



Brussels, 5 November 2010
072VDH10

**GESAC's Submission to the Public Consultation on the Future of
Electronic Commerce in the Internal Market and the Implementation of the Directive
on Electronic Commerce (2000/31/EC)**

1. I answer as (*question filtered directing the answers towards a specific part of the questionnaire*)

- a) A private individual
- b) An association of citizens or consumers
- c) A business (electronic commerce supplier included)
- d) A federation of businesses**
- e) ~~More specifically: a member of a regulated profession~~
- f) ~~An internet service provider~~
- g) A public administration
- h) ~~A legal professional or specialising in information society services.~~

INTRODUCTION

- Identification of your organisation, with postal and e-mail addresses

GESAC is the European Grouping of Societies of Authors and Composers.

Its contact details are the following:

Postal Address:

Rue Montoyer, 23
B-1000 Brussels

Email Address:

secretariatgeneral@gesac.org

- What is your interest in the information society services sector?

GESAC is the European Grouping of Societies of Authors and Composers and represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the rights and remuneration of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary and visual and graphic arts) and music publishers.

GESAC welcomes the opportunity to express its views on the Future of Electronic Commerce in the Internal Market and the Implementation of the Directive on Electronic Commerce.

GESAC has a natural interest in the Information Society services' sector since it represents those who are at the origin of the most demanded product in the Information Society: copyright protected content.

Indeed, Internet is an excellent opportunity for the cultural sector. Consumers can access a vast amount of content in a manner that was unthinkable only a few years ago. We are glad to see that music, movies, TV shows, publications, pictures or videogames are widely sought after by consumers online and we are equally pleased that consumers are increasingly looking for high-speed Internet connections to access the content that our members have so proudly created, performed, written or financed.

However, it is a significant cause of concern to us that this valuable contribution to the development of the Information Society goes largely unrewarded. The reality is that the overwhelming majority of content is accessed outside legitimate channels and that there is no proper recognition and remuneration for those who create, perform or provide such content.

- In which Member State(s) are you established and/or where do you perform your activity?

GESAC is established in Brussels (Belgium) and its members operate in all the EU Member States except Bulgaria, Romania, Slovenia, and Estonia . However, local authors' societies in those countries have ties with GESAC members and manage the latter's repertoire in their respective territories.

Additionally, GESAC has members in Norway and Switzerland.

Issue 1: The development and practice of electronic commerce

Please note that GESAC will not reply to all the questions of the questionnaire, since many of them are not relevant for its sector.

28. Are you aware of information on the types and growth of e-commerce businesses and on whether this substitutes or complements off-line retail services? If so, please specify

Unfortunately the most significant growth we have observed involves illegal use of copyright protected material by e-commerce services. In fact, on just about every measure, the illegal or 'black market' for music online is gigantically larger than the legal one. One example to

highlight is the P2P site Mininova, which celebrated its 10 billionth download three months before the globally renowned - and legal - iTunes music store celebrated the same landmark. Recent BPI research¹ also suggests that a quarter of the adults online access unlicensed content in the UK, whereas only one-in-ten have made a legal digital purchase, even though the UK legal market for online music is now up to 40 major services and over 1400 individual smaller online licences for use of music on a website.

It is not that legal digital sales are not growing. They are. According to an IFPI report, they have grown by 940% between 2004 and 2009. But this growth has been incapable of offsetting the decline in physical sales. In fact, total sales decreased by 30% in that same period.²

29. In your view, what are the economic sectors where electronic commerce has developed significantly over the past decade and the fields where, on the other hand, its potential has not yet been sufficiently exploited?

As indicated above, the development of legal services of copyright protected content has grown significantly in the last years. However, this growth is till far from reaching its potential. This is due to the fact that legal services have to face unfair competition from illegal services that offer exactly the same products but for free.

30. Do you consider that the offer of viewing sporting and cultural events on the internet, for example by direct streaming, is sufficiently developed? If not, in your view, what are the obstacles to such development?

This offer is improving. However, competition from illegal services is still very harmful and potential service providers have to carefully assess whether they are going to get a return on their investment in the development of such services. As licensors of copyright protected content, GESAC members do license content to these services.

31. As organisers of sporting or cultural events, do you see an interest in proposing direct on-line access to your events, in particular if they are not broadcast on traditional media, at national level or in other Member States?

GESAC members are not promoters of cultural events. However, as indicated above they are ready to license to every platform the copyright protected content used in those events.

Issue 2: Questions concerning derogations from Article 3 (Article 3(4) and Annex)

36. In your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services?

Territoriality of copyright is often presented as an impediment to effective cross border trade, based on the idea that it would prevent users from obtaining a single licence from a single

¹ BPI Statistical Yearbook and monthly trade surveys.

² IFPI Digital Music Report 2010.

source for the use of protected works covering several territories.

