

**GESAC'S CONTRIBUTION TO THE CONSULTATION ON THE
COMMUNICATION ON CREATIVE CONTENT ONLINE****1. INTRODUCTION**

GESAC links together 34 of the biggest collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, who administer the royalties of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary, visual arts, etc.), music publishers and other rights holders.

As such, GESAC's constituency represents creators, thus those who are at the origin of all the creative chain. The remuneration that they receive on the basis of current copyright legislation constitutes their salary. It is what they get in return for the exploitation of their works. Creators have a special relationship with those who listen to their music, watch their films, read their books or enjoy their art, and do not look at them as mere consumers, but rather as fans. For them it is therefore important, and that has always been the philosophy of authors' societies, that their works be as widely accessible as possible. Technology today gives fans wider availability of creative content, which authors and composers wholeheartedly welcome. However, it is only fair that they receive an adequate payment for these new ways of enjoying their works. That is why authors' societies give so much importance to issues such as private copying remuneration or Internet piracy.

As regards the due remuneration that authors are entitled to, authors' societies play a vital role in defending their interests, engaging in negotiations with users, monitoring the exploitations, and collecting and adequately distributing royalties to their members and, through their sister societies, to foreign rights holders. This is why they are major operators in the entertainment business, always adapting their practices to new technological developments and facilitating, if necessary, cross-border exploitation of works.

On the other hand, authors' societies do not only operate as economic entities. In most countries they have a role in promoting the cultural heritage and preserving the value of artistic works. As their umbrella organisation, GESAC has therefore always encouraged the Commission to adopt an ambitious agenda as regards the defence of the value of creative content and Europe's cultural diversity, that can guarantee the availability of an accessible content of the highest quality.

GESAC welcomes the Commission's Communication on Creative Content Online and agrees that before any legal measure is adopted, it is necessary to engage in a wide consultation process.

GESAC also generally shares the Commission's approach that Private Copy Remuneration be left out of this initiative. Indeed, this is not, in GESAC's view, an issue that is specifically related to the online distribution of creative content. GESAC will duly share its concerns with the Commission in the framework of the Stakeholder Consultation on Fair Compensation for Acts of Private Copying, recently launched by DG MARKT.

As regards the cross-border licensing of musical works, GESAC also understands DG INFSO's assessment that for the time being no further intervention is needed, since it could overlap with the work of DG MARKT and DG COMP in this field.

Finally, GESAC very much welcomes that a point on Internet piracy have been included in the Communication. Piracy is the single most important obstacle to the development of online markets of creative content. Not addressing this issue would have rendered this whole exercise almost meaningless.

On the other hand, GESAC misses references to the protection of cultural diversity. It is true that the Internet in itself could eventually become a very useful tool to promote cultural and linguistic diversity. The market is, however, very immature to ascertain if cultural diversity is self-sustaining in the online world. A number of our members indeed think that this is not the case and would welcome any initiative in the direction of the protection and promotion of cultural diversity.

In any case cultural and linguistic diversity is a European asset that has to be safeguarded. We therefore urge the Commission to carefully monitor potential risks that may appear in the future and adopt the necessary measures to make sure that cultural and linguistic diversity continue to be Europe's most important asset.

2. EXECUTIVE SUMMARY

Following the Commission's request to include an executive summary, you will find below the most important points of GESAC's contribution:

- **DRMs**
- GESAC understands that DRMs will enable efficient management of rights and successful new business models to emerge if they are well defined, standardised and implemented in a way that ensures that the benefits accrue to all stakeholders;
- Authors' societies are supportive of solutions that improve the management of online and mobile exploitations of copyright protected content. However, as regards specific types of DRMs that limit the number of copies that consumers can make, sometimes referred to as Technological Protection Measures (TPMs), GESAC understands that they face numerous problems: they lack consumer acceptance, they are not widespread and they are not entirely reliable;

