interested parties and the guidelines issued by the Commission provided for in Article 17, paragraph 10, and recital (71)[17] will contribute to such an outcome.

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[17] According to recital (71) of Directive 2019/790, "As soon as possible after the date of entry into force of this Directive, the Commission, in cooperation with Member States, should organise dialogues between stakeholders to ensure uniform application of the obligation of cooperation between online content-sharing service providers and rightholders and to establish best practices with regard to the appropriate industry standards of professional diligence. For that purpose, the Commission should consult relevant stakeholders, including users' organisations and technology providers, and take into account developments on the market. Users' organisations should also have access to information on actions carried out by online content-sharing service providers to manage content online."