This is a misrepresentation.

Music rights are licensed on a pan-European basis already by some collecting societies, and rightsholders, demonstrating that territoriality of the right is no inhibition on the scope of the licence.

The first thing that should be pointed out is that harmonization is already quite substantial as regards copyright and therefore the possible inconveniences linked to the territoriality of copyright have been discarded. This is acknowledged by the Reflection Document in a European Digital Single Market.³

In that sense, it is to be noted that, contrary to what is often said, introducing a European Copyright title would not facilitate pan-European licensing.

A European Copyright title does not imply that rights holders would be prevented from freely delimiting the territorial scope of the licence they grant. In fact, here lies, in our view, the origin of the confusion. Copyright territoriality, whether national or European, does not affect the scope of the licences.

At national level, for example, despite the existence of national copyright titles, rights holders can delimit the territorial scope of the licenses they grant to a part of the national territory, which allows them in particular to take into account the specific needs of the user.

Therefore, territoriality of copyright neither encourages nor impedes cross border trade; it is neutral.

In any case, be the copyright title European or national, rights holders must retain the possibility to delimit the territorial scope of the licenses they grant.

If rights holders were no longer able to grant licences with a territorial scope other than EU-wide they would be prevented from adjusting licensing practices (and fees) to the practical realities of online exploitations.

Users do not have the same characteristics and capabilities; markets and the value of copyright protected content vary from country to country.

Also, not all users are interested in EU-wide licences.

In this respect, the importance of language, cultural traditions, whether local, regional or national should not be downplayed. In Europe, in the music sector, only Anglo-American works manage to draw a European, and even worldwide, audience because of these factors.

Consequently, rights holders should have the possibility to define by contractual arrangement with the user the territory where they authorize each user to exercise its activity. The users should be able to get a licence according to their needs, without being obliged to acquire EU-

³ Page 15.

wide licences even for exploitations intended to be national in scope or limited to a part of the national territory of a Member State.

However, it has to be stressed that this possibility does not preclude that, when appropriate and on a voluntary basis, multi-territory licences be granted, too.

Today, it must be stressed that cross border trade is often impeded by the service providers themselves who choose to limit their offers to a territory or a region. The KEA “Study concerning multi-territory licensing for the online distribution of audiovisual works in the EU” mentioned in the public consultation emphasizes this in the following terms: “*Rights holders are free today to license on an international as well as on a territorial basis – the latter prevails due to market demand.*”

37. In your view, are there other rules or practices, which hinder the provision or take-up of cross-border on-line services? If so, which?

This has been partly addressed in our answer to question 36. As indicated above the provision of online services that are national in scope prevails mainly due to market demand.

There are practical aspects that explain this such as the need for development of payment mechanisms for young people, consumer trust in contracts and cross border remedies, lack of tax harmonization, and in the field of online content services, the attachment of European citizens to the local culture.

Additionally, it should be indicated that the current levels of online piracy are a disincentive for the creation of national services, let alone for cross-border services, which require more investment.

Finally, one fallacy relating authors’ societies’ practices needs to be corrected.

It has been pointed out that authors’ societies’ practices have been an impediment to the take-up of cross-border online services, on the grounds that they do not grant multi-territorial licenses.

This is untrue. Authors’ societies are generally entrusted with the rights of their members for the whole world and are therefore in a position to grant a license on such rights for the whole world.

Multi-territorial mono-repertoire licenses are therefore readily available.

However, the non-clearance by the European Commission of the Santiago and Barcelona agreements, the withdrawal of the major publishers’ rights on their Anglo-American repertoire from the societies’ network of reciprocal representation agreements, in the framework of the Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, and the consequences of the 16th July 2008 CISAC decision make it so that authors’ societies are no longer in a position to offer multi-territorial **AND** multi-repertoire licenses to international online services.

Authors' societies are currently striving to introduce means of enabling the widest possible

repertoire to be offered within a single licence. The idea is to allow for the re-aggregation of musical repertoire by authors' societies and to facilitate the development of one or several platforms that would allow multi-territorial and multi-repertoire music licensing.

Issue 3: Cross-border commercial communications, in particular for the regulated professions

Not applicable.

Issue 4: The development of the press on the Internet

Not applicable.

Issue 5: Interpretation of the provisions concerning intermediary liability in the Directive

52. Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which?

Generally, rights holders in Europe are encountering serious difficulties in having their rights respected in the online environment. Those difficulties vary depending on the type of intermediary service provider. In this answer, we will however just focus on the intermediary service providers for which the E-Commerce Directive has provided for a safe harbour liability.

As regards hosting, the E-Commerce Directive has worked fairly effectively in most of the Member States where it has been correctly implemented it. Unfortunately, this has not always been the case, notably Spain, as we will discuss below.

Article 14 provides for a carefully crafted conditional safe harbour that ensures legal certainty while maintaining the incentives for effective cooperation from ISPs. However, some problems have been identified.

