



HIGH COUNCIL FOR LITERARY AND ARTISTIC PROPERTY

MISSION TO LINK DIRECTIVES 2000/31 AND 2001/29

- Report and Proposals -

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3 November 2015

In a mission letter dated 3 April 2015, the High Council for Literary and Artistic Property (CSPLA) expressed its wish for research to be carried out on *"proposing changes to current European Union legal provisions enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content"*.

The President of the mission will be Pierre Sirinelli, a Professor at the Université Paris-I (Panthéon-Sorbonne), while the Vice-President roles have been entrusted to Josée-Anne Benazeraf, a lawyer at the Paris Bar and Alexandra Bensamoun, Senior Lecturer HDR [accreditation to supervise research] at Université Paris-Sud.

Modus operandi

The mission began by setting up round tables in order to gauge the opinions of various professionals within the sector, both from the CSPLA and elsewhere. It continued by working on the proposals put forward by some of the contributors and has itself outlined some solutions. The draft legislation contained in this report is the result of these various discussions.

In addition the work of the mission – which met twice a week for several months – took many different forms including hearings, bilateral discussions, consultation meetings by sector or stakeholder category, cross-analysis of legislation and plenary meetings.

All sectors were heard, including the technical service providers, although some technical service provider representatives opted not to respond to the mission's invitation.

Work was performed alongside the work conducted in Brussels by the Commission and the Parliament, which recommended that the liability regime for some information society service providers¹ ought to be clarified in order to prevent these providers from capturing the value of the works which fuel their economy².

This mission's work has given rise to numerous discussions in this area with European institution representatives.

1 *The harmonisation of certain aspects of copyright and related rights*, a European Parliament Resolution of 9 July 2015, point 45, suggests *"a review of the liability of service providers and intermediaries in order to clarify their legal status and liability with regard to copyright (...)"; A Digital Single Market Strategy for Europe*, European Commission Communication of 6 May 2015, p. 8: *"In addition the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given in particular the growing involvement of these intermediaries in content distribution. "*

2 *The harmonisation of certain aspects of copyright and related rights*, European Parliament Resolution as specified above, point O: *"whereas creative works are one of the main sources nourishing the digital economy and information technology players such as search engines, social media and platforms for user-generated content, but virtually all the value generated by creative works is transferred to those digital intermediaries, which refuse to pay authors or negotiate extremely low levels of remuneration. "*

Questions

In a nutshell, the mission has been asked to resolve the following questions:

- Do the regimes implemented by Articles 12 to 15 of the E-Commerce Directive of 8 June 2000 (Directive 2000/31/EC) truly provide a full understanding of the activities of certain service providers (Web 2.0 in particular) who were barely in existence when this legislation was adopted?
- If not, what solutions could be implemented in order to prevent some of the consequences of these statutes from being applied in the field of literary and artistic property?

In order to bring together initial impressions on the topic together with outlines of the answers to these two questions, the mission felt it necessary to ask each participant a series of simple questions:

- 1 - Must we intervene in order to change the solutions adopted by certain courts in the absence of clear legislation providing a harmonised understanding of the new activities conducted by certain service providers?
- 2 - If so, which activities need to be understood in order to be able to propose new solutions?
- 3 - What form should this legislative change take?
- 4 - What consequences should it have?

Positions expressed

The first question has been answered in the affirmative. This affirmative response would have been unanimous but for the caution of certain technical service providers.

The second question also gave rise to some main areas for consideration:

- A large majority of the respondents deemed that it would **not be appropriate to reform the legal regime for activities related to mere conduit, internet service provision or caching.**
- Moreover, there were no requests to revise the legal regime for hosting providers conducting activities which fully meet the definition proposed by Directive 2000/31 in the year 2000. This denotes a 'transparent' technical service provider which hosts content and remains **out of direct and intentional contact with the public.**
- However, **almost all of the contributors agreed that a clarification ought to be added to indicate that the regime proposed by Article 14 of the 8 June 2000 Directive should in no case be applied to what many professionals call 'false hosting providers',** in other words, information society service providers whose role extends beyond that of a technical service provider as defined by the Directive. This includes certain **Web 2.0 platforms** (particularly **contribution-based or community sites**), **certain social networks**, and certain **services** that may be used by certain **search engines**. It should however be noted that although opinion was unanimously in favour of

intervention for the former, more varied opinions were expressed on the latter. The proposed solutions were therefore considered in the light of the former parties, and are therefore not fully applicable to the other categories. Our thinking does not cover conduits, ISPs, cache providers or personal file storage services.