- Given the many shortcomings of DRMs as regards private copying, GESAC cannot but oppose any measure that would have as a consequence the phasing out or weakening of current private copying remuneration schemes;
- Authors' societies believe that lack of interoperability between online services and playback devices is indeed an obstacle for the development of online creative content services in the Internal Market. Authors' societies are therefore in favour of measures that foster this interoperability, in order to prevent consumer lock-in and competitor lock-out. However, interoperability should not put in peril the effectiveness of DRMs.
- **Multi-territory Rights Licensing**
- GESAC understands the exclusion of multi-territory licensing of music from the scope of this initiative, in order to avoid further overlapping with the work of DG MARKET and DG COMP;
- GESAC understands that any initiative addressing multi-territory rights licensing should take into account the following elements:
 - Account should be taken to the results of previous initiatives in the audiovisual or other creative sector, such as Directive 2007/65 EC or the 2005 Recommendation on Online Management of Music Rights;
 - Any initiative must guarantee that authors receive an adequate remuneration for any sort of exploitation of their works, be it mono or multi-territorial. We understand that the best way to achieve this is by ensuring that the audio-visual creator receive royalties based on the total gross revenues generated by the exploitation of his work - irrespective of whether a user's business model is based on subscription income, per use income, advertising revenue or some other form of revenue;
 - Licensing systems that results in a 'race to the bottom' on licensing rates that apply for online services or on the protection of rights holders should be avoided;
 - Any initiative has to make sure that it places cultural diversity as a main objective;
 - Discrepancies in the economic and moral rights granted by the different Member States to the audiovisual author should be eliminated or reduced to a minimum;
 - Withholding taxes on copyright royalties to be transferred between operators located in different Member States should be eliminated, since they constitute a significant obstacle to the development of any multi-territorial licensing model.
- **Legal Offers and Piracy**
- Online piracy is the single most important obstacle to the development of online content services;
- While the availability of legal online services and educational and aware-raising campaigns are important elements to curb piracy, the most important element for the reduction of piracy is increasing the cooperation of ISPs. In order to get an adequate level of cooperation from ISPs they have to bear some responsibility in the fight

against online piracy and there have to be legal consequences to the lack of cooperation;

- The Memorandum of Understanding recently adopted in France is a very positive approach. It includes some very important principles:
 - Graduate response;
 - Public authority as an intermediary between rights holders, ISPs and infringers;
 - ISPs to be sanctioned if they do not cooperate;
 - Obligation for ISPs to cooperate with rights holders in the development and deployment of filtering technologies;

While all these principles can only be saluted by the copyright community, it remains to be seen how they are implemented;

- GESAC supports the application of filtering measures as an effective way to prevent copyright infringements.

3. DIGITAL RIGHTS MANAGEMENT

- *General Remarks on DRMs*

GESAC understands that DRMs will enable efficient management of rights and successful new business models to emerge if they are well defined, standardised and implemented in a way that ensures that the benefits accrue to all stakeholders. Ideally, they must in particular be effective, secure and robust, open, applicable to a wide range of content and business models, world-wide compatible, interoperable, renewable and cost efficient. On that basis, technological measures must be designed on a broad consensus and adopted voluntarily. Industry-led and/or Government-facilitated standardisation processes on an open, fair and voluntary basis, must be encouraged. National Governments and the EU certainly have a role to play to promote and encourage voluntary international standards such as MPEG.

Authors' societies are supportive of solutions that improve the management of online and mobile exploitations of copyright protected content. Indeed, they work with other operators in the development of Rights Management Information (RIM) solutions and in facilitating interoperability. Since our sister umbrella organisation CISAC is particularly active in these fields, we refer to its contribution on this issue.

On the other hand, specific types of DRMs limit the number of copies that consumers can make. These types of DRMs are sometimes referred to as Technological Protection Measures. These TPM, however, face numerous problems. They are not entirely effective, since they are constantly cracked, and even if they are not, they are often rendered ineffective once a copy of the TPM-protected song has been made on a blank CD. They lack consumer acceptance. And finally, there are some operators that are not convinced of the viability of TPM-based models: for example Apple's CEO, Steve Jobs, already made clear that he did not share the view of some record producers vis-à-vis the limitations on the number of copies that a consumer can make; EMI has decided to allow music services to provide its recordings to their clients without TPMs; other music service providers are already selling music without TPMs. Indeed, consumer acceptance of DRMs that limit the number of copies is low. A very recent research

study conducted in the UK by Entertainment Media Research/Olswang found that 68% of respondents who expressed an opinion agreed that downloads are “*only worth purchasing if free of DRM*”, 61% agreed that DRM “*invades the rights of the music consumer to hear their music on different platforms*”, and 49% agreed that “*it's a nuisance and I don't like it*”¹.