Firstly, the definition of hosting providers has created some problems. On the one hand, as it will be explained in more detail in our answer to question 56, cases of hosting providers trying to avoid NTD procedures have been reported by our members. Also providers of services other than the hosting of websites, such as newsgroups, try to evade their liability alleging that they do not fall into the definition of hosting providers.⁴

⁴ In the UK the reference case is Twentieth Century Fox Film Corporation and others v Newzbin Ltd (2010). The case focused on the level of knowledge the service had of the infringements of its users.

In France, the Paris court has rendered a decision whereby it considered that the intermediary provider giving access to newsgroups was an Internet access provider while applying the regime of the caching provider. A solution was however found as explained in answer to question 61 through cooperation between the internet service provider and the rights holders to bar access to the newsgroups.

Other problems concerning hosting providers relate to issues that are going to be discussed below, such as problems regarding “actual knowledge”, NTD procedures and Web 2.0 services. On these points, we refer to our answers to questions 53 - 57 and 64.

On the other hand, EU and national provisions governing mere conduit have, in our view, created too wide a safe harbour to the benefit of ISPs. In fact, the area of greatest concern to rights holders today is the lack of incentives for ISP cooperation in the fight against unauthorized exchanges of copyright protected material through P2P networks and other forms of unlawful uses, all occurring through the ISPs’ servers. This constitutes the most important obstacle to the development of new legal online content services, and EU assistance for the creative industries to shift towards sustainable models is therefore fundamental.

It should be pointed out that the E-Commerce Directive has not been helpful in building bridges between rights holders and ISP. It has limited incentives for co-operation and contributed to the polarisation.

Looking at figures of content downloads, it cannot be disputed that there is a huge demand for copyright protected content. However, only a very small portion of these downloads generate income for rights holders. This means that the current “business model” satisfies the demand of consumers, generates a huge amount of income for intermediaries, such as ISPs, but does not remunerate the rights holders and is therefore not sustainable.

In this perspective, the involvement of ISPs is essential. Gaining access to music and audiovisual content using P2P is an incentive to consumers to subscribe to high speed and expensive Internet access, and consequently generates a huge amount of income for ISPs, while in many cases resulting in copyright infringements.

In 2000, when the E-Commerce Directive was adopted, file sharing through P2P networks was a marginal activity. Today, this practice is widespread and the harm it causes rights holders is very significant. We therefore need to create the necessary incentives for ISPs to cooperate with rights holders and combat the lack of cooperation when it is technically feasible and affordable. However, ISPs hide behind the mere conduit safe harbour, in order to avoid any cooperation with rights holders. Ideally, we would like the provisions to be modified in such a way that it would create incentives to ISPs to cooperate. We believe that many ISPs have a strong interest in the normalization of their businesses and of the transactions of their subscribers and in contributing to the developing of sustainable business models for the creative industry.

Another issue to be regarded is the possibility of considering ISPs as actual content providers. Their status is from an economic point of view not very different from cable operators. They both transmit copyright protected content to consumers through their networks. However, cable operators, contrary to what is the case of ISPs, are obliged by Directive 93/83/EC to respect copyright and pay royalties through collective management societies. ISPs, albeit conducting a similar economic activity, are completely exempted from any responsibility in this respect.

53. Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? Are you aware of any situations where this criterion has proved counter-productive for providers voluntarily making efforts to detect illegal activities?

Difficulties in the interpretation of the term “actual knowledge” tend to appear in those countries that have not implemented a notification procedure.

This is the case for example in Spain, where a restrictive interpretation of the law allows for “actual knowledge” to be gained only through a court order or an order of an administrative authority. This increases the liability limitation of hosting providers (and in the case of Spain, also of providers of hyperlinks). Given that, until now, only a court can declare the illegality of content available in the Internet and given the time taken by Spanish courts to adopt such orders, this increase in the liability limitation has reached a level that is clearly in breach of the E-Commerce Directive.

This and similar situations regarding difficulties in the interpretation of “actual knowledge” are clearly a disincentive for intermediary service providers to cooperate in the detection of illegal activities.

Our British member, PRS for Music, reports that their experience is that new business models are designed, legally, strategically and technically, to ensure there can be no actual knowledge of content, even if technically this would be possible. This allows such service to deny liability, until notice is served, but has the effect of incentivizing the development of business models, which do not respect copyright over ones that do. The exploitation of the uncertainty around the boundaries of these definitions means that licensing negotiations are long, and aimed at reducing the scope of a licence.

54. Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information?

Again, there are differences from country to country.

The interpretation given by French courts to the term “expeditious”, for example, is meant to ensure the most effective protection of the rights and therefore is satisfactory. French courts have held that intermediary service providers must bar access to illegal content within 24 hours of being actually informed of the presence of such content on the online service.