Basis of requests for change

The reasons put forward for the development of the solutions or clarification of the inadequacy of the manner in which the solutions set out by Article 14 of Directive 2000/31 have been applied for the above activities tend to be technical or economic rather than legal. Although all parties noted that the above activities do not match the assumptions made by the European authorities in 2000 when the legislation was drafted, it was also highlighted that **better sharing of value** may be gained through a clarification of the non-applicability of the European procedure to these activities.

This point does not require a long explanation:

1 - Claiming that they are covered by the conditional exemption from liability provided by Article 14 enables the above service providers to make considerable profits due to the (unauthorised) existence of copyright protected works or items covered by related rights on their platforms. These services (whether charged or free-of-charge) generate considerable advertising revenues due to the existence of such works, yet consider that they do not need to seek authorisation and therefore redistribute a share of the profits made to the extent sought by rights holders. This is due to the fact that:

1.1. Either the courts wrongly apply this regime to information society service providers.

It should be noted in this respect that in its *Google* judgments of 23 March 2010³, the CJEU ruled that Article 14 of the E-Commerce Directive could be applied to a service provider that *"has not played an active role of such a kind as to give it knowledge of, or control over, the data stored"*.

This condition, which is based on recital 42 of the E-Commerce Directive, is however a foreign concept to hosting providers. In addition it seems to have been distorted by the aforementioned assessment by the Court of Justice.

First and foremost, it is clear when reading recital 42 that it does not apply to hosting providers (which are covered by recital 46), nor to the search services in question in the case ruled on by the Court, but rather to conduits, ISPs and cache activities. The activity covered by the aforementioned recital 42 is indeed *"limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored"*.

Therefore, the condition (as expressed by the final sentence of the recital) under which one is covered by the exemption from liability based on a *"mere technical, automatic and passive nature"*, applies to Articles 12 and 13 of the Directive, but not to Article 14.

³ Case C-236/08 to C-238/08; also see CJEU, 12 July 2011, *L'Oréal et al. v. eBay*, case C-324/09; CJEU, 11 September 2014, *Sotiris Pappasavvas*, case C-291/13.

Please also note that the vocabulary used by the Directive differs according to the service provider, i.e. "exemptions from liability" for conduits, ISPS and caches (recital 42), and "limitation of liability" for hosting providers (recital 46).

Secondly, the above-mentioned statement by the CJEU does not match recital 42, under which the *"mere technical, automatic and passive nature [...] implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored"*.

In recital 42, the Directive states that in order to occupy a passive role, the service provider must have neither knowledge of nor control over the information. But this does not mean that the service provider is necessarily passive just because it does not have knowledge and/or control of the information, or likewise that the service provider must have knowledge and control of the information in order to play an active role (as stated by the CJEU).

In other words, the condition set out by recital 42 is necessary but insufficient.

By turning the recital around, the CJEU has substantially changed its meaning, as its interpretation would mean that 'false hosting providers' would never actually be active, given that when users post content, service providers generally do not have knowledge of or always control over said content.

1.2. Or, rights holders refrain from enforcing their literary and artistic property rights on providers due to the cost of proceedings and the difficulty of implementing their exploitation monopoly in such circumstances.

⇒ It is therefore clear that the balance of power is not at all on the side of the rights holders, and that the economic and technical power as well as the high-profile nature of some of the providers makes it even more difficult to hold true negotiations, or even proper discussions between the two sides.

2 - The reasoning provided by rights holders is varied.

2.1. Some simply comment that the situation ought to be resolved purely for reasons of legal integrity, and that the application of Article 14 to the above activities is the result of twisted logic, a misunderstanding of circumstances or a manipulation of the legislation.