Moreover, the vast majority of copyright protected content available in the Internet has no protection at all. The European Information Technology Observatory (EITO), for example, estimates that around 77% of all the music exchanged on P2P services is done either in the MP3 or OGG formats, two formats that do not permit any protection against unauthorised copying.² The rest is exchanged in the WMA format, for which, although it could eventually offer some kind of protection, this protection is non-existent in most of the files in this format available on P2P services.

Given the many shortcomings of DRMs as regards private copying, GESAC cannot but oppose any measure that would have as a consequence the phasing out or weakening of current private copying remuneration schemes.

1. Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

Authors’ societies believe that lack of interoperability between online services and playback devices is indeed an obstacle for the development of online creative content services in the Internal Market for two reasons.

First, the lack of interoperability forces consumers to access content through proprietary technology that limits consumer choice. Consumers are not allowed to play the acquired content in all available playback devices but only in those which are technically compatible with this content. This reduces consumer acceptance and is often used as an excuse to use illegal services.

Second, only major operators have the capacity to develop DRM systems that limit access to content to the use of playback devices that they, too, have manufactured or provided. This situation creates a barrier to entry the market to small and medium sized operators, which are not in a situation to develop a technology that allows them to be present in all the elements of the chain, which reduces the possibilities of having a wide and diversified offer.

Authors’ societies are therefore in favour of measures that foster this interoperability, in order to prevent consumer lock-in and competitor lock-out. However, the main obstacle to the development of totally interoperable DRMs is that the dominant operators are looking to have a return in their investment and have no interest in giving away their competitive advantage of controlling non-interoperable DRMs. Negotiations on this issue at European level have therefore brought little improvement.

Having said that, it is important to point out that interoperability should not put in peril the

¹ EMR/Olswang *The 2007 Digital Music Survey*. London, July 2007, available at http://www.entertainmentmediaresearch.com/reports/EMR_Digital_Music_Survey2007.pdf.

² European Information Technology Observatory Report 2006, p. 118.

effectiveness of DRMs. A right balance between fostering interoperability while at the same time safeguarding the protection of DRMs has to be found. Moreover, any solution has to make sure that it does not unnecessarily become an obstacle to technological development.

Ideally, this balance should be found by stakeholders themselves. If that is not the case, an alternative should be available. The French law, for example has created a Regulatory Authority which has to guarantee that DRMs do not create, due to their incompatibility or non interoperability, restrictions for the use of the acquired content that go beyond those decided by rights holders. If a software developer has been denied access to information that is essential for interoperability, it can ask the Regulatory Authority to intervene. This Authority, which is an independent administrative body of judges as well as qualified people in the technical and copyright fields, can decide if this refusal is justified. If the Authority decides that this refusal is unjustified it has to define the commitments of the stakeholder that has demanded its intervention in terms of guaranteeing the efficiency of DRMs and the protection of copyright protected content. It must be noted that only software developers, manufacturers of technical systems or service providers can ask the Authority to intervene, but never individual consumers.

On the other hand, and as mentioned above, authors' societies are working through CISAC, their international umbrella organisation and sister organisation of GESAC, in a project called Moebius. Moebius is a not-for-profit organization whose primary mission is to promote the implementation of interoperability of DRMs through mpeg-21 within the digital entertainment industry. Its first priority will be to define the technical specifications allowing the export/import functions between all existing DRMs and mpeg-21. The second priority will be to make this specification available to all parties using proprietary DRM systems and to support them in the implementation process.³

2. Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

GESAC supports that consumers be informed in a clear, accessible and fully-fledged way of their rights and duties when they are granted access to copyright protected content. The provision of clear – and non intricate – information is a key factor for consumer acceptance. This includes information on the systems used by right holders to protect their rights and their impact on consumers' privacy and capacity to legally enjoy the content purchased.

However, it is important to distinguish between consumer information with regard to interoperability and with regard to data protection features of DRMs. As regards data protection features of DRMs, it is our understanding that both at EU level and at a national level the legal protection is sufficient to guarantee that consumers are duly informed on any data processing that could affect their privacy.

³ More on Moebius can be found at <http://www.moebius-forum.org>.

Concerning information on the interoperability features of DRMs, GESAC supports that it be made available to consumers, namely through a detailed, thorough and clear labelling. In fact, the obligation to inform the user of content of the access conditions of such content already exists in some Member States, like France for example.

3. Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

GESAC does not support the view that the complexity of EULAs may as such be an obstacle to the development of online content services in the Internal Market. Complex contracts and contractual conditions are accepted by users of other types of online services, such as sales of electronic tickets or software.

The main feature of online content services is that they allow for different types of access to the digital content (permanent or temporary downloads, streaming, subscription services, possibility or lack thereof to make subsequent copies, etc.). Also it is indispensable that the end user knows exactly the types of usages that are allowed. Any lack of information on this will create legal uncertainty for him.

As regards particular issues related to EULAs that may need to be addressed, we have identified two.

On the one hand, we understand that, in those countries where the private copying exception has been introduced, consumers need to be informed through EULAs that this exception generates a right for rights holders to be compensated and that this compensation is paid through private copying remuneration schemes and not through the initial payment that grants access to the content.

On the other hand, GESAC understands that the development of online creative content services in the Internal Market could greatly benefit if piracy was curbed. As discussed in greater detail below, one of the elements correctly identified by the Commission to fight against Internet piracy is awareness-raising campaigns. One of the ways to educate consumers would be for ISPs to inform their subscribers in their subscription contracts and through other communications of the most common acts of illegal activities and their legal consequences.

4. Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

ADR mechanisms could indeed be a good solution to facilitate the development of DRMs. Whereas codes of conduct are only adopted after long discussions and often do not bring any visible results, mechanisms such as the one provided for in the French legislation to facilitate interoperability of DRMs could be the way forward.

5. Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

DRM should always be considered as a tool for protecting copyright from piracy and other violations, rather than as an instrument to prevent or control access to the market. This was confirmed in the Final Report of the High Level Group on DRMs, in which it was stated that “*DRM must not be allowed to become a commercial or technology licensing control point.*”⁴ As mentioned above, however, a non-discriminatory access to DRM solutions also has to respect the legitimate interests of DRMs developers and should not compromise their effectiveness. In any case it is our belief that the stakeholders should be given the chance to agree on a common –or at least- open standard, before measures are taken at EU level.

4. MULTI-TERRITORY RIGHTS LICENSING

- *General Remarks on Multi-territory Rights Licensing*

As mentioned above, GESAC understands the exclusion of multi-territory licensing of music from the scope of this initiative, in order to avoid further overlapping with the work of DG MARKT and DG COMP. In any case, GESAC salutes that the Commission takes the view that a “*licensing system that results in a 'race to the bottom' on licensing rates that apply for online services, would be highly detrimental to the livelihood of musical writers and composers, the survival of collecting societies and, in consequence, cultural diversity.*”⁵ GESAC understands, however, that this statement is equally valid for any other type of content, notably audiovisual content.

As regards the audiovisual sector, which is the focus of the Commission’s initiative, it must be noted that this sector is much more complex than the musical sector. Major studios, independent producers and collecting societies coexist in a non-homogenous environment where not all EU Member States regulations are similarly protective of authors’ interests. Also the audiovisual online market is taking its first steps, being the traditional exploitations still the core of the business.

In any case, GESAC would like to draw the Commission’s attention to an issue that could seriously jeopardize any multi-territorial licensing scheme.

The fundamentals of direct taxation are not harmonized at Community level and remain the exclusive competence of Member States. This has resulted in the fact that, with the exception of countries like Luxembourg, the Netherlands, Hungary and Malta, most States levy a withholding tax on copyright royalties accruing to those who are not resident for tax purposes. The statutory rates of tax charged in each State vary widely from one country to the next - ranging from 5% to 33.33%.

Double taxation agreements often provide for a reduced or zero rate. However these

⁴ High Level Group on Digital Rights Management, Final Report, March – July 2004.

⁵ Staff Working Paper Accompanying the Communication on Creative Content Online in the Internal Market, p. 25.

agreements only apply when the rights holder is a resident in the country signatory of the agreement. The fact that authors' societies are not always considered by the tax authorities of the Member states as the beneficial owner of the payment hugely complicates the administration of the payments made by one collecting society to its sister society, notably as regards uses of works whose member authors live in different countries, thus having to distribute most of the royalties collected across several territories.

While the situation has been difficult to deal with in an environment in which licences were granted on a mono-territorial basis, the situation in a multi-territory rights licensing environment will be much worse. Withholding tax rules do create borders within the EU for the trade in intellectual property and are clearly at odds with the Lisbon agreement.