In Spain, on the other hand, the term “expeditious” has not even been included in the provision implementing the caching safe harbour, generating uncertainty as to when the intermediary service provider is expected to remove the illicit content after having “actual knowledge”. As regards the provision of hosting services, the need for Spanish rights holders to get a court order in order for the ISP to acknowledge “actual knowledge” of the illicit content, is contrary to the spirit of the Directive to try to block access to said content in an expeditious manner.

There is no clarity in the UK on the meaning of expeditious.

55. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law?

NTD procedures have been implemented in a number of EU Member States.

However, there are important exceptions, notably Spain and Italy. In Spain, rights holders tried to agree on a NTD procedure with the main association of Telecom operators and ISPs. However, the latter had no incentive to agree on such a procedure, since they were happy with the wide liability limitation enjoyed under the Spanish law.

Where they exist, said procedures vary from country to country.

The French legislator, for example, has introduced into French law a notification procedure, which is only optional and in no way a prerequisite to engage the hosting service provider's liability and which does not impose on the hosting service provider any obligation to take down the notified content.

However, French courts have interpreted such provision in a way that makes it effectively a notice and take-down procedure and even almost a notice and stay down procedure.⁵

Other examples of NTD procedures can be found for example in the Netherlands, where a self-regulatory NTD-code was introduced in 2008,⁶ and Hungary.

The Hungarian E-commerce Act (Act CVIII of 2001 as amended), also includes provision detailed ruling on the entire NTD procedure. The said article includes an „authorisation” for interested parties to conclude agreements on NTD that may not depart from the statute but may supplement the statutory provisions. Based on this „authorisation” certain CMOs include such supplementary provisions in their relevant online Tariffs. That is the practice of Artisjus. Section 5.2. 3. of its online Tariff (Official announcer 2010/3) includes supplementary provisions.⁷

⁵ Article 6-I 5° of the Loi pour la confiance dans l'économie numérique provides that: "*knowledge of the litigious facts [by the hosting service providers] is presumed when the following elements are notified to them:*

- *date of notification;*
- *when the notifier is a physical person : family name, first name, profession, address, nationality, date and place of birth; if the notifier is a legal entity : its legal form, its denomination, place of its registered offices and its legal representative;*
- *name and address of the hosting service provider or, if it is a legal entity, its denomination and place of registration;*
- *description of the litigious facts and their precise location;*
- *reasons for which the content must be withdrawn including the mention of the applicable legal provisions and the factual reasons;*
- *copy of the correspondence sent to the author or the publisher or the editor the litigious information or activity requesting their interruption, their withdrawal or their modification or the justification that the author or the publisher could not be contacted”*

⁶ An English version can be found at http://www.ecp-eqn.nl/sites/default/files/NTD_Gedragcode_Engels.pdf; the French version is available at http://www.ecp-eqn.nl/sites/default/files/NTD_code_Frans.pdf

⁷ The relevant provision reads as follows:

Section 13.

(1) Any right holder whose rights relating to any authors' works, performances, phonograms, broadcast program, audiovisual works or database under copyright protection, furthermore, whose exclusive rights conferred by trademark protection under the Act on the Protection of Trademarks and Geographical Indications are infringed upon by any information to which a service provider has given access - not including the standardized title of the information accessed - (hereinafter referred to as: right holder'), shall be entitled to

notify the service provider specified in Sections 9-11 in a private document with full probative force or in an authentic instrument for removing the information in question.

(2) The notification shall contain:

- a) the subject-matter of the infringement and the facts supporting the infringement;
- b) the particulars necessary for the identification of the illegal information;
- c) the right holder's name, residence address or registered office, phone number and electronic mail address.

(3) Where applicable, the right holder's authorization fixed in a private document with full probative force or in an authentic instrument and issued to his representative for attending the "notice and take down" procedures shall also be attached with the notification referred to in Subsections (1)-(2).

(4) Within twelve hours following receipt of the notification referred to in Subsections (1)-(2) the service provider shall take the measures necessary for the removal of the information indicated in the notification, or for the disabling of access to it and shall concurrently inform in writing the recipient of the service who has provided the information that infringes upon the right holder's right (hereinafter referred to as "recipient of the service affected") within three working days, and shall indicate the right holder and the right holder's notice on the basis of which the information was taken down.

(5) The service provider shall refuse to comply with a notice dispatched under Subsections (1)-(2) requesting the removal of information or the disabling of access to it, if he has already taken the measures prescribed in Subsection (4), acting upon the notification of the same right holder or of the right holder's representative authorized under Subsection (3), except where the removal of the information or the disabling of access to it was ordered by the court or another authority.

