ETNO blogpost – achieving improvements on Copyright legislation without hampering the innovation in the Digital Single Market

This autumn, after a dramatic vote in the European Parliament that sparked worldwide debate, the Copyright Directive will enter the final stage of negotiation. We spoke with Caterina Bortolini, Chairwoman of the ETNO working group on the Digital Single Market, which gathers experts on audiovisual services, media and content regulation from Europe's leading telecom operators.

Why is the Copyright Directive relevant to telecom providers?

Telecom providers believe in the importance of the creative content industries and in the underlying principle that copyright should be upheld and protected. We have a special position in the digital value chain being both intermediaries, mainly as Internet Service Providers (ISP), as well as producers and distributors of copyrighted audio-visual material. Our main aim is to act in a framework that strikes the right balance between the need to guarantee a legally sound online environment, the development of innovative services and the respect of fundamental rights. It is important to find proportionate measures to a targeted problem.

What is your key concern and how should it be addressed?

Ensuring legal certainty and a fair collaboration amongst stakeholders, each according to their role, is key. This is especially true with regard to Article 13 of the Directive, which is meant to bridge a perceived "value gap" in the market in terms of lost revenues for right-holders when their content is spread over certain online platforms. As a focussed sector-specific intervention, it is critical that Article 13 strikes a fair and proportionate balance between the interests of all affected parties and that its scope is duly -and strictly- limited to avoid risking a detrimental effect on the larger digital economy.

If we go back to the initial Commission proposal, it intended to address those service providers that are involved actively and directly in the distribution of content uploaded by their users to the wider public. There is a need to consider the different roles of different actors as the value chain for the online distribution of creative content is complex. We therefore welcomed that the scope of the proposed measures was specifically targeted to the so-called 'online content sharing service providers' (OCSSP). This reasonably excludes those services that do not distribute videos, music, images and other content to the general public in the open and borderless internet, like internet access providers and providers of private and professional cloud computing solutions.

Another key concern is the stipulation that an OCSSP commit an act of "Communication to the Public" when they distribute user-generated material. This is a complex legal term, which has already been subject to several preliminary ruling requests referred to the European Court of Justice. It should therefore be up to the continued interpretation by Courts and not carved into legislation that would freeze a concept that may quickly become obsolete.

The proposal has been criticised for interfering with one of the pillars of the digital economy, the eCommerce Directive (2000/31/EC). Do you think there are any problems in the relation between the Copyright Directive and the eCommerce Directive?

Any new proposal by the Commission should be compatible with the basic and fundamental principles that have positively grounded the development of the sector. Here, we see major issues with the proposal regarding the measures proposed in Article 13. The liability regime for online intermediaries established by the eCommerce Directive is at the core of the continued provision of innovative digital economy services. It is therefore important that the Copyright Directive does not indirectly change this framework provision that remains a valid and solid tool for the development of the whole sector.

Another part of Article 13 that has gained a lot of attention are the so-called filtering technologies. What are your views here?

If read in isolation in its current form, Article 13 could arguably be interpreted as imposing an absolute, outcome-based obligation on the OCSSP to take measures that must lead to the non-availability of all infringing works on their platforms – even if the platform has not been specifically notified at least by right holders (if not by the competent authority, as is the case in some member states). Such an interpretation would contradict Article 15 of the eCommerce Directive (no general obligation for a provider to monitor the content hosted by its service) because it effectively imposes a general obligation on the OCSSP to monitor and detect copyright-infringing works. It would also be impossible to comply with, since no OCSSP could ensure a 100% success rate in removing infringing works using currently available technical measures.

How do you see the way forward and how to achieve a proportionate balance between different interests?

It is important to achieve improvements on legal certainty and further specify the scope of Article 13 of the proposal. Some provisions should be reconsidered with regards to the potential harmful effects they can have on the broader digital economy. Finally, this is a complex debate with many interests. The institutions should take their time in making sure the Directive does not interfere with fundamental provisions in legislation that is already in place. This might further contribute to legal uncertainty and negatively impact innovation in Europe.