Withholding tax rules are strongly burdensome for individual rights holders, who suffer a heavy administrative burden, one that is proportionately heavier for the lower earning member, since he cannot always obtain deductions from withholding taxes payed in a foreign country. This situation also acts against cultural diversity.

We understand that the issue is of a complex nature and are ready to elaborate on this if need be. At the same time, we urge the Commission to seriously take it into account whenever dealing with multi-territory licensing schemes.

6. Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

It is our opinion there is no hurry in proposing regulation via a soft law approach and that the outcome of the Directive 2007/65/EC and the evaluation in process of the Recommendation on online management of music rights (2005/737/EC) should also be taken into account before any new recommendation is passed.

GESAC understands that any initiative addressing multi-territory rights licensing should take into account the following elements:

- Account should be taken to the results of previous initiatives in the audiovisual or other creative sector, such as Directive 2007/65 EC or the 2005 Recommendation on Online Management of Music Rights;
- Any initiative must guarantee that authors receive an adequate remuneration for any sort of exploitation of their works, be it mono or multi-territorial. We understand that the best way to achieve this is by ensuring that the audio-visual creator receive royalties based on the total gross revenues generated by the exploitation of his work - irrespective of whether a user's business model is based on subscription income, per use income, advertising revenue or some other form of revenue;
- Licensing systems that results in a 'race to the bottom' on licensing rates that apply for online services or on the protection of rights holders should be avoided;
- Any initiative has to make sure that it places cultural diversity as a main objective;
- Discrepancies in the economic and moral rights granted by the different Member States to the audiovisual author should be eliminated or reduced to a minimum;
- Withholding taxes on copyright royalties to be transferred between operators located in different Member States should be eliminated.

- 7. What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?**

Cooperation amongst stakeholders, dialogue with the European Commission and the elements mentioned in the answer to question No. 6 are key in order to foster an adequate system of multi-territory rights licensing.

- 8. Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?**

GESAC is not in a position to comment on this issue. However, authors' societies have a clear will to license against an adequate remuneration their entire repertoire to every user that wants to exploit it, whether on a mono or multi-territorial basis, whatever their business model and whatever the level of demand for the different works that are part of this repertoire.

At least for the case of music, the introduction of a distinction between licenses granted by authors' societies according to different catalogues would unnecessarily complicate the management of rights with no apparent benefit.

5. LEGAL OFFERS AND PIRACY

- General Remarks on Legal Offers and Piracy

At this point one would think that it is needless to say that online piracy is the single most important obstacle to the development of online content services.

Authors' societies and their members are faced to a situation in which their works are widely made available in the Internet, without any licence being granted and no payment being made. At the same time the laws that protect rights holders against this widespread piracy are difficult to be enforced, since in many cases proceedings need to be started against individual consumers. Although consumers greatly benefit from this free access to copyright protected content, they are also faced with the uncertainty of potentially being sued by rights holders for infringing copyright laws. Finally, we have ISPs who make tremendous profits from the increased demand of broadband subscriptions. Most of them turn a blind eye towards the illegal activities taking place thanks to their service and are hardly ever held liable even if they refuse to cooperate with rights holders in order to put an end to these activities.

However, piracy does not only reduce the income of rights holders, thus reducing, too, the resources and the incentives in bringing new creating content to the market. It also constitutes a significant barrier for investment in the development of new online services. Potential new entrants know that they will not be able to compete with illegal services. The legal market, on the other hand, albeit growing, is still so small that it can only bear a reduced number of operators.

In its Communication, the Commission points at four elements that are involved in the fight against online piracy: (1) developing legal offers; (2) educational initiatives; (3) enforcement of legal rights; (4) seeking improved cooperation from Internet Service Providers (ISPs) in stopping dissemination of infringing content.

While GESAC agrees that these four elements might to a greater or lesser extent be involved in the fight against piracy, it does not agree with the order. For GESAC enforcement of legal rights and cooperation of ISPs are really the key elements in the fight against online piracy.