(6) The recipient of the service affected may lodge an objection fixed in a private document with full probative force or in an authentic instrument at the service provider within eight days of receipt of the notice referred to in Subsection (4) against the removal of the information contested. The objection shall contain:

a) the particulars for the identification of the information removed or to which access has been disabled, including the network address where it was previously hosted, and the particulars for the identification of the recipient of the service affected, as prescribed in Paragraphs a)-e) and g) of Subsection (1) of Section 4 of this Act;

b) a statement, including justification, declaring that the information provided by the recipient of the service did not infringe upon the rights of the right holder indicated in the notice referred to in Subsection (2).

(7) Upon receipt of the objection specified in Subsection (6) the service provider shall proceed without delay to restore access to the information in question, and shall simultaneously send a copy of the objection to the right holder, except where the removal of the information or the disabling of access to it was ordered by the court or another authority.

(8) If the recipient of the service affected acknowledges the infringement or fails to lodge an objection within the time limit specified in Subsection (6), or the objection, if lodged, fails to contain the particulars and the statement prescribed in Subsection (6), the service provider shall keep access to the illegal information disabled or shall keep it removed.

(9) If the right holder moves to enforce his claim relating to an infringement to which the notice referred to in Subsection (7) pertains by lodging a claim - within ten working days from the day of receipt of this notice - demanding that the infringement of rights be terminated and that the infringer be enjoined to cease any further infringement of rights, or makes a request for a payment warrant, or files criminal charges, the service provider shall take measures within twelve hours following receipt of the court's decision for ordering provisional measures, in due application of what is contained in Subsection (4), to maintain the removal of the information referred to in the notice specified in Subsection (2) or the disabling of access to it. The service provider shall send a copy of the court decision to the recipient of the service affected within one working day after the measures are taken.

(10) The right holder shall inform the service provider of all final and conclusive resolutions adopted under Subsection (9), including the approval or rejection of any request for provisional measures. The service provider shall comply with the provisions contained in the final and conclusive resolutions without undue delay.

(11) The right holder and the service provider affected may enter into a contract with respect to the application of the procedures specified in Subsections (1)-(10). In the contract the parties may not derogate from the provisions of law, however, they may agree on matters which are not regulated by law. The parties may install a contract clause to consider effective written communication the authentic copies of private documents they sent to or received from third parties, as well as any communication transmitted by way of electronic means if the addressee has acknowledged receipt also by way of electronic means, in which case the parties are required to acknowledge the receipt of electronic consignments from one another.

GESAC would therefore strongly advise the introduction in the E-Commerce Directive of an effective notification procedure following the experience of EU Member States.

56. What practical experience do you have regarding the procedures for notice and take-down? Have they worked correctly? If not, why not, in your view?

Our members have reported cases of hosting providers trying to avoid the existing Notice and Take Down (NTD) procedures. Some providers of hosting services sublease the service to other ISPs. When the original ISP is identified through the respective Who Is Register and required to put an end to the hosting of infringing material following a NTD procedure, it argues that the infringing content is not hosted by it, but by the ISPs it has subleased the service to, without providing the contact information of the latter.

Also, our French member reports that the French notification procedure represents a burden for the rights holders.

This burden is quite important as the rights holders are required to provide numerous specific and precise information (see footnote No. 4) without their being guaranteed in any way:

- that access to the works will effectively be barred,

Indeed the Constitutional Council provided hosting service providers with grounds to refuse to bar access to works to which they give access as, under the interpretation of the Constitutional Council, should a hosting service provider bar access to content, its liability could be sought if such content were proven not to be obviously illegal.

- to receive remuneration for the use of their works.

Our Dutch member reports that the effectiveness of the NTD procedure is largely hampered by insufficient verification of registration information provided by website holders who consequently in most cases act as if anonymous. Websites will hop from one provider to the other. The Dutch joint anti-piracy organization Stichting Brein⁸ promotes the view that ISPs should be obliged to verify the registration data provided by individuals or companies when subscribing to a ISP's service.

In Hungary, Proart, the alliance of the affected right holders' collective management societies acts on behalf the societies in NTD cases. Below there are the data provided by Proart.

Proart sent out 823 NTD letters to ISP-s and infringers (e.g web radios) in 2009. 148 thereof remained unanswered. In the other cases the unlawful content was removed.

In 2010, until the date of this response Proart sent out 656 NTD letters to ISP-s and 169 thereof remained unanswered.

(12) The service provider shall not be responsible for the success of the removal of information or the disabling of access to it if acting in good faith and in accordance with the provisions contained in Subsections (4) and (9) in the process of the removal of information or the disabling of access to it.

⁸ We refer to the submission of Stichting Brein for additional factual and practical information about the Netherlands.

Notices are also applied in relation to hyperlinks that lead to sites with pirate content. Such links are collected with IT support. In 2009 Proart found 13.989, in 2010 until the date of this answer 102.943 such links. The domestic service providers delete voluntarily such links if they receive a notice from Proart.