2.2. Others simply highlight the fact that the rejection of Article 14's conditional exemption system would enable better negotiation of the remuneration which is legally payable in order to provide access to copyright works or material. In other words, the objective of rights holders is not to prohibit their works from being posted online, but rather to ensure that they are in a position in which they can obtain improved compensation and sharing of value.

2.3. Other rights holders are less prepared to negotiate with service providers, and intend to recover the full scope of their copyright and related rights in order to ensure that they can

continue with their own strategies without hindrance, and in order to be able to implement (at least initially) their own individual policies to make works available over networks.

To conclude, it is clear that there is a high demand for intervention in order to change current case law solutions, which are deemed to be both unfounded and unjust.

There are therefore two questions to consider:

1 - Which type of intervention should be carried out, and which means should be used (I)?

2 - What new solutions are sought (II)?

I - TYPES OF INTERVENTION

First of all, one needs to look at the means to be used in order to develop a solution, and which reform instrument ought to be used.

Intervention at a European level

There are several possible routes, all of which involve a **European-level solution**. Of course, it would be easily possible to add numerous progressive changes to fill the voids of European Member State legislation, enabling national legislators to make their own clarifications or adjustments. Yet due to case law developments in many Member States, it was unanimously decided that it would be wiser to act at directive level in order to obtain a standard solution which would apply in all 28 Member States.

The question is whether this should be done by way of official drafted legislation or through a process of interpretation?

Preference for an official intervention setting out a clear standard

In a document⁴ sent to the French Ministry of Culture (*Ministère de la Culture*), the audiovisual production sector initially expressed its preference for a **purely interpretation-based route**. Based on the statements that the existing legislation has advocated (recitals 40⁵ and 48⁶ of Directive 2000/31/CE), for the past 15 years, the existence of a **duty to act** for technical intermediaries in order to be able to block access to illegal content, some audiovisual professionals considered that *“the best way to address all of the areas that require improvement is to use a cross-disciplinary process of interpretation, the purpose of which would be to provide clarification to the concepts included in several European legislative texts on the subject of making works available online (2000/31/EC, 2001/29/EC and 2004/48/EC in particular). This could involve an interpretative communication by the European Commission”*.

This option failed to convince a substantial majority of the contributors, who wish to see more clearly defined and effective action, so that the interpretation route could be used as a fallback solution should the adoption of specific legislation be unlikely to be implemented.

⁴ *Propositions pour une meilleure efficacité des droits* (Proposals to ensure that rights are more effective), 13 July 2015.

⁵ *“Service providers have a **duty to act**, under certain circumstances, with a view to preventing or stopping illegal activities. This Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information”*.

⁶ *“This Directive does not affect the possibility for Member States of **requiring** service providers, who host information provided by recipients of their service, **to apply duties of care, which can reasonably be expected from them** and which are specified by national law, in order to detect and prevent certain types of illegal activities.”*

The **route of an official intervention setting out a clear standard** is justified both on a *positive* basis by the need to be able to rely on a provision which sets out the solution, in certain cases, of rejecting Article 14 of Directive 2000/31, and on a *negative* basis by the fear of the interpretation route being insufficient.

One of the fears expressed, apart from the risk of European judges retaining the disputed approach, lies in the fact that the interpretation route proposed to resolve the issue at stake here would involve clarifying the concept of a hosting provider as defined by Article 14 of the E-Commerce Directive. In other words, it would therefore relate to all types of infringements which could be committed by a service with hosting provider status, and would not specifically deal with content protected by copyright and related rights.

Moreover, many of the participants believed that this approach may be counterproductive, as it would not provide a focus on the copyright-specific central issue of the **sharing of value**. They all however considered it essential to ensure that the issue of 'false hosting providers' remains at the heart of the issue of copyright and related rights, therefore justifying a change in legislation and the defining of the regime's boundaries.

This approach of enacting a specific standard does not only seem to be the most secure and targeted, but it also appears to offer more potential, in that it grants the option (where required) of adding a number of stipulations, including in cases in which it would be insufficient to simply reject Article 14 for the service providers in question, but would also potentially be necessary to better define the applicable legal regime in such a scenario.