It is true that if we want consumers not to illegally download copyright protected material, legal services must be provided. However, in the music sector for example, it is estimated that over 500 legal services are available worldwide, many of them in the European Union, through which more than 6 million songs can be accessed by consumers. In fact, over 1.7 billion songs were legally downloaded in 2007. However, it is estimated that for every song that is legally downloaded, 20 illegal downloads take place.⁶ Apart from that, the number of peers in the EU25 is expected to rise from 13.6 million in 2005 to an estimated 44.5 million in 2010, and so is the average number of downloaded audio files per user per year, from 874 in 2005 to an estimated 1247 in 2010.⁷ As we can see, demand for music is still high. However, on the one hand, physical sales have dramatically declined for the last five years. On the other hand, growth in the digital sales segment is not making up for the shortfall.⁸ This means that, while more and more people are changing their consumption patterns of music from physical to digital, and although they have the possibility to legally acquire that music, a vast majority chooses to use illegal services. And they do so because there is little impediment for them.

As for the second point, GESAC understands that educational and awareness raising activities are very important. Although we understand that, generally speaking, society acknowledges that file-sharing without authorisation from the right holder is illegal, consumers (and for that matter politicians, too) are sometimes confused on whether both the upload and the download of copyright protected material constitute a copyright infringement. Sometimes we hear voices saying that downloading copyright protected material is not illegal, since it falls under the private copy exception.⁹ This, as will be discussed below, is contrary to the Copyright Directive, notably since it would be contrary to the 3 step test of its article 5.5. We would therefore welcome that the Commission actively defend this point, so that consumers would not be confused with contradicting messages. The recently published Report on the Application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is not of much help, when it establishes that the “*uploading of works or sound recordings does not fall within the scope of the private copying exception*”, and remains silent as regards the downloading.

⁶ IFPI, *IFPI Digital Music Report 2008*.

⁷ EITO, *European Information Technology Observer*, 2006.

⁸ Screen Digest Ltd, CMS Hasche Sigle, Goldmedia GmbH, Rightscom Ltd, *Interactive Content and Convergence: Implications for the Information Society*, October 2006, p. 43.

⁹ In fact in some countries, notably the Netherlands, the download of copyright protected material with no commercial purposes is indeed considered legal.

9. How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

As discussed above, consumers must be given the possibility to access copyright protected content through legal services. In the musical field this possibility already exists. There can be room for improvement and for new entrants with new types of services. But this requires that piracy be curbed. Otherwise, very few people will be tempted to enter a market where only one out of 20 times do consumers pay for the music they download.

Also educational and aware-raising campaigns are needed in order to make clear to consumers that both unauthorised uploading and downloading is illegal. An unambiguous statement from the Commission confirming this issue will be extremely useful.

However, the most important element for the reduction of piracy is giving right holders adequate legal tools to enforce their rights. But this enforcement of rights cannot be done without the cooperation of ISPs. In fact, apart from certain services that offer consumers access to content without the proper licence, such as allofmp3.com or mp3sugar.com, online piracy is mainly caused by users of P2P services or Newsgroups. Legal proceedings can be initiated to stop this illegal exchange of copyright protected content. However, account should be taken that this are massive copyright infringements and that recourse to courts of justice is not a sufficient and effective way to putting an end to this activities, thus the need for ISP cooperation.

The Commission points at codes of conduct as the way forward to increase the cooperation of ISPs in the fight against online piracy. However, codes of conduct have been signed in the past in various EU Member States with little or no effect in the reduction of online piracy.¹⁰ In order to get an adequate level of cooperation from ISPs they have to bear some responsibility in the fight against online piracy. In other words, there have to be legal consequences to the lack of cooperation of ISPs. Otherwise this cooperation will not be effective. It is thus necessary that these measures be taken through binding legislation.

The Commission has to bear in mind that ISPs have absolutely no incentive to cooperate. In fact, they have all the incentives not to, since they benefit from an increased demand for broadband access thanks to unrestricted offer of illegal copyright protected content. In fact ISPs tend to hide behind the broad exception of art. 12 of the E-Commerce Directive to avoid cooperation. And while some ISPs would be willing to cooperate, they either do not want be in a competitive disadvantage vis-à-vis those other operators.

Any measure taken by the Commission must create incentives for ISPs to cooperate and include sanctions for all the ISPs that do not exercise reasonable endeavours to stop or reduce the unauthorised traffic of copyright protected content. While the references to the respect of copyright proposed by the Commission in the review of the Telecom Package are a step in the right direction, more needs to be done. Further amendments to curb piracy can be introduced in this initiative. Moreover, this initiative has to be completed with a review of the E-Commerce Directive in order to create on the one hand the necessary incentives for the Internet Access Providers to cooperate and to avoid that web 2.0 services can benefit from the hosting safe haven provided for in article 14. Moreover, the Commission should consider introducing an initiative that would render developers of software destined to facilitate the

¹⁰ For example the San Remo Agreement, signed on 2 March 2005.

unauthorised making available of works liable for copyright infringement. Such a measure is already included in the French legislation since 2006. Finally, it is remarkable that in some EU Member States, such as Spain, no Notice and Take Down (NTD) procedures have been introduced. This issue should also be addressed in a review of the E-Commerce Directive.