Those addressees of the notices that do not answer are usually the operators of sms-web services, and torrent services. If a webradio receives a notice either stops its service or obtains a license.

Proart initiates criminal procedures against those who leave the notices unanswered.

Earlier the number of NTD procedures was higher. It is to be remarked that if the content is not removed upon receipt of the notice and the case develops into a court procedure Proart has to face more and more complicated facts from a technical point of view (it is not easy to find the first uploader if the file is split into bits.)

At this stage the „defect” of the NTD-s can be explored. If the removal takes place voluntarily the procedure is cost-effective, although the final aim would be licensing not removal. However if the infringing content is not removed voluntarily the enforcement seems in the period of complicated P2P filesharing models that operate with all tasks separated to be a futile effort let alone the uncertainties of the legal framework.

57. Do practices other than notice and take down appear to be more effective? ("notice and stay down", "notice and notice", etc)

Notice and take down procedures do not prevent the notified content being made available again. Therefore rights holders have to go through the whole notifying process again, which has a cost and is time consuming. Therefore notice and stay down procedures seem more effective than notice and take down procedures.

58. Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations?

We are not familiar with the imposition of general monitoring obligations by public authorities or legal bodies of EU Member States.

As regards filtering obligations, our Belgian member SABAM obtained a judgment by virtue of which the Belgian ISP, Scarlet (formerly known as Tiscali), was ordered to introduce technical measures to put an end to the copyright infringements through the illegal file sharing of its customers, by way of P2P software, of electronic files containing copyright protected material.

It appears from the sentence that the court retained none of the arguments put forward by Scarlet as regards the right of privacy, the right of secrecy of correspondence and the right to freedom of expression. Nor did it accept the ISP's argument that "*the requested technical measures came down to imposing a duty of supervision of the entire P2P activities, which is contrary to the legislation on E-commerce*". As to the risk for Scarlet of losing – due to the implementation of filtering measures – its waiver of liability for activities of mere conduit, the court decided not to uphold this argument.

The court insisted on the fact that the termination order does not impose on Scarlet a general obligation to monitor its network. The solutions identified by the expert appointed by the court are “technical instruments” that limit themselves to blocking or filtering certain information transmitted on the network of Scarlet. They do not constitute a general obligation to monitor the network. Moreover, the court considers that filtering and blocking software are not dealing as such with any personal data and that a blocking measure has a purely technical and automatic character, as the ISP is not playing any active role in the blocking or filtering. The case has been appealed and a question has been referred to the European Court of Justice for preliminary ruling.

On the other hand, in France the President of the Republic initiated in the summer of 2007 a reflection and concertation process which aimed at enabling the conclusion of an agreement between the rights holders in the audiovisual sector, the movie sector, the music sector and the technical intermediaries to develop and ensure the protection of works and cultural programs on the new networks.

This mission ended with the conclusion by more than 40 organizations active in the music sector, the audiovisual sector, the movie sector and the Internet of an agreement known as the “Accords de l’Elysée”.

In this agreement, the Internet access providers undertook to collaborate with the rights holders on the means of experimenting filtering technologies and to implement them should the results prove satisfactory and the generalization of such technologies technically and financially realistic. However, no filtering (let alone monitoring) obligation was introduced.

GESAC’s member, SACEM, who has always shown a keen interest in developing and implementing filtering and detection technologies participated alongside phonogram producers in the testing of the available filtering solutions for P2P traffic.

The Deep Packet Solution was tested with Vedicis and it gave positive results.

The next stage is finding an agreement with Internet access providers for a voluntary implementation of such technology.

It should also be mentioned that the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* which was created by the *Loi pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* in order in particular to implement the graduated response, has as one of its missions the assessment of filtering technologies. It has therefore to this end put in place a laboratory in charge of studying the filtering experiments taking place.

In the UK the Digital Economy Act 2010 imposes a statutory duty on ISPs to respond to copying infringement notices delivered by rightsholders and for the ISP to notify its account holder that it is aware that the account may be being used for infringement. The Act does not introduce any provisions in relation to monitoring and filtering.

59. From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering?

See our answer to question 58.

60. Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse?

We believe that the introduction of filtering technology could contribute to combating counterfeiting and piracy. In any case, should there be reluctance as regard the introduction of such technology, our recommendation would be to test it, in order to assess its effectiveness and negative effects.

On the other hand, it is to be feared that the setting of specific technical standards would enable pirates and counterfeiterers to anticipate and find ways to easily circumvent the filtering, thus rendering such filtering ineffective and the investments useless.

61. Are you aware of cooperation systems between interested parties for the resolution of disputes on liability?

Generally, it is difficult for stakeholders to develop cooperation mechanism for the resolution of disputes on liability, since this may imply that one of the stakeholders is accepting the position of the other side.

However cooperation is possible.

In France, for example, rights holders have been able to cooperate with an Internet service provider in order to bar access to newsgroups whose aim was to make available protected content without any authorization.

