

ETNO response to the European Commission public consultation on the evaluation and modernisation of the legal framework for the enforcement of IPRs: intermediaries



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ETNO's first considerations

ETNO follows with great attention the different policy and regulatory initiatives, taken at EU, national and international level, in relation to the online market and in particular the discussions related to the intermediaries and their role in tackling the violation of IPRs. Specifically, ETNO as an individual association and also in alliance with other associations, actively contributed to the discussions on the revision of the IPRED held since 2010.

ETNO welcomes the Digital Single Market Strategy of May 2015 and the Single Market Strategy of October 2015, where the Commission announced the modernisation of the enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach). In this direction, the Copyright Communication of December 2015 also announced its intention to work with all stakeholders on the definition of 'follow the money' mechanisms, based on a self-regulatory approach, with the objective of reaching agreements by spring 2016. It said that those codes of conduct at EU level could be backed by legislation, if required, to ensure their full effectiveness.

Accordingly, on 14 March 2016, the Commission held a Stakeholders' general meeting on online advertising and IPR, bringing all the interested parties together (the advertising industry, intermediaries, content protection sector, online media, right owners, civil society, consumer organisations, brands and advertisers). The stakeholders discussed the possibility of establishing a voluntary agreement at EU level in order to avoid the misplacement of advertising on IP-infringing websites, thereby restricting the flow of revenue to such sites while safeguarding the reputation of the advertisers and the integrity of the advertising industry"¹.

¹ http://ec.europa.eu/growth/industry/intellectual-property/enforcement/index_en.htm

In this context, the current EU Commission consultation on the evaluation and modernisation of the legal framework is an important opportunity to highlight some important aspects.

ETNO welcomes the Commission “follow-the money approach” and related initiatives, which allow to tackle commercial-scale infringements, by targeting specifically those players that seize significant economic benefits from the IPR violations.

As a preliminary remark, we note that the different approaches on intermediaries adopted in the different ongoing consultations, discussions and legislative proposals (such as the current consultation, the one on platforms, the e-commerce directive, the copyright directive, the IPRED, etc.), do not seem to be aligned. This creates a lot of uncertainty on shaping the right legal and regulatory framework for the global digital environment. Intermediaries cover a wide range of activities of different natures. A definition would be unlikely able to cover all market realities and be future-proof, as the dynamic market could render it obsolete and irrelevant, generating legal uncertainties for players on the market. Should the definition of intermediaries remain specific for the purpose of each different consultation (and therefore, within each subsequent legislative or regulatory measure), we would run the risk of having duplication and overlapping of applicable rules. As a consequence, ETNO does not believe that IPRED should specify the definition of intermediaries.

In relation to the different categories of intermediaries mentioned in the current consultation, ETNO, as a representative body of a number of different operators playing different roles, is not in the position to provide a specific reply. Instead, we take this opportunity to bring to the attention of the European Commission ETNO’s position on the role of intermediaries in IPR enforcement, addressed in Section D. of the questionnaire on Issues outside the scope of the current legal framework.

- IPR protection is fundamental to guarantee a fair remuneration of right holders and, in a knowledge-based economy, to guarantee innovation. Measures to protect (online) intellectual property must be flexible and should not stifle innovation.
- In the digital environment it is important to get the correct balance of (legitimate) interests, particularly of the *three main players: creators, service and content providers and consumers*.
- The IPRED played and continues to play a crucial role in providing Europe’s right holders with a high level of intellectual property rights protection. The IPRED is based upon principles that remain valid today and that should be maintained.
- ETNO is not in favour of moving towards a revision of the IPRED, with an unclear alteration of the existing legislative framework for enforcement applicable to ISPs. A potential revision of the Directive should in any case not increase regulation, fragmentation and complexity.

- Any future eventual revisions must be coherent with the current EU framework in place on copyright enforcement, namely the Copyright directive and the ISP liability regime regulated by the e-commerce directive. It is also crucial to recognise that counterfeiting and online IP infringements are different in nature and size, and require different approaches.
- Any new legislative proposal should meet the better regulation standards and be objectively necessary and proportionate to the objective. Global and non-contested figures about the dimension of illegal activities over the digital networks and the subsequent impact on different industries should be provided.
- Enforcement of intellectual property rights should not be seen as the sole solution for illegal downloading by itself. A more holistic view is necessary, focusing on how to increase offers and consumption of legal content and not just on facilitating current infringement claims by right holders (this aspect has also been recognised by the Expert Group).
- Measures established and applied in accordance with the IPRED must be viable for all parties concerned and must be proportionate also to the gravity of infringement. They must also respect the fundamental rights to a presumption of innocence, the right to a fair trial, the right to privacy, the right to confidentiality of communications and the right to conduct a business
- The IPRED provides the appropriate procedural tools to the right holders, allowing them to protect their rights in the framework of an established court case, in front of the competent judicial body, which applies the necessary safeguards to all parties involved within a legal procedural framework. Telco operators cannot replace the courts in their role of determining the illegality of a conduct or act. They do not have neither the capacity nor the tools to provide such an assessment. Such a regime would expose them to an enormous risk and an unacceptable increase of liability. It is therefore of the utmost importance to maintain the fundamental role of the competent authorities in the process.
- The IPRED links its provisions to the notion of commercial scale. The maintenance of this concept is of the utmost importance in order to maintain a balanced, reasonable and effective framework.
- Concerning the balance between different fundamental rights, the CJEU gives important indications in well known cases (Promusicae, Tele2 and Scarlet v. Sabam), asking Member States and their respective authorities to take measures that, while balancing all rights involved, should respect the principle of proportionality. The CJEU

decisions imply also that ISPs cannot assume the responsibility of balancing rights and becoming controllers of the Internet.

- Concerning the right of information, it is important to underline that a request for information from electronic communications operators relating to the identity of a user shall, due to the right to privacy of users, only be provided to right holders after a judicial authority or a court order. Such a decision shall only be issued if the right holder has presented relevant evidence that an infringement has been committed from the IP-address in question.
- Concerning injunctions and the use of technical measures, some important decisions of the Court of Justice clarified their scope, recognising that filtering techniques known today are not effective because they can easily be circumvented. In addition, the use of blocking techniques to filter content in the framework of civil claims needs to be carefully examined because it raises meaningful concerns under the data protection rules. Similarly, the protection of fundamental rights, in particular the freedom of expression, calls for a cautious approach.
- In general, it is crucial to make a distinction between the roles of the different players in the value chain: some intermediaries play a “mere conduit passive role” and are thus exempted from liability in particular for copyright infringement; e.g. network access service providers and cloud hosting providers. The current liability regime is still fit for purpose in these cases. By contrast, other intermediaries go beyond the technical transmission of content, by taking editorial responsibility, prioritising content, using advertising or promoting business models to access illegal content. These cases fall outside the scope of the current liability regime, therefore their liability should be determined through sound application of European rules and guidelines. A clarification in this regard at European level would be useful here.
- In conclusion, ETNO welcomes the consideration of a stable, comprehensive framework for IPR that is fit for the digital era and new emerging business models. The current patchwork of national online markets frustrates the objectives of the Single Market and the creation of an online copyright licensing framework, which would, in turn, help to stimulate legal offers of goods and services. For ETNO, rather than reviewing the IPRED, the EC should promote a more coherent and global approach aimed at harmonising the implementation of the existing regulation and providing certainty for all players. This would encourage innovation and ensure a balanced framework that will also ensure the necessary protection of IPR.