Oftentimes, too, ISPs claim that personal data protection legislation precludes them from disclose personal data of their subscribers, notably in the context of civil proceedings against users of P2P technology who provide unauthorised access to copyright protected material stored in their personal computers. This forces rights holders to choose criminal proceedings in order for these data to be disclosed. Although criminal proceedings might be adequate to address infringement on a major scale, particularly if there are conducted with a commercial purpose, this way seems ill-suited for minor infringements that should be dealt with in the civil context.

The Commission has to make sure that, if a reasonable request is made by rights holders, notably in the context of a civil proceeding, ISPs disclose personal data of subscribers conducting acts of copyright infringement.

Such a measure would not run counter the EC Law. In fact, the recent judgment of the European Court of Justice in the Promusicae case¹¹ establishes that the ePrivacy Directive “*does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings*”. The judgment also calls for a right balance to be struck between the right to respect for private life on the one hand and the rights to protection of Intellectual Property and to an effective remedy. Finally, the ECJ confirms that the authorities and courts of the Member States have to make sure that they do not rely on an interpretation of the E-Commerce, the Copyright, the Enforcement and the ePrivacy Directives which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. It goes without saying that what is valid for Member States is also valid for the Commission.

10. Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

The Memorandum of Understanding recently adopted in France is certainly a very positive approach. It includes some very important principles:

- *Graduate response*: the infringer will be requested to cease its illegal activities before any measure is taken and only if these activities continue will the service be suspended or terminated. GESAC understands that this is the way to go. Most of the users of P2P services conduct activities of file-sharing on a non-commercial basis. Although the aggregate damage that these users cause is enormous, very few of them individually commit copyright infringements at such a big scale for criminal sanctions to be called for. For the majority of minor infringers this graduate response approach, with administrative sanctions, if well implemented, should be a sufficient deterrent. For the major scale infringer, criminal sanctions should be applied.
- *Public authority as an intermediary between rights holders, ISPs and infringers*: This public authority will be controlled by a judge and will guarantee that the respect of

¹¹ Case C-275/06 Promusicae v. Telefónica. 29 January 2008.

copyright is done in such a manner as to respect individual liberties. It will have the possibility to sanction repeat infringers by suspending their service.

- *ISPs to be sanctioned if they do not cooperate:* Cooperation from ISPs is key, in order to achieve a high level of protection for copyright holders. While some of them would be willing to exercise best or at least reasonable endeavours to guarantee this protection, a sanction mechanism is needed for those that try to escape their obligation to cooperate.
- *Obligation for ISPs to cooperate with rights holders in the development and deployment of filtering technologies:* This confirms the need to test if filtering technologies can be a viable solution to reduce piracy.

Moreover, an important point is the commitment adopted by the public authorities to enact legislative measures to put in practice the initiative. These measures are expected to be adopted before summer 2008.

On the other hand, while all these principles can only be saluted by the copyright community, it remains to be seen how they are implemented. Many times have rights holders seen how nice words and interesting ideas were faded away due to bad implementation. An adequate implementation will prove the true willingness of the French authorities to effectively tackle piracy. This would imply giving the Administrative Authority the necessary resources in order to put in place a sufficiently effective mechanism to address massive infringement through P2P services and to apply sufficiently dissuasive sanctions.

11. Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

The application of filtering measures would indeed be an effective way to prevent copyright infringements. In fact, as it has been mentioned above, the French Memorandum of Understanding makes a reference to this technology urging to its development and application.

There are two types of situations, in which this technology could be applied.

First, as regards exchange of copyright protected content through P2P technology, the filtering of protocols appears to be reliable and with no negative effects on the functioning of networks. Moreover, the filtering of content is a solution which has to be developed.

Second as regards the filtering of social sites of web 2.0, the filtering of content is widespread and should become a useful, if yet insufficient, tool to protect rights holders.