Such cooperation took the form of joint request made to a judge to grant an order on the Internet service provider to bar access to the concerned newsgroups.

Such example does not qualify as a system; it however shows that cooperation between rights holders and Internet intermediaries can take place and is a step to be promoted as it safeguards everyone's best interest at a lesser cost.

Right holders' associations in Hungary, in particular CMOs, commenced negotiations with ISP-s on a potential cooperation including but not limited to the possible introduction of a flat-fee system regarding P2P file sharing, and the licensing of video file sharing sites. The negotiations have not brought any result until now.

62. What is your experience with the liability regimes for hyperlinks in the Member States?

Again the situation varies from country to country.

Some countries apply the general civil liability regime to hyperlinks.

This is the case of France, for example where the application of such general liability regime by the courts has given rise to some hesitations as to the exact status and regime to be applied to such providers.

In other countries, such as Spain, liability of hyperlinks has been specifically regulated. In

Spain, providers of hyperlinks, including search engines, are subject to the same liability limitations as hosting providers, which, as indicated above is wider than the one provided for in the E-Commerce Directive.

In our view, as indicated in the Study on the Liability of Internet Intermediaries,⁹ a liability regime on hyperlinks should take into account that the setter of an hyperlink is generally aware of the content of the website towards which he is directing users via his hyperlink. It would be useful that the Evaluation Report would include a clarification in that sense.

63. What is your experience of the liability regimes for search engines in the Member States?

Variations in legislations of the different Member States appear in this field as well. Some countries have specifically regulated the liability regime for search engines, while in others they are subject to the general civil liability. In many cases where the liability of search engines has been regulated, no distinction is made with the occasional provision of hyperlinks.

However, the purely automatic nature of the indexation carried out by these intermediaries makes it necessary to reflect on their status in order to define the appropriate liability regime, one that is specific to them and of a nature to guarantee a better protection of rights holders and to take into account the receipts search engines generate from the indexations which direct consumers towards illegal websites.

The indications given by the Study on the Liability of Internet Intermediaries may be a good point of departure.¹⁰

As indicated in the report, liability exceptions should take into account the degree of control and awareness that the provider of an information location tool has as regard the content to which the tool directs the user. However, there should not only be a distinction between natural results (automatically generated links to websites as a result of a search and commercial links (“Adwords”)). Search engines indeed have some control on the parameters that rule the results given to users on any given search.

Working with digital music experts Music Ally, our British member, PRS for Music, carried out research into how illegal and legal music content ranks on some popular search engines in the UK:

A series of searches based around music using ‘artist + songtitle’ and varying the keywords to gauge the prevalence of infringing links on four search engines were conducted. The findings highlighted that there is considerable discrepancy in results.

In a simple search illegal sites are on the first page of search results 78% of the time, dropping to 0% for one (i.e. legal sites were always the first link offered). On another search ‘artist + songtitle + mp3’ the first illegal site came up above the first legal one between 89% and 100% times, dropping to 44% and 67% on another and between 22% and 11% on a third. The disparity between the four sites shows that there is considerable scope to reduce the prominence of illegal results. This indicates that some search engines are doing far more to

⁹ Thibault Verbiest et al, *Study on the Liability of Internet Intermediaries*, pages 18 and 19.

¹⁰ Thibault Verbiest et al, *Study on the Liability of Internet Intermediaries*, pages 18.

direct users towards legal music purchases, rather than towards illegal downloads, and we would like to see more support for best practice search.

A liability regime for search engines should take into account this scope.

The Study on Liability of Internet Intermediaries also points at the need to exempt abuses from any liability limitations on search engines. This is the case of aggregators of copyright protected content, which advertise, select and classify links to illegal content, and which in most cases make a commercial profit from it. We believe that it should be made clear in the Evaluation Report that these operators should not be put at the same level as Google-type search engines.

64. Are you aware of specific problems with the application of the liability regime for Web 2.0 and "cloud computing"?

As indicated above, courts are inclined to apply to Web 2.0 platforms the hosting service provider liability regime¹¹ notwithstanding the fact that their activity does not entitle them to it.

Indeed, the activity of these platforms is not limited to a mere stocking of information: Web 2.0 platforms organize the content they make available, organize the means they put at the public's disposal to access such content, develop special search engines, develop software to enable consumers to pre-view and pre-listen the content, seek to develop the widest audience possible and seek to valorise the access given to protected content thanks to advertising receipts.

In fact, the E-Commerce Directive was discussed and adopted when Web 2.0 services did not exist yet.

In Spain, the Trade Court No. 7 of Madrid ruled in favor of YouTube in the lawsuit filed by the Spanish broadcaster Tele 5 for breach of the making available of its broadcasts. The court declared that YouTube is not a content provider, but a hosting service provider. The judgment has been appealed.

