Committed to Europe

Copyright in the Digital Market

The EC proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Market – Orange views

As an Internet access provider as well as a distributor of audiovisual services and a buyer of licensing rights, Orange welcomes the modernization of the EU framework and a balanced approach towards intellectual property and freedom of communication. Ensuring a well-functioning marketplace for audiovisual services in the future is without doubt a desirable goal for European creators and services providers. This would also allow promoting European creation and cultural industries.

On the topic of intellectual property enforcement, Orange supports the fight against commercial piracy, for instance through the "follow the money" approach, which has proved its worth. This approach is compatible with the limited liability regime applying to Internet intermediaries, which is fundamental to the development of the Internet in Europe and must be maintained as it is. Co-regulation, as set out in the Commission's proposal, is the right way to go.

Generally speaking, consistency and smooth coordination with other European legislation, such as the e-commerce directive, should be fostered. A proportional approach should apply in certain provisions notably in transparency or adjustment mechanisms. Also, the wording regarding the use of protected content and application in time of the legislation could be refined in order to avoid ambiguities.

Orange believes that the following improvements could be brought to the proposal with the aimto clarify the reach and the relevance of its provisions.

The proposed provisions regarding uses of protected content by online services call for refinement, in order to bring legal certainty to the concerned market players.

First of all, **the exact scope of information society service providers concerned by the provisions could be clarified** by further defining the "*large amount of works*" notion, which may lead to various interpretations once implemented in each Member State's legislation. The proposal should ensure that only specific video-sharing-service providers involved actively and directly in the communication of content to the public uploaded by their users are addressed. It should be clarified that services and features like **cloud (either private or public), network or digital personal video recorders (NPVR or DPVR)**, which allow the storage of data at the request and on behalf of the users, and for which providers do not know in many cases whether they host a work or not, **are not be subjected to any ensuing obligation**.

In addition, **article 13 is confusing as it seems to imply that storing and giving access** (this latter notion not being defined in the Directive proposal) **to copyright protected works necessarily involves an act of communication to the public**. In Orange's view, giving access to protected works is not necessarily an act of communication to the public. A service provider can implement a service that facilitates the access to copyrighted works while such works are communicated to the public by a third party.

In this regard, **recital 33 also deserves clarification as it seems to imply that some acts of hyperlinking may constitute an act of communication to the public**. The obligation of getting a license from the rights owner of the linked copyrighted-work would be an impracticable system, as hyperlinks are the backbone of the Internet and are designed as mere technical tools that do not transmit works *per se*. These necessary clarifications are a matter of legal certainty, but also of **consistency with the ongoing refit of the AVMS directive**, that aims at regulating video-sharing platform services.

The liability exemptions for Internet intermediaries provided by the e-commerce Directive are core principles enabling proper functioning of the Internet and providing legal certainty, which must be maintained.

Regarding the struggle against piracy, the European Commission should rely on existing regulatory rules and related jurisprudence, while tailoring practical details**. The limited liability regime applying to Internet intermediaries (e-commerce Directive) is a pillar of the Internet that must not be questioned,** as this would put innovation, the European digital ecosystem and the very functioning of the Internet at risk. The prohibition of a general monitoring obligation for Internet intermediaries is a strong guarantee of the respect of privacy rights and freedom of speech. **It should be expressly stated in recital 4 that this Directive is complementary to the rules laid down in the e-commerce Directive.**

Besides, it should be made clear that **the obligation to prevent the availability of works on Internet services cannot be seen as an obligation for the players concerned to prevent any further infringement**, which would be a disproportionate provision regarding the cost and complexity of necessary measures. Moreover, this would be in contradiction with Directive 2004/48 on the enforcement of intellectual property rights and with jurisprudence from the CJEU**.** Therefore, the scope of this obligation calls for clarification so as to be sure that it is not construed as an obligation to prevent any further infringement.

Orange believes collaboration between providers and right-holders is key for implementing state-of-the-art and cost-effective content recognition technologies. However, as such technologies may lead to unintended consequences for third parties, the proposal should indicate that Information Service Providers shall not be held liable for damages resulting from it. Finally, the proposal should clearly state that Providers remain responsible for the implementation or not of measures proposed by right holders, given that some of these measures can only be implemented if a court decision orders the provider to do so.

Transparency is welcome, while provisions promoting it must remain proportionate

Increasing transparency on the exploitation of works vis a vis the authors and collective right management organizations is a positive move. **Orange has already implemented several measures to this end to the benefit of right holders**, notably for VOD reporting towards collective management organizations. These should be taken into account as efficient measures satisfying the need for transparency.

Besides, the provision does not state clearly whether it refers only to direct contractors of authors and performers, or also to any party in the chain which exploits works or performances. In case of further distributors of content, it may be difficult for them to fulfill such obligations if they have not been provided by their suppliers with full data about authors and performers. Therefore, Orange considers that article 14 should be supplemented by :

- either an obligation for any licensor/any party which transfers rights to provide his contractor with full data on authors and/or performers, or
- an exemption from liability for service providers if they acted with due care to identify authors and performers.

Finally, **guarantees that this proposal will not increase the related cost and processes** and that the burden will not rest solely on the shoulders of the content distributors would be appreciated.

Proposed provisions regarding contract adjustment mechanism could be adapted to fit current, consensual practices

Orange points out that mechanism already exist in French law to achieve the goal of article 15. More specifically, if the author suffers a prejudice as a result of a burdensome contract or of insufficient advance estimate of the proceeds from the work, he may demand a review of the contractual price conditions. It is worth noting that under French law, the sole beneficiaries of this mechanism are authors, not performers whose contracts are partly labor, partly license of their neighboring rights. Said performers get a minimum remuneration, previously negotiated via sector-specific agreements. Given these different regimes, **Orange wonders about the compatibility of the proposed provision with existing contractual practices.**

Rights in publication should not create new, additional types of compensation

Article 12 provides that publishers may claim a share of the compensation for the uses of the work which authors under an exception or limitation licensed rights to them. It should be confirmed that the purpose of this article is to enable new actors (i.e. publishers) to claim a share of the royalties for the exploitation of copyrighted works and that it is disconnected from the new rights provided to them in article 11 of the Directive, in order to **make sure the provision is not creating a new type of compensation to be paid by end users** in addition to existing compensations (private copy levy for instance).

Safeguards guaranteeing would also be welcome if the level of compensation paid in consideration of the use of works made under a copyright exception will not increase due to this new right for publishers to claim a share of the said compensation.

Negotiation mechanism should be consistent with existing rules

The link between the proposed negotiation mechanism and Directive 2014/26/UE, which already considers a dispute resolution procedure between collective right management organizations and users, should be clarified in order to bring legal certainty. The consequences if one of the parties does not intend to finalize any agreement, the way the proceeding should be conducted or the kind of referral practices that should be used are also unclear in the proposed provision. Given the questions raised, **a mere code of good practices may be a more suitable tool than a dedicated, additional mechanism** to achieve the desirable goal.

Application in time calls for clarification

Provisions of article 18 seem redundant by providing that article 11 shall also apply to press publications published before the date of entry in force of the Directive, while setting a general principle according to which said Directive applies to works that are protected by copyright on or after this date - that is, to any copyrighted works including press publications, either created before or after the date mentioned. Secondly, the wording of article 18.3 suggests that users who have already concluded a license agreement for press publications before the date of entry in force of the Directive would be required to pay publishers in consideration of their new rights.

In order to ensure a smooth transition towards this new regime and not undermine the market**, the Directive should only apply to contracts signed after its date of entry in force.**