Of course, everyone is aware that the forthcoming solution is not necessarily a new concept, as the vast majority of contributors considered the case law solutions applying Article 14 to the above-mentioned scenarios to be flawed. Yet putting pen to paper offers certain advantages, such as being able to make a clear and simple statement of the most timely solution, taking into account the balance sought by the joint implementation of Directives 2000/31 and 2001/29, and providing a solution which is acceptable both to the political authorities and to professionals within the sector.

It remained only to decide which Directive the above-mentioned solution should be inserted into.

Intervention in copyright legislation

Some requests were made to change the actual wording of the **E-Commerce Directive**. Others expressed a preference for the legislative intervention to be restricted to clarifications in a **legislative text covering only to copyright and related rights**.

The decision between these two options was quickly made. Although a wider amendment may have seemed more apt to some, it soon became apparent that such an amendment would come up against strong objections and problems, and therefore a **limited intervention** was quickly deemed to be more realistic and apt in this case. Furthermore, the **specific nature of literary and artistic**

property rights provides a solid basis for the rejection of Article 14 of the E-Commerce Directive when copyright and related rights are applied by certain service providers.

The vast majority of the contributors therefore ideally wanted the forthcoming standard to be inserted into the body of Directive 2001/29, should the latter be reopened. This report favours the latter route. Yet technically, the proposed provisions could be inserted into any copyright legislation.

Based on these considerations, what solution ought to be recommended?

II – THE CONTENT OF THE NEW LEGISLATION

Once the vehicle has been chosen, the boundaries of the new rule must be set out (A) and then a drafting proposal must be completed (B), followed by an explanation of the proposal (C).

A – The boundaries of the proposal

This consists of planning the scope of the legislation and its intended position.

Drafters are likely to have the option of several different constructions.

One might decide to create a whole **new status** (definition, regime etc.), but this option did not win the support of the contributors for two main reasons:

- Firstly, it has the disadvantage of having to propose new solutions, with complex boundaries to be set out, which themselves could quickly become obsolete due to future technical innovation and economic and social change.
- Secondly, it leads one to believe that new standards need to be drafted, where in fact it is simply a case of rejecting the consequences of case law which has failed to correctly interpret the pre-existing legislation. Such rejection is easily justified by the need for clear content due to the specific nature of copyright.

It was therefore deemed that this option ought to be rejected as long as it had not been proven that the renewed enforcement of copyright through the rejection of Article 14 was likely to prompt any problematic imbalances.

The route of shifting copyright and related rights back towards ordinary law was therefore deemed to be more reasonable, especially as the option of (potentially and in certain cases) accompanying it by a simple duty of collaboration between rights holders and service providers seemed likely to maintain a balance between potentially opposing interests.

Based on these considerations, where should the new rule be inserted within **Directive 2001/29**?

- Does a new Article need to be created (9a)?
- Does the solution need to be written into an existing provision (Article 9)?
- Do several provisions need to be changed at the same time (Article 9 and Article 3)?

Option one has been chosen for the sake of simplicity and in order to avoid any adverse effects.

B -Drafting proposals

Insertion of a new recital 16a:

1. This Directive and the Directive on electronic commerce have been prepared in such a way as not to contradict one another, particularly insofar as the limitation of liability set out by Article 14 of the second Directive has been devised exclusively for hosting providers offering a mere technical service for storage of information. And yet their respective objectives, namely both the wish to provide a high level of protection for copyright and related rights, and that of ensuring immunity in order to allow hosting providers to develop their businesses, have been shown to be contradictory at the expense of rightholders when the aforementioned limitation of liability has begun to be applied to information society service providers whose intervention, beyond or besides the mere storage of information, consists of giving access to the public to copyright works and/or subject-matter. Such evolution in the application of the Directive on electronic commerce inhibits a high level of protection for copyright and related rights, and prevents rightholders from exercising the rights granted to them by this Directive.

2. It is therefore necessary to stipulate that these information society service providers whose intervention consists of giving access to the public to copyright works and/or subject-matter do not benefit from the limitation of liability set out for a different purpose by Article 14 of the Directive on electronic commerce.

In this respect, it is of no consequence whether the infrastructure or features used by these service providers to give such access to the public to copyright works and/or subject-matter are automated, as this does not provide an exemption from the implementation of the rights protected hereunder.