The French courts, for their part, have reached their current position by following a reasoning, which doesn't resist a critical analysis. Indeed they did not attempt to assess whether the Web 2.0 platforms' activity is that of hosting service providers, which is the normal way to proceed when faced with the task of applying a derogatory regime, such as that of hosting service providers. Instead, they sought to assess whether Web 2.0 platforms could be analysed as online service editors.

Furthermore, it needs to be stressed that when following their reasoning, French courts used different criteria which have led to diverging decisions and consequently to legal uncertainty.

Finally, it must also be underlined that the French courts, aware of applying to Web 2.0 platforms a regime, which was not suited to their activity, deemed it necessary to "compensate" by being extremely strict in the definition of the obligations imposed on such service providers, and even sometimes expanding on them.

¹¹ See for example the judgment of the Trade Court No. 7 of Madrid of 20 September 2010 on the lawsuit filed by the Spanish broadcaster Tele 5 against YouTube for breach of the making available of its broadcasts.

The French courts decisions are therefore clearly flawed and moreover a source of legal uncertainty.

It is urgent to clarify the situation at the European level and to clearly state that the hosting service provider liability regime cannot be applied to Web 2.0 platforms.

65. Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain?

We refer to our answers to the previous questions.

66. The Court of Justice of the European Union recently delivered an important judgment on the responsibility of intermediary service providers in the Google vs. LVMH case. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way?

Technical intermediaries benefit from a limited liability regime insofar as they are neutral. However, as indicated above, the information transmission by search engines is not necessarily a completely technical, automatic and passive act. As search engines derive revenues from the indexations they put in place, and which result from commercial partnerships, it seems difficult to consider that they are neutral and should be entitled to benefit from the limited liability regime of the hosting service provider. This is particularly true in the case of aggregators of illegal content.

In fact, the Court of Justice has considered that Google's behavior is purely technical, automatic and passive although:

- it determines the order in which the links appear due in particular to the remuneration paid by the sponsors;

This seems to indicate some kind of control and activity.

- there is a concordance between the selected key word and the search word chosen by the consumer, when at the same time, the Court held that in order to determine whether or not a search engine is passive, it is relevant to take into account the role played in the establishment or selection of search words.

The indications given by the European Court of Justice are therefore likely to give rise to differences in interpretation as they are vague, and somewhat contradictory.

67. Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why?

No. Not at all. Here we refer to recital 47 of the E-Commerce directive: "Member States are prevented from imposing a general monitoring obligation; **this does not concern monitoring**

obligations in a specific case (...).” Therefore the specific and even the preventive monitoring obligation do not constitute a challenge of the no general monitoring rule set forth in Art. 15 of the E-Commerce Directive. Such a specific monitoring shall be regarded as an essential precondition of the injunction claim of the right holder based on the Enforcement Directive. Such a claim remains without enforcement if no specific monitoring obligation exists. We do hope that the European Court of Justice will come to an identical conclusion in the preliminary ruling in case C-70/10 (Sabam vs. Scarlet)

In any case, we are not aware of any obligation placed by administrative or legal authorities to service providers with the aim of preventing copyright infringements that could be qualified as a general obligation to monitor.

As regards measures of graduated response introduced in France or the UK, ISPs are in no case requested to monitor their subscribers’ activity. The only request that can be made is for the ISP to identify a subscriber based on an actual infringement and therefore is specific and in no way general.

The obligation to apply filtering technology cannot be considered a general obligation to monitor either.

In France, for example, if the Intellectual Property Code does enable French Courts to impose an obligation to take any measure – *a posteriori* – of a nature to put an end to a copyright infringement within the framework of an online service, e.g. a filtering measure, but such measure is limited by the scope of the infringement and is here again specific.

As indicated above, in Belgium, the court in the SABAM/Scarlet case was also confronted to the question of whether the application of filtering technology was tantamount to a general obligation to monitor. It answered negatively. It was recognized that this technology merely blocks specific content, meaning specific works or phonograms, not music in general. It therefore identifies content in a way more precise manner than anti-spam technology, a technology, the application of which no one would consider a general obligation to monitor.

68. Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service?

We refer to our answers to the above questions on the application of the hosting safe harbour to providers of services that go beyond the mere hosting of content, such as Web 2.0.

69. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer.

We do not think that it is a matter of investing in law enforcement. However, improving the legal tools to enforce copyright is certainly essential. The current limited liability regimes and the subsequent lack of involvement and concern of intermediary service providers contribute to encourage copyright infringers to continue as they are not at risk.

Of course, this has to be coupled with the raising of awareness as to the dangers, prejudicial consequences and illegality of counterfeiting and piracy.

It is also essential to develop legal offers in order to offer consumers choice and to deter them from the too easily accessible illegal offers. That is why authors' societies are doing their utmost to license all viable online music services and so improve the available legal offer.