The provision of an access to the public to copyright works and/or subject-matter, which should not be confused with the mere provision of physical facilities as set out by recital 27 of this Directive, constitutes an act of communication to the public and/or making available to the public as defined by Article 3. This act is performed by the service provider giving such access, under its own liability. If the copyright work or subject-matter is sent to said service provider by a user of its services in order that an access to it is given to the public, the service provider and the aforementioned user together perform the act of communication to the public and/or making available to the public, and therefore hold their joint and several liability.

As they, alone or with the participation of users of their services, are implementing the rights set out by Article 3 and, where relevant, the right set out by Article 2, the information society service providers who give access to the public to copyright works and/or subject-matter must obtain permission from the relevant rightholders.

Such permission covers acts performed by users of their services in order that an access to copyright works and/or subject-matter is given to the public, as long as these users are not acting in a professional capacity.

Insertion of a recital 24a:

In accordance with the provisions of Article 11bis of the Berne Convention, these rights must apply whenever the copyright work or subject-matter is subject to an act of communication to the public and/or making available to the public by a third party to the initial act of communication to the public and/or making available to the public, whether this third party uses the same technical method or a different technical method to that used for the initial act.

Insertion of a new Article 9a:

Article 9a:

Linking of Directives 2000/31 and 2001/29

Without prejudice to Articles 12 and 13 of the Directive on electronic commerce, information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation of liability set out by Article 14 of said Directive.

These service providers must obtain permission from the relevant rightholders as they, either alone or with the participation of users of their services, are implementing the rights set out by Articles 2 and 3.

Such permission covers acts performed by users of their services when they send the copyright works and/or subject-matter to the aforementioned service providers in order to allow the access set out by sub-paragraph one, as long as these users are not acting in a professional capacity.

C – Notes

1. The new provision states clearly that the activities performed by certain service providers do not match the definition provided by Article 14 of the *Directive on electronic commerce* (sub-paragraph one).

These service providers, whether alone or with the participation of users of their services, perform acts which apply copyright (sub-paragraph two), which does not necessarily need to be demonstrated within the body of the legislation. A technical and legal analysis of the performed acts provides sufficient proof, for example after a post has been made on a Web 2.0 content contribution site.

Such an analysis shows, however, that a single act of making available to the public can be attributed to two people or entities (the uploading web user and the website manager), while sub-paragraph three allows for the legitimacy of the two acts being technically performed simultaneously, as long as the uploading web user is not acting in a professional capacity.

2. The mission proposes that the service user's action of posting the protected content and that of the technical posting online by the information society service provider should be deemed to be a **single act** in the sense of copyright. Indeed, although a piecemeal understanding is possible in

intellectual terms, it would not be logical here as autonomous actions alone have no interest as such⁷. The service provider is dependent on the user who provides it with the content, and the web user must use the service of the provider which, through its intervention, grants access to the work. There is only one final result.

This **access criterion** is essential in order to constitute the act of making available. Indeed, the service providers in question enable the public to access protected content. Without their intervention, the public would not have access to this content. Their role is therefore 'indisputable'⁸. The concept of access is moreover central to Article 3.1 of Directive 2001/29: "(...) including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them." Thus, the service provider's intervention to give access to the work prevents Article 14 of Directive 2000/31 from being applied, insofar as the activity in question cannot be summarised as mere storage.

Furthermore, the fact that the intervention has been made using automated tools has no bearing on the qualification of the act in question. Indeed, even a technical act does not prevent copyright and related rights from being applied (see for example the transient or incidental copy which required an exception).

The wording used in sub-paragraph one may seem broad, but this shouldn't be a cause for concern as it in fact only pertains to those parties that claim to be covered by Article 14, even though they are not simply storing but also giving access to the protected content. ISPs and conduits continue to be covered by the exemptions set out by Articles 12 and 13 (mere conduit and caching), as specified by the chosen provisions.

Furthermore and in order to reinforce legal certainty, it is proposed that permission granted by rights holders to service providers will ensure the legitimacy of the act in question as a whole, as long as the service users are not acting in a professional capacity. The latter would therefore no longer be threatened with legal action.

3. The reference to the Berne Convention made in recital 24a, is crucial at a time at which the Court of Justice of the European Union is interpreting legislation (particularly the right of communication to the public) in a manner which seems to be far removed from a strict legal orthodox approach. This critical change in approach is demonstrated by many of the Court's global case law specialists, particularly but not exclusively in the area of hyperlinks⁹. Two robustly-argued resolutions¹⁰ adopted by the International Literary and Artistic Association (ALAI) are of relevance here. It is of note that this 'learned society' – which was at the source of the Berne Convention – has criticized the Court of Justice for deviating from the meaning that ought to be taken from the international legislation by adding a legal assumption of the requirement of a 'new public' as a basis for the enforceability of copyright.

7 Comp. CJEU, 13 October 2011, *Airfield*, case C-431/09 and C-432/09.

8 See, on these issues, not. CJEU, 7 December 2006, *SGAE*, case C-306/05, para. 42; CJEU, 13 February 2014, *Svensson*, case C-466/12, para. 18.

9 See CJEU, 13 February 2014, case C - 466/12, *Nils Svensson et al. vs. Retriever Sverige AB* and C - 348/13, 21 October 2014, *BestWater International GmbH vs. Mebes et al.*

10 <http://www.alai.org/assets/files/resolutions/2014-avis-public-nouveau.pdf> and <http://www.alai.org/assets/files/resolutions/201503-rapport-et-avis-hyperliens-3.pdf>

This is an important point, given that some service providers may in the future decide to provide link databases rather than storing files of copyright works.

4. So what will be the consequences of the service providers described by the proposed legislation no longer being covered by Article 14 of Directive 2000/31?

The first logical effect, as mentioned earlier, will be **the enforceability of copyright and related rights** on these service providers where they have made copyright works or material accessible. The issue raised is therefore that of a **harmonised and balanced application** of copyright and related rights **in order to enable fair sharing of value without hindering the launch of new services that might be offered to the public.**

There are therefore two potential areas for concern.

The first is linked to the issue of **the implementation of the new rules over time**, given that, as far as many are concerned, the solutions in question should have been applied as soon as Directive 2000/31 was adopted. It may be wise to consider the circumstances of service providers which have rightly or wrongly relied on the solutions provided by case law, by setting out a time period for application of the procedure, with a view to enabling service providers to adapt to it and find solutions in consultation with rights holders.

The second area for concern is linked to the setting up of a system to prevent the '**backlash**' of copyright and related rights which might be considered **overly drastic**, in a scenario in which certain rights holders refuse to grant user licences to service providers. The exercising of the right to prohibit may in this case be accompanied by **a duty of collaboration between the aforementioned rights holders and service providers.**

This duty of collaboration is likely to occupy **various forms** in the light of the **state of the art technology** and the **virtuous uses** likely to be developed in this domain. One might decide to set up the negotiation of charters, standard contracts or fingerprint recognition in order to screen works and prevent acts of infringement, potentially from the outset.

This approach forms part of a move to **create an environment of participation and respect** for the various interests represented. It is not a question of forcing consent, but rather of creating a **virtuous circle and above all a positive spiral enabling the development of new markets to benefit all.**

Moreover, this forms part of a greater movement which is already beginning to take hold, and which has led some service providers to enter into discussions with rights holders, as well as being part of the extension of initiatives that some advertising professionals have agreed to in order to clean up the sector and remove the economic dominance of those providers offering works unlawfully by attempting to position themselves out of reach of intellectual property rights.

In addition, it is clear that the generalisation of virtuous systems will benefit not only rights holders but also those service providers that are very keen to develop new lawful methods of distributing intellectual works. The latter are however apprehensive of being forced into a situation of 'unfair competition' with those that do not, for the time being, share these concerns, and prefer to maximise their profits by using illegal set-ups rather than considering ways of improving the sharing of value and complying with intellectual property rights.

The adoption of a specific legislative text would provide the necessary boost in order to trigger and maintain a virtuous spiral. It would offer rights holders and service providers a 'win-win' situation and provide a basis for the development of new consumer services.

In the light of the sheer diversity of circumstances to be taken into account, the detail of each party's duties and rights is of course a sensitive issue, and therefore the reference to the general notions of 'cooperation' and 'collaboration' would appear to be sufficient as a starting point and for cases in which